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A
SELECTION
OF
LEADING CASES,
ON
VARIOUS BRANCHES OF THE LAW:

With Notes,

BY
JOHN WILLIAM SMITH, ESQ.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"It is ever good to rely upon the book at large; for many times *Compendia sunt dispensia* and *melius est petere fontes quam sectari rivulos.*"—1 Inst. 305, l.

FROM THE THIRD ENGLISH EDITION,

BY
HENRY SINGER KEATING AND JAMES SHAW WILLES, ESQRS.,
OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

Fourth American Edition,
WITH ADDITIONAL NOTES, AND REFERENCES TO AMERICAN DECISIONS,

BY
J. I. CLARK HARE, AND H. B. WALLACE.

IN TWO VOLUMES.—VOL. I.

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RICHARD GRAINGER BLICK, ESQ.

This Work is inscribed,

BY HIS OBLIGED FRIEND AND FORMER PUPIL.

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P R E F A C E

TO THE FOURTH AMERICAN EDITION.

THE present edition of "SMITH'S LEADING CASES" is reprinted from the last London edition, which was carefully revised, after Mr. Smith's death, by Messrs. Keating and Willes. References to the English Cases, in points decided since their edition, have been added.

The American Notes have been amended and improved by an elaborate revision; and the American Cases, up to the time of the work's going to press, have been incorporated.

The present publication is believed to exhibit, with fulness and correctness, *the actual state of the law*, as displayed in the adjudged cases of both countries, upon the points discussed.

Philadelphia, May, 1852.



P R E F A C E

TO THE SECOND ENGLISH EDITION.

WHEN this work was first published, it was hoped that it would be found to supply, in some degree, a want which was believed to have been felt, although on different occasions, both by the student and the lawyer occupied in actual practice.

The student, when he devotes himself to the perusal of Law, is frequently advised by experienced friends, that he ought early to habituate himself to the perusal of Reports at large, instead of pinning his faith upon the commentaries and abridgments of the treatise writers—“*Melius est,*” says Lord Coke, “*petere fontes quam sectari rivulos*”—When, however, he attempts to follow this advice, he finds himself astray amid the masses of accumulated lore which the Reports present to him, the “*aliarum super alias acervatarum legum cumuli* :” he feels his judgment perplexed, his choice distracted, and his immediate wish is, that some guide would direct him to the *leading* cases, embodied in which he might discover those great principles of Law of which it is necessary that he should render himself thorough master, before he can trace with accuracy the numerous ramifications into which those principles are expanded in the surrounding multitude of decisions.

The lawyer engaged in actual business frequently also feels the want of a portable collection of leading cases, but for a different reason. The leading cases are those with the names of which he is most familiar, which he has most frequently occasion to consult, and which, consequently, he would, if it were practicable, willingly carry into court or round the circuit with him.

It was therefore thought that this collection might prove of some utility to both the classes of Readers just described. The cases it contains may all, it is believed, be properly denominated “*leading cases.*” Each involves, and is usually cited to establish, some point or principle of real practical importance. In order that the consequences of each may be understood, and its authority estimated as easily as possible, notes have been subjoined, in which are collected subsequent decisions bearing on the points reported in the text, and in which doctrines having some obvious connexion with them are occasionally discussed. This, though of course the least valuable part of the work, has cost its author by far the greatest labour and anxiety; care has been taken in executing it not to allow the notes to digress so far from the subject-matter of the text, as to distract the reader’s

mind from that to which they ought to be subsidiary. In perusing them, it will be found that the facts of some cases cited are set forth at considerable length, and portions of the judgments transcribed *verbatim*. This is done only when the case cited is itself of such importance as to merit the appellation of a *leading case*, with an abridgment of which the reader is thus furnished, where it could not, consistently with the plan of the work, be presented to him entire. As to the references in the margin, they are in some instances taken from previous editions of the same case; for others, the present editor is responsible: the former are connected with the text by letters, the latter by the sign †.

In this second edition, the paging of the former one has been preserved. This has been done because some gentlemen had, in works of much greater value, done this the honour of referring to it; and it was thought desirable that those references should be applicable to this edition as well as the former. The place where a page in the former edition terminated and a new one commenced, is shown by the sign * in the text, and the corresponding sign * at the top of the page. Thus the first page of the former edition terminated at the word *resolved*, and the second page began with the figure 1, at which there is now an * in the second page of this edition.

J. W. S.

12, KING BENCH WALK,
Feb. 28, 1841.

ADVERTISEMENT

TO THE THIRD ENGLISH EDITION.

THE Editors in preparing this edition for the press, have endeavoured to preserve the original work; and with very few exceptions, all the contents of the edition will be found in this.

The new matter, compiled in part from manuscript notes of the Author, is between brackets.

The paging of the former editions has been retained: in many instances, however, for facility of reference, letters have been added to the numbers of the pages.

Readers are requested to make the corrections mentioned at the end of the Index of Cases in each volume.

INNER TEMPLE,
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T W Y N E ' S C A S E .

MICH. 44 ELIZ.—IN THE STAR-CHAMBER.

[REPORTED 8 COKE, 80.]

What transactions are fraudulent within st. 13 Eliz. c. 5, and 27 Eliz. c. 4.

In an information by Coke, the Queen's Attorney-General, against Twyne of Hampshire, in the Star-Chamber,^(a) for making and publishing of a fraudulent gift of goods. The case on the stat of 13 Eliz. c. 5, was such: Pierce was indebted to Twyne in 400*l.*, and was indebted also to C. in 200*l.* C. brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of 300*l.*, in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shored the sheep and marked them with his own mark; and afterwards C. had judgment against Pierce, and had a fieri facias directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift, on the whole matter, was fraudulent and of no effect by the said act of ^(b) 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole court of the Star-Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

(a) Moor, 638. Lane, 44, 45, 47. Co. Lit. 3, b, 76, a, 290, a. 3 Keb. 259. See the stat. 27 Eliz. cap. 4.

(b) 5 Co. 60, a, b. 6 Co. 18, b. 10 Co. 56, b. 3 Inst. 152. Co. Lit. 3, b, 76, a, 290, a, b. 13 El. c. 5. 2 Leon. 8, 9, 47, 223, 308, 309. 3 Leon. 57. Latch, 222. 2 Rol. Rep. 493. Palm. 415. Cr. El. 233, 234, 645, 810. Cro. Jac. 270, 271. Dy. 295, pl. 17, 351, pl. 23. 2 Bulst. 226. Rastal, Entries, 207, b. Lane, 47, 103. Hob. 72, 166. Moor, 638. Doct. pla. 200. Yelv. 196, 197. 1 Brownl. 111. Co. Ent. 162, a.

*1. That this gift had the signs and marks of fraud, because the gift [2] is general, without exception of his(c) apparel, or any thing of necessity; for it is commonly said, *quod(d) dolosus versatur in generalibus*.

2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bona fide*; *et clausulæ inconsuetæ semper inducunt suspicionem*.

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided, that the said act shall not extend to any estate or interest in the lands, &c., goods or chattels, made on a good consideration and *bona fide*; for, although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said proviso which is accompanied with any trust. As if a man be indebted to five several persons in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal(e) favourably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide*; so a good consideration does not suffice, if it be not also *bona fide*. And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also;—1. Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud.

[3] 2. Let the goods and chattels be appraised by good *people to the very value, and take a gift in particular in satisfaction of your debt.

3. Immediately after the gift, take the possession of them; for continuance of the possession in the donor is the sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide*, do not extend to every gift made *bona fide*; and, therefore, there are two manner of gifts on a good consideration, *scil.* consideration of nature of blood, and a valuable consideration. As to the first in the case before put, (Cr. Jac. 127. Palm. 214;) if he who is indebted to five several persons, to each party in 20*l.*, in consideration of natural affection gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such cases should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the

(c) Godb. 398.

(e) Goldsb. 161.

(d) 2 Bulstr. 226. 2 Co. 34, a. 1 Rol. Rep. 157. Moor, 321.

father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature of blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to the gifts made bona fide, it is to be known, that every gift made bona fide, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called(*f*) a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only: and therefore, if a man, before the statute of 27 H. 8, had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, enfeoffed others, (*g*) who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee; *so in the same [*4] case, if the feoffees, in consideration of nature or blood, had without a valuable consideration enfeoffed their sons, or any of their blood, who had no notice of the first bargain, yet that he shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature. (2 Roll. 779.)

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.*, that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, vide 33 H. 6. 33, (7 Co. 39, b.,) by Prisot, if the father enfeoffs his son and heir apparent within age bona fide, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made bona fide, is a gift made without any trust either expressed or implied: by which it appears, that as a gift made on a good consideration, if it be not also bona fide, is not within the proviso; so a gift made bona fide, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also bona fide.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Quæritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former

(*f*) 6 Co. 72, b.

(*g*) See Stat. 1 Rich. 3, cap. 1, and Sanders on Uses, 4th ed. p. 23. 2 Roll. 779.

times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt, in the Exchequer Chamber, Mich. 35 & 36 [*5] Eliz., (Lane, 44, 45,) the case was : Pauncefoot *being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the Queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, coloured with feigned consideration, and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment: and whether this gift should be void to defeat the Queen of her forfeiture, either by the common law, or by any statute, was the question. And some conceived that the common law, which(h) abhors all fraud, would make void this gift as to the Queen, vide Mich. 12 & 13 Eliz. ; Dyer(i) 295 ; 4 & 5 P. & M. 160. And the statute of (j) 50 E. 3, c. 6, was considered : but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, or other privileged places ; but some conceived that the stat. of (k) 3 H. 7, c. 4, extends to this case. For although the preamble speaks only of creditors, yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good. But it was resolved by all the barons, that the stat. 13 Eliz. c. 5,(l) extends to it ; for thereby it is enacted and declared, that all feoffments, gifts, grants, &c., “to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs,” shall be void, &c. So that *this act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.*

And it was resolved, that this word of forfeiture should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty,) but also to every thing which shall by law be forfeited to the king or subject. And therefore, if a man, to prevent a forfeiture for felony, or by outlawry, makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are(m) forfeited notwithstanding this gift, the same law of recusants, and so the statute is expounded beneficially to suppress [*6] fraud. Note well this word(n) (declare) in the act *of 13 Eliz., by which the parliament expounded that this was the(o) common law before. And according to this resolution it was decreed, Hil. 36 Eliz., in the Exchequer Chamber.

(h) 3 Co. 78, a.

(i) 3 Co. 78, a. b. Dyer 295, pl. 8, 9, 10, &c. Lane, 44.

(j) Co. Lit. 76, a.

(k) Cro. El. 291, 292. Lane, 45.

(l) Co. Litt. 3, b. 76. a. 290, a. b. 3 Inst. 152. 5 Co. 60. a. b. 6 Co. 18. b. 10 Co. 56, b. Co. Ent. 162, a. 1 Leon. 47, 308, 309. 2 Leon. 8, 9, 223. 3 Leon. 57. Latch, 222. 2 Roll. Rep. 493. Palm. 415. Cr. El. 233, 234. 645. 810. Cr. Jac. 270. 2 Bulst. 226. Hob. 72. 166. Yelv. 196, 197. 1 Brownl. 11. Dyer, 295, pl. 17. 351. pl. 23. Rastal, Fraudulent Deeds. 1 Rast. Ent. 207, b. Lane, 47. 103. Moor, 638. Doct. pl. 200.

(m) Co. Lit. 250, b.

(n) Co. Lit. 76. a. 290, b.

(o) Hard. 397. Standen and Bullock's case.

Mich. 42 & 43 Eliz. in the Common Pleas, on evidence to a jury, between Standen(*p*) and Bullock, these points were resolved by the whole court on the statute 27 Eliz. c. 4. Walmsley, J., said, that Sir Christ. Wray, late C. J. of England, reported to him, that he and all his companions of the King's Bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs; this bargain and sale is within the(*q*) remedy of the said stat. For although the stat. saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes *in esse*; yet it was held that the intent of the act was, that such voluntary conveyance which was originally subject to a power of revocation, be it *in presenti*, or *in futuro*, should not stand against a purchaser bona fide for a valuable consideration; and if other construction should be made, the said act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said act; for otherwise the good provision of the act, by a small addition, and evil invention, would be defeated.(*r*)

And on the same reason it was adjudged, 38 Eliz. in the Common Pleas, between Lee and his wife executrix of one Smith plaintiff, and Mary(*s*) Colshil, executrix of Thos. Colshil, defendant in debt on an obligation of 1000 marks, Rot. 1707. The case was, Colshil the testator had the office of the Queen's customer, by letters-patent, to him and his deputies; and by indenture between him and *Smith, the testator of the plaintiff, and for 600*l.* paid, and 100*l.* per ann. to be paid during the life of Colshil, [*7] made a deputation of the said office to Smith; and Colshil covenanted with Smith, that if Colshil should die before him, that then his executors should repay him 300*l.* And divers covenants were in the said indenture concerning the said office, and the enjoying of it; and Colshil was bound to the said Smith in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the 300*l.*, forasmuch as Smith survived Colshil; and although the said covenant to repay the 300*l.* was lawful, yet forasmuch as the rest of the covenants were against the statute of(*t*) 5 E. 6, cap. 16, and if the addition of a lawful covenant should make the obligation of force as to that,(*u*) the statute would serve for little or no purpose; for this cause it was adjudged, that the obligation was utterly void.

(*p*) Moor, 605. 615. Bridgm. 23. 5 Co. 60, b. Palm. 217. Lane, 22. 2 Jones, 95.

(*q*) 1 Sid. 133. (*r*) Sed. vide 2 Show. 46, and post 13, in notis. Colshil's Case.

(*s*) 2 And. 55, 107. Godb. 210. Cro. El. 529. Moor, 857. Ley, 2. 75. 79.

(*t*) Style, 29. Cro. El. 520. Cro. Jac. 269. Hob. 75. Co. Lit. 234, a. 12 Co. 78. 3 Inst. 148. 154. 3 Keb. 26. 659. 660. 717, 718. 1 Brownl. 70, 71. 2 And. 55. 107. 3 Bulst. 91. 3 Leon. 33. 1 Rol. Rep. 157. 256. Goldsb. 180.

(*u*) 2 And. 56, 57. 108. 1 Mod. Rep. 35, 36. Hob. 14. 11 Co. 27, b. 2 Rolfe's, 28. Co. Lit. 224, a. 2 Jones, 90, 91. Cro. El. 529, 530. Cro. Car. 338. Godb. 212, 213. 1 Brownl. 64. Plowd. 63, b. Moor, 856, 857. Ley, 75. 79.

2. It was resolved, that if a man hath power of revocation, and afterwards to the intent to defraud a purchaser, he levies a(v) fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the lands to another for a valuable consideration, the bargainee shall enjoy the land, for as to him, the fine, feoffment, or other conveyances by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covenous conveyances are made void as to purchasers, extend to the last clause of the act, *scil.*, when he who makes the bargain and sale had power of revocation. And it was said, that the statute of Eliz. hath made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between(w) Upton and Basset in trespass, Trin. 37 Eliz. in the Common Pleas, it was adjudged, that if a man makes a lease for years by fraud and covin, and afterwards makes another lease bona fide, but without fine or rent reserved, that the second lease should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt or demand, as by 33 H. 6, a sale in open(y) market by covin shall not bar a right which is more ancient: nor a covenous gift shall not defeat execution [*8] in respect of a former debt, as it is agreed in 22 Ass. 72; but he who hath right, title, interest, debt or demand more puisne shall not avoid a gift or estate precedent by fraud by the common law.

2. *It was resolved, that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a(z) purchaser for money or other valuable consideration, for although in the preamble it is said (for money or other good consideration,) and likewise in the body of the act (for money or other good consideration,) yet these words (good consideration) are to be intended only of valuable consideration, and that appears by the clause which concerns those who had power of revocation, for there it is said, for money or other consideration paid or given, and this (paid) is to be referred to (money,) and (given) is to be referred to (good consideration,) so the sense is for money paid, or other good consideration given, which words exclude all consideration of nature or blood, or the like, and are to be intended only of valuable consideration which may be given; and therefore he who makes a purchase of land for a valuable consideration, is only a purchaser within the statute. And this latter clause doth well expound these words (other good consideration,) mentioned before in the preamble and body of the act.*

And so it was resolved, Pasch. 32 Eliz., in a case referred out of the Chancery to the consideration of Wyndham and Periam, Justices: between John Nedham, plaintiff, and Beaumont, Serjeant-at-law, defendant; where the case was, Hen. Babington seised in fee of the manor of Lit-Church, in the county of Derby, by indenture, 10 Feb. 8 Eliz. covenanted with the

(v) 1 Co. 112, b. 174, a. Co. Lit. 237, a. Hob. 337, 338. Moor, 605. 2 Rol. Rep. 337. 496. Winch. 65.

(w) Co. Ent. 676, b. nu. 19. Cro. El. 444, 445. Lane, 45. Upton and Basset's Case.

(y) Antea, 78, b. Plow. 46, b. 55, a. Fitz. Replie. 15. Br. Trespass, 26. Br. Collusion, 4. Br. Property, 6. 2 Inst. 713. 14 H. 8. 8. b. 33 H. 6, 5, a. b.

(z) Cro. El. 445.

Lord Darcy, for the advancement of such heirs males, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy), before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary begotten, in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 *Maii*, ann. 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years, to Robert Heys :* and afterwards levied the fine accordingly : [*9] and on conference had with the other Justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intendment : also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the statute of Eliz., for (a) a valuable consideration is only a good consideration within that act. In this case, Anderson, C. J., of the Common Pleas, said, that a man who was of small understanding, and not able to (b) govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same ; and afterwards, he being seduced by deceitful and covenous persons, for a small sum of money bargained and sold his land, being of a great value : this bargain, although it was for money, was holden to be (c) out of this statute, for this act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit ; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration bona fide, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

STATUTE 13 Eliz. c. 5, (made perpetual by 29 Eliz. c. 5,) after reciting that feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of malice, fraud, covin, collusion, &c., to delay, hinder, or defraud creditors, or others of their just and lawful actions, suits, debts, accounts, damages, &c., proceeds to declare and enact that every feoffment, &c. of lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution made for any intent and purpose before declared and expressed, shall be

as against that person, his heirs, successors, executors, &c., whose actions, suits, &c. are or might be in anywise disturbed, hindered, delayed or defrauded, *utterly void*. By sect. 6, however, the act is not to extend to any estate or interest in lands, &c. on good consideration and bona fide, lawfully conveyed to any person, &c. not having notice of such covin, &c. [This act was not by any means the first attempt of the legislature to foil covenous transactions, for by 3 H. 7, c. 4, "all deeds of gift of goods and chattels made or to be made of trust to the use of the person or persons that made the same deed of gift"

(a) 2 Roll. Rep. 305, 306.

(b) Cro. El. 445.

(c) Ibid.

are declared "void and of none effect." And by the prior act of 50 Ed. 3, c. 6, after reciting "that divers persons do give their tenements and chattels to their friends by collusion to have the profits at their will and after do flee to the franchise of Westminster, of St. Martin-le-Grand of London, or other such privileged places, and there do live a great time with a high countenance of another man's goods, and profits of the said tenements and chattels, till the said creditors shall be bound to take a small parcel of their debt and release the remnant, it is ordained and assented that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels as if no such gift had been made." There is another statute containing provisions on the same subject. 2 R. 2, c. 3.]

When it is attempted to invalidate a transfer of goods by showing it to fall within the provisions of 13 Eliz. c. 5, a question arises proper for the consideration of a jury, who are to say whether the transaction was bona fide, or a contrivance to defraud creditors. Where a bill of sale of chattel property is executed by a debtor to his creditor, purporting to convey the property to the vendee immediately, yet* the vendor is after its execution suffered to remain in possession, a very strong presumption of fraud arises; for, as Lord Coke remarks in the principal case, continuance in possession by the donor is a sign of a trust for his benefit, and therefore in *Edwards v. Harben*, 2 T. R. 587, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, and in the mean time the debtor died, whereupon the creditor took and sold the goods, he was held liable to be sued as *executor de son tort* for the debts of the deceased. See *Shears v. Rogers*, 3 B. & Ad. 363. Indeed, in *Edwards v. Harben* the court went so far as to say, "This has been argued as a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance, *per se*, as makes the transaction fraudulent in point of law. That is the point we have considered, and we are all of opinion that if there be *nothing but the absolute conveyance without the possession*, that, in point of law, is fraudulent." See also *Barnford v. Baron*, *ibid*.

in notis; *Reid v. Blades*, 5 Taunt. 212; *Paget v. Perchard*, 1 Esp. 205; *Martin v. Perchard*, 2 W. Bl. 702. Nay, Lord Ellenborough thought that if the vendor remained in possession of the goods after the sale thereof, the case was not bettered by the vendee's remaining in possession along with him; and, therefore, in *Wordall v. Smith*, 1 Camp. 333, where an action was brought against the sheriff of Middlesex for a false return to a writ of fieri facias sued out by the plaintiff against John Mason, and returned by the sheriff nulla bona, and upon the trial it appeared that Mason had, before the issuing of the fi. fa., assigned all his effects to a creditor, whose servant was immediately put into the house, and remained conjointly with Mason, Lord Ellenborough directed a verdict for the plaintiff, saying, "To defeat the execution there must have been a bona fide substantial change of possession. It is a mere mockery to put another person in to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable; there must be an exclusive possession under the assignment, or it is fraudulent and void, as against creditors."

However, though in *Edwards v. Harben* it was laid down, in the express terms above stated, that an absolute sale without delivery of possession was, in point of law, fraudulent, the tendency of the courts has lately been to qualify that doctrine, and leave the whole circumstances of each case to a jury, bidding them decide whether the presumption of fraud deducible from the absence of a transmutation of possession shall prevail. And, indeed, it ought to be remarked, that even in *Edwards v. Harben*, the words of Buller, J., were, "If there be *nothing* but an absolute conveyance, without the possession, that in point of law is fraudulent;" by which his lordship may have intended, that where there was *nothing*; i. e. no facts whatever appearing in the case except the absolute conveyance and the non-delivery, that then the inference of fraud would be so strong, that a jury ought not to resist it. But it is very different in cases where, although the conveyance is absolute, and the possession has not passed, still there are surrounding circumstances which show that a fraud may not have been intended; in such cases it cannot properly be said,

that there is "*nothing but an absolute conveyance without the possession.*" Therefore in *Latimer v. Batson*, 4 B. & C. 652, where the sheriff seized the goods of the Duke of Marlborough, and sold them to the judgment creditor, who sold them to the plaintiff, who put a man in possession, but allowed them to remain in the duke's mansion and be used by him as before, it was held that it was properly left to the jury to say whether the sale was a bona fide sale for money paid by the plaintiff; and, that, if so, they should find a verdict for him. Here the goods had been seized by the sheriff, who is a public officer, and his seizure a public act, so that the transaction was accompanied with some notoriety, and as the secrecy of the transfer is a badge of fraud (see the principal case, and *Mace v. Cammel*, Lofft, 782), so is the notoriety of the transfer always a strong circumstance to rebut the presumption thereof. See *Latimer v. Batson*; *Leonard v. Baker*, 1 M. & S. 251; *Watkins v. Birch*, 4 Taunt. 823; *Jezeff v. Ingram*, 8 Taunt. 838; *Kidd v. Rawlinson*, 2 B. & P. 59; *Cole v. Davies*, 1 Lord Raym. 724.

*It may, therefore, be safely laid down, that, under almost any circumstances, the question, *fraud or no fraud*, is one for the consideration of the jury. See the judgments in *Martindale v. Booth*, 3 B. & Adol. 498, where several cases establishing this point are cited; and see in *Carr v. Burdiss*, 5 Tyrwh. 316, the expressions of Parke, B., *Dewey v. Bayntun*, 6 East, 257; *Reed v. Blades*, 5 Taunt. 212, [and per Tindal, C. J., *Lindon v. Sharp*, 6 Man. & Gr. 898; 7 Scott, N. R. 730, S. C.]

The above observations apply to cases where the conveyance is *absolute*, and there is no transmutation of possession, but where the conveyance is not absolute to take effect immediately, as, for instance, where it is by way of mortgage, and the mortgagee is not to take possession till a default in payment of the mortgage money, there, as the nature of the transaction does not call for any transmutation of possession, the absence of such transmutation seems to be no evidence of fraud. "We consulted," says Buller, J., in *Edwards v. Harben*, "with all the judges, who are unanimously of opinion, that unless possession *accompanies and follows the deed*, it is fraudulent and void; I lay stress on the words

accompanies and follows, because I shall mention some cases where, though possession was not delivered at the time, the conveyance was held not to be fraudulent." And then his lordship proceeds to point out the distinction between "deeds, or bills of sale which are to take place *immediately*, and those which are to take place *at some future time* : for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as *accompanying and following* the deed." See B. N. P. 258, and *Cadogan v. Kennett*, Cowp. 436, *Minshull v. Lloyd*, 2 M. & W. 450. This doctrine was affirmed and acted upon in the late case of *Martindale v. Booth*, 3 B. & Adol. 505, and in *Reed v. Wilmot*, 7 Bingh. 577. [See also per C. J., *Reeves v. Capper*, 5 N. C. 140.] Cases may, and probably will, arise in which it may be attempted to take advantage of this doctrine for the purposes of fraud, by introducing terms consistent with the continuing possession of the vendor into deeds really intended not to operate as a bona fide transfer of property, but to enure for the vendee's protection. In such cases, however, the collusion, as soon as discovered, would be held to invalidate the deed as much as if the conveyance purported upon the face of it to be absolute, for the presence or absence of fraud depends on the motives of the party making the conveyance. See *Nunn v. Wilson*, 8 T. R. 521; per Le Blanc, J. [*Riches v. Evans*, 9 C. & P. 640.]

There are some cases, that for instance of the sale of a ship at sea, in which an actual delivery being impossible, no presumption of fraud can possibly arise from the substitution of one merely symbolical. *Atkinson v. Maling*, 2 T. R. 472.

It will be observed that the statute of Elizabeth only declares the fraudulent conveyance to be void, "as against that person, his heirs, successors, executors, &c., who are, or might be in anywise disturbed, hindered, delayed or defrauded." Such a conveyance is good as against the party executing it, *Robinson v. McDonnell*, 2 B. & A. 134; and also as against any other person privy and consenting to it, *Steel v. Brown and Parry*, 1 Taunt. 381; [and as against strangers other than creditors or bona fide purchasers for valuable con-

sideration, *Bessey v. Windham*, 6 Q. B. 166.]

In the principal case, *Pierce*, the grantor, was indebted to the grantee, *Twyne*, which debt would have been a sufficient consideration to support a bona fide transfer of the goods, and the ground on which the court proceeded was not that there was no sufficient consideration to sustain a grant by *Pierce* to *Twyne*, but that the secrecy, the non-delivery, the *clausula inconsuetæ*, &c., raised a presumption that the whole transaction was collusive and a juggle, and though purporting to be a sale was, in reality, the creation of a trust for the benefit of *Pierce*; to use their own words, "it was resolved that, notwithstanding here was a true debt due to *Twyne*, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it was provided that the said act shall not extend to any estate or interest in lands, &c., goods or chattels, made on good consideration and bona fide; for although it is on a true and good consideration, yet it is not bona fide, for no gift shall be deemed to be bona fide, within the said proviso, which is accompanied with any trust." In other words, although a debtor has a right to prefer one creditor to another, and by making a transfer of his property to one favoured claimant [*12] to defeat the other, provided he do so in an open manner, and without any further object than his act upon the face of it imports;—still the law will not allow a creditor to make use of his demand to shield his debtor; and, while he leaves him *in statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting upon it. Thus, (to illustrate this position by Lord Coke's words in the principal case.) "if a man be indebted to five several persons in the several sums of 20*l.*, and hath goods of the value of 20*l.*, and makes a gift of all his goods to one of them in satisfaction of his debt, *but there is a trust between them* that the donee shall deal favourably with him in regard of his poor estate, either to permit the donor, or some other person for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called bona fide within the said proviso, for the proviso saith on a good consideration and bona fide, so a good con-

sideration doth not suffice if it be not also bona fide." There is, however, no doubt but that a debtor (so he be not a trader in contemplation of bankruptcy) may openly prefer one creditor to the rest, and transfer property to him even after the others have commenced their actions. *Pickstock v. Lyster*, 3 M. & S. 371; *Holbird v. Anderson*, 5 T. R. 235; *Meux v. Howel*, 4 East, 1; *Eastwick v. Caillaud*, 5 T. R. 420; *Bowen v. Branidge*, 6 C. & P. 142. *Goss v. Neale*, 5 B. M. 19; [*Riches v. Evans*, 9 C. & P. 640, Lord Abinger; *Everleigh v. Pursford*, 2 Mo. & R. 539, Rolfe, B.] See, however, the late case of *Owen v. Body*, 5 Ad. & El. 22. [And it is broadly laid down in *Wood v. Dixie*, 7 Q. B. 892, that a sale of property for good consideration is not, either at common law, or under the statute, void merely because it is made with intent to defeat the expected execution of a judgment creditor.] An assignment of all his effects in trust for his wife, by a man about to be tried for felony, has been held to come within this statute, and to be fraudulent and void as against the crown. *Shaw v. Bean*, 1 Stark. 319; *Jones v. Ashurst*, Skinn. 357; *Morewood v. Wilkes*, 6 C. & P. 145; and *Pauncefoot's case*, sup. pp. 4, 5. *Vide R. v. Bridger*, 1 M. & W. 145. A deed has been held void which purported to create a trust for all the creditors, but contained terms which would, if accepted, have imposed on them the liability of partners. *Owen v. Body*, 5 Ad. & El. 22. [A covenant in a deed of separation (containing no indemnity to the husband against his wife's debts) whereby the husband covenanted to pay an annuity to a trustee for his wife, was holden void as against the creditors of the husband, in *Clough v. Lambert*, 10 Sim. 174; and see *Frampton v. Frampton*, 4 Beav. 287.

A judgment and execution "contrived of malice" are within the same mischief and same rule as a gift or assignment. An early case on this subject is *West v. Skip*, 1 Ves. sen. 244, in which it is laid down by Lord Hardwicke, that if a creditor seize the goods of his debtor and suffer them to remain long in his hands, this is evidence of fraud. See *Lovick v. Crowder*, 8 B. & C. 132; *Imray v. Magnay*, 11 M. & W. 267; *Hunt v. Hooper*, 12 M. & W. 664.]

It has been said by Lord Mansfield, that "the principles of the common law,

as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by stat. 13 Eliz. c. 5." The question, whether a gift be fraudulent within the meaning of this statute, is very different indeed from the question, whether, if made by a trader, it would be fraudulent, and an act of bankruptcy within the meaning of the bankrupt act. The latter question may be answered in each case by reference to one of the following three rules:—

1. Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent, and an act of bankruptcy, under the bankrupt act.

2. Any conveyance to a creditor by a trader, of his whole property, or of the whole with an exception merely nominal, in consideration of a by-gone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent under the bankrupt act, and an act of bankruptcy. [Lindon v. Sharp, 7 Scott, N. R. 730; 6 Man. & Gr. 895, S. C.]

3. A transfer by a trader of part of his property to a creditor in consideration of a by-gone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent, and an act of bankruptcy under the bankrupt act, if made *voluntarily*, and *in contemplation of bankruptcy*.

It has been laid down that a voluntary conveyance is not fraudulent against creditors within the 13th Eliz., unless the party making it was indebted at the time, or nearly so; Holcroft's case, Dyer, 294 (b); Stephen v. Olive, 2 Bro. R. 9; Lush v. Wilkinson, 5 Ves. 384; B. N. P. 257; and indeed Lord Alvanley has said that to invalidate a settlement made after marriage, by the 13th Eliz. the settlor must be in insolvent circumstances, 5 Ves. 384; see Shears v. Rogers, 3 B. & Ad. 362; Battersbee v. Farrington, 1 Swanst. 106; Russell v. Hammond, 1 Atk. 15; Middlecome v. Marlow, 2 Atk. 220; Lord Townsend v. Wyndham, 2 Ves. 1. 10. In some instances, however, a contrary doctrine has prevailed; see B. N. P. 257; [Townsend v. Westcott, 2 Beav. 340; 4 Beav. 58, S. C.; where the grantor was considerably in debt at the time and insolvent within three years after]; and it would be difficult to contend that a conveyance proved to be

made *with the express intent* to defraud even *future* creditors would not be void as against them, indeed that very point seems involved in Tarback v. Marbury, 2 Vern. 510, and Hungerford v. Earle, 2 Vern. 261. [And if the conveyance does not leave the grantor enough to pay his present debts, he is for this purpose considered as if insolvent at the time of the conveyance. Jackson v. Bowley, 1 Car. & M. 97, Erskine, J.] It has been held to make no difference that the debt was contracted, not by the party making the conveyance but by his ancestor from whom he derived the estate, *Ap-harry v. Bodingham, Cro. Eliz. 56; [*13] Gooch's case, 5 Rep. 60; [see Richardson v. Horton, 7 Beav. 112]; and as a fraudulent conveyance by the heir is void, so is one by an executor or administrator of the property of the deceased, and he is chargeable with what he so conveys as assets. Doe v. Fallows, 2 Tyrwh. 460, 2 C. & J. 481. And property fraudulently conveyed by the deceased himself is, in contemplation of law, assets for payment of his debts in the hands of his executors. Shears v. Rogers, 3 B. & Ad. 363. By sec. 3 of st. 13 Eliz., parties to the fraudulent conveyance, bond, &c., forfeit a year's value of the lands or tenements conveyed, the whole value of the chattels, and the amount of any covenous bond, half to the crown and half to the parties grieved; the assignees of an insolvent are *parties grieved* within this section, Butcher v. Harrison, 4 B. & Ad. 129; [the fraudulent conveyance being void as against them, Doe d. Grimsby v. Ball, 11 M. & W. 531.

As a general rule in the case of ordinary creditors, where the debtor is not dead, bankrupt, or insolvent, the statute of 13 Eliz. operates only upon property capable of being taken in execution. Thus, before 1 & 2 Vict. c. 110, it is found laid down that] copyholds are not, generally speaking, within 13 Eliz., on account of their not being, generally speaking, subject to debts, Matthews v. Feaver, 1 Cox, Ch. Ca. 278, [and the same is stated to be the law, since that statute, in a learned work, 1 Scriven on Copyholds, by Stalman, 146. It would seem, however, that the law is otherwise, since the 11th section of that statute has subjected copyholds, like other lands, to execution by elegit. With regard to choses in action, it has lately been laid down by Lord Cotten-

ham, in *Norcutt v. Dodd*, Cr. & Ph. 100, that a voluntary assignment of a chose in action is not fraudulent as against creditors, within the meaning of st. 13 Eliz., during the lifetime of the assignor, since it could not be reached by an execution. But that after his death, it might be treated as fraudulent in a proceeding against the executor, because the chose in action would have been assets in his hands available towards payment of the creditors; and that in case of an insolvency it becomes fraudulent by the conjoint operation of 13 Eliz. c. 5, and the insolvent act. Pursuing this doctrine, it would seem that a voluntary assignment of such choses in action as are seizable in execution by the provisions of 1 Vict. c. 110, would now be subject to the operation of 13 Eliz. c. 5. And, with submission, an assignment of a chose in action, (or other property not seizable in execution), under circumstances which (if the property were seizable), would make the conveyance void under 13 Eliz. c. 5, seems void in case of a subsequent bankruptcy or insolvency as against the assignees, who, but for the assignment, would be entitled to the property. *Norcutt v. Dodd*, supra. In *Sims v. Thomas*, 12 Ad. & El. 536, it was laid down as a general [*13b] proposition, that a *voluntary assignment of a bond (before 1 & 2 Vict. c. 110), was not void as against creditors; but the important distinction between an ordinary execution, under which the bond could not have been taken, and the statutory execution, so to speak, of an insolvency, does not appear to have been there adverted to. Perhaps it was considered not to arise upon the pleadings.

The effect of 13 Eliz. c. 5, upon the sheriff's duty has been explained by the Court of Exchequer in *Imray v. Magray*, 11 M. & W. 267; from which decision it follows, that the sheriff is bound (at all events if he have notice of the fraud), to seize and sell, notwithstanding a fraudulent assignment or judgment and execution, and that if he do not, an action lies against him.]

The statute 27 Eliz. c. 4, being *in pari materia* with the 13 Eliz. c. 5, is referred to in the text in illustration of the doctrine there laid down respecting the construction of the latter statute. The 27 Eliz. (rendered perpetual by 30 Eliz. cap. 18) was enacted for the protection of *purchasers*, as 13 Eliz. was

for that of *creditors*. It enacts that every conveyance, grant, charge, lease, estate, and limitation of use of, in, or out of any *lands, tenements, or other hereditaments* whatsoever, for the intent and purpose to defraud and deceive such persons, bodies politic, &c., as shall purchase the said lands, &c., or any rent, profit, or commodity, in or out of the same, shall be deemed and taken, only against that person or persons, bodies politic, &c., and his or their heirs, successors, executors, administrators, and assigns, and against every one lawfully claiming under them who shall so purchase for money, or any good consideration, the said lands, &c., or any rent, &c., to be *wholly void*, frustrate and of none effect.

Under this act it is held that not merely is a conveyance executed *with express intention to defraud* subsequent purchasers for value void as against them, see *Burrell's case*, 6 Rep. 72; *Gooch's case*, 5 Rep. 60; and *Standen v. Bullock*, cited ante, p. 5: but a *voluntary* conveyance is so likewise, even though the subsequent purchaser have notice of it. *Goodright v. Moses*, 1 Bl. 1019; *Evelyn v. Templar*, 1 Bro. R. 148; *Doe v. Manning*, 9 East, 59; *Cornick v. Trapaud*, 8 Dow, 60; for the very execution of a subsequent conveyance sufficiently evinces the fraudulent intent of the former one. [It is however good as against the grantor, who therefore cannot as against a purchaser without notice, compel specific performance of a subsequent contract to purchase for value. *Smith v. Garland*, 2 Mer. 123. See *Wilkins v. Ormsby*, 5 Beav. 153.] The *fifth* section of the same statute enacts, that if any person shall make any conveyance of lands, with a clause of revocation, at [*13c] his *will and pleasure, of such conveyance; and, after such conveyance, shall bargain, sell, grant, demise, convey, or charge the same lands to any person or persons for money or other good consideration, the said first conveyance not being revoked, that the said first conveyance, as against such bargainees, vendees, lessees, their heirs, successors, executors, administrators, and assigns, shall be void and of none effect. See the observations on this section in the principal case. A power to mortgage to any extent is a power of revocation within the meaning of this section. *Tarback v. Marbury*, 2 Vern.

511. But a power to charge with a particular sum is, if no fraud be found, not so. *Jenkins v. Kemish*, 1 Lev. 152. A power to lease for any number of years with or without rent, is also a power of revocation within this section: for both that and the mortgage power enable the party exercising them to defeat the estate in substance. *Lavender v. Blackstone*, 2 Lev. 146. But a power to be exercised with the consent of third persons is not within this clause, unless, as in the case put in the text, they be under the control of the settlor. *Buller v. Waterhouse*, 2 Show. 46.

A mortgagee is a *purchaser* within the meaning of the 27 Eliz., *Chapman v. Emery*, Cowp. 279. [As to an equitable mortgagee, see *Buckle v. Mitchell*, 18 Ves. 100; *Lister v. Turner*, 5 Hare, 281; *Kerrison v. Dorrien*, 9 Bing. 76.] And so is a lessee at a rack-rent, *Goodright v. Moses*, 2 Bl. 1019; or a person who releases a contested right in consideration of the conveyance to him, *Hill v. Bishop of Exeter*, 2 Taunt. 69; or the purchaser under a settlement made in consideration of an *intended [*14] marriage, *Douglas v. Ward*, 1 Cha. Ca. 79; but not under a post-nuptial settlement, unless made in pursuance of articles entered into before marriage, *Martin v. Scudamore*, 1 Cha. Ca. 170, for one voluntary conveyance cannot defeat another. *Clavering v. Clavering*, 2 Vern. 473; 1 Abr. Eq. 24. And *semble* that the articles ought to be binding ones, *Doe d. Barnes v. Rowe*, 4 N. C. 737.

A will is looked on as a voluntary conveyance, *Villers v. Beaumont*, 1 Vern. 100; *Boughton v. Boughton*, 1 Atk. 625. See 3 Swanst. 412, 414, *in notis*. And there may be cases in which, on account of the inadequacy of the price, a question may arise, whether a subsequent conveyance, though *some* value pass, be not *in effect* voluntary, and a mere trick for the purpose of invalidating a former one. *Doe v. James*, 16 East, 212. [See an analogous case, *Persse v. Persse*, 7 Cl. & F. 279, post, 14.] A lessee without fine or rent is not a purchaser within the statute, *Upton v. Bassett*, Cro. Eliz. 444; cited also in *Twyne's case*. [Quære, whether a bona fide purchaser for value from the heir-at-law of one who has made a voluntary *conveyance is within [*14a] the statute? According to the report of *Parker v. Carter*, 4 Hare, 409,

it would seem that he is not; but compare s. 2 and s. 5; and see *Burrell's case*, 6 Rep. 72, recognised and acted on in *Warburton v. Loveland*, 6 Bligh, N. S. 30. See also 1 Sugd. V. and P. 928, 11th ed.]

In 27 Eliz. there is a proviso, sect. 4, similar to that in 13 Eliz. sect. 6, in favour of bona fide purchasers. Such are considered, persons taking under instruments made [bona fide and] for a valuable consideration, *Roe v. Mitton*, 2 Wils. 356; or under ante-nuptial settlements; *Kirk v. Clark*, Prec. Cha. 275; or post-nuptial settlements made in consideration of ante-nuptial articles; or of an additional portion, *Dundas v. Dutens*, 2 Cox, 235; *Jones v. Marsh*, Forest. 63; *Browne v. Jones*, 1 Atk. 188; *Spurgeon v. Collier*, 1 Eden, 55; or in consideration of the wife's joining to destroy an ante-nuptial settlement, *Scott v. Bell*, 2 Lev. 70. So also persons who between the voluntary settlement and the purchase, have acquired as purchasers under the voluntary settlement any legal or even equitable right. *Prodgers v. Langham*, 1 Sid. 133. [The *East India Company v. Clavell*, Prec. Cha. 377, seems opposed to *Prodgers v. Langham*, but the latter case was not referred to in the former, and it was approved of by Lord Eldon, *George v. Milbanke*, 9 Ves. 193, and by Lord Kenyon, *Poer v. Eliason*, 1 East, 95, where it is called "a very leading authority."] *Smartle v. Williams*, 3 Lev. 387, *Skinn*. 423; *Kirk v. Clark*, Prec. Cha. 275; *Brown v. Carter*, 5 Ves. jun. 862; *George v. Milbanke*, 9 Ves. 190; [*Meggison v. Foster*, 2 Y. & C. C. C. 336. There have been some cases in which the question has been, how far the consideration of marriage will extend, and whether limitations in favour of very remote objects may not be void as against subsequent purchasers. See *Jenkins v. Kemish*, Hard. 395; *White v. Stringer*, 2 Lev. 105; *Osgood v. Strode*, 2 P. Wms. 245; *Ball v. Bamford*, Prec. Cha. 113; *Reeves v. Reeves*, 9 Mod. 132; [*Hart v. Middlehurst*, 3 Atk. 371.] In two of the latest cases on the subject a limitation to the issue of the settlor by a second marriage was certified by the King's Bench *not* to be voluntary. *Clayton v. Earl of Winton*, 3 Madd. 302. And a limitation to the brothers of the settlor *to be* voluntary. *Johnson v. Legard*, *ibid.* 283; [see *Stackpoole v. Stackpoole*, 4 Dru. &

War. 326. So a limitation in a marriage settlement of the wife's land, in default of children, for the benefit of her brothers and sisters has been holden void as against a bona fide purchaser for value from the husband and wife. *Cotterell v. Homer*, 13 Sim. 506. As to the validity of such a limitation between the high contracting parties themselves, see *Davenport v. Bishopp*, 2 Y. & C. C. C. 451; 1 Phil. 698.] A settlement made [*14b] by a *widow about to take husband upon the children of her former marriage, was upheld by Lord Hardwicke against a subsequent mortgagee. *Newstead v. Serles*, 1 Atk. 265. The title of one who purchased for valuable consideration, from a person who had obtained a conveyance by fraud, of which he however had no notice, falls within the above proviso, and cannot be impeached. *Doe v. Martyr*, 1 N. R. 332. [The existence of a valuable consideration, though it should differ from the consideration specified in the instrument, may be proved, in order to rebut fraud and establish a right to the benefit of the proviso; thus, where a deed purported to be in consideration of love and affection, evidence was allowed that the grantor was under a bond to support the objects of it. *Gale v. Williamson*, 8 M. & W. 405; see *Pott v. Todhunter*, 2 C. C. C. 76.

The adequacy of the consideration is an important element in forming a conclusion as to the bona fides of the transaction. (See *Doe v. Jones*, 16 East, 212, ante, 14.) In no case, however, can inadequacy of consideration alone be said, as a proposition of law, conclusively to establish mala fides. The relationship of the parties, and other circumstances, may explain away its prima facie effect. For instance, a conveyance in a deed, by way of family arrangement, part of the inducement to execute which is obviously natural love and affection, may be sustained by any valuable considera-

tion not very inadequate. *Persse v. Persse*, 7 Cl. & F. 279. See *Pott v. Todhunter*, 2 C. C. C. 76; *Parker v. Carter*, 4 Hare, 409. The joinder of a necessary party in a conveyance is not always a sufficient consideration. It has been held not to be so where a limitation was made, not for his benefit or at his desire, nor in pursuance of any contract of his. *Doe d. Baverstock v. Rolfe*, 8 A. & E. 650.]

The statute of 27 Eliz. was, perhaps, a more beneficial enactment than that of 13 Eliz., for it has been laid down, that at common law no fraud was remedied which should defeat an after purchase, but only that which was committed to defraud a former interest. *Cro. Eliz.* 445, and pp. 7 & 8, supra; yet there is a dictum of Lord Mansfield's to the contrary, in *Cadogan v. Kennett*, *Cowp.* 434. [The words of the act, it will be observed, are very large and comprehensive. They include every "conveyance, grant, charge, lease, estate, and limitation of use." Therefore, it has been held that the uses declared on a recovery might be void as against a subsequent purchaser, though the recovery itself remained valid and destroyed an estate tail for his benefit. *Doe d. Baverstock v. Rolfe*, 8 A. & E. 650.] Copyholds are within this act, *Doe d. Bottriell*, 5 B. & Ad. 131; *Currie v. Nind*, 1 Myl. & Cr. 17. [*Doe d. Baverstock v. Rolfe*, 8 A. & E. 650. [*14c] *But not personal property, [*Jones v. Croucher*, 1 Sim. & Stu. 315, and *Sugd. V. and P.* 936, 11th ed.

There are also cases to which, from their nature, as importing the absence of valuable consideration, the statute of 27 Eliz. c. 4, does not, it seems, extend; for instance, a voluntary endowment of a charity is not defeated by a subsequent conveyance for valuable consideration. *Corporation of Newcastle v. Attorney-General*, 12 Cl. & F. 402.]

The subject of sales and mortgages of chattles without delivery of possession, has given rise, in America, to more protracted discussion than any other matter, probably, in the law. For precision in regard to so nice a subject, it will be necessary to consider the different courts of the Union separately: but they may be grouped conveniently in three classes. In the first, which includes the courts of the United States, of Kentucky,

Illinois, Alabama, and Indiana, the principle established is, that unless possession follow the deed,—that is, if the possession be retained inconsistently with the legal nature and purpose of the transfer,—the conveyance is, by the statutes of Elizabeth, fraudulent in law, and void, against creditors and subsequent bona fide purchasers; and by these courts it is held, that in case of contingent sales or mortgages, the retaining of possession is not inconsistent with the nature of the conveyance. And this was the law of Virginia before the late case of *Davis v. Turner*. The law of New Hampshire and South Carolina may be considered in this connexion, as resembling this class more nearly than any other. The second class, which takes in the courts of New York, as they stood before the Revised Statutes, of Pennsylvania, Connecticut and Vermont, differs from the first, chiefly in holding that delivery of possession is necessary as against creditors, in case of mortgages and contingent transfers, as well as in cases of absolute sales; they hold that all conveyances are fraudulent in law, where possession does not pass with the title, unless it has been retained for reasons satisfactory to the court. In the third class, the distinction taken in the first, between absolute and contingent sales, is adopted, but it is held, that retaining possession inconsistently with the conveyance is only evidence of fraud for the jury. This class comprehends the courts of Massachusetts, Maine, Ohio, Tennessee, Missouri, Georgia, Texas and North Carolina.

It is believed that the real difference in principle, between the last and two former classes, is upon the question what, in law, constitutes the fraud which, under these statutes of Elizabeth, avoids conveyances. The definition of fraud is always matter of law; and the point really in issue, in the controversies that have taken place on this subject, appears to be, whether this statutory fraud consists in the debtor's merely reserving to himself a trust out of the property conveyed, or whether like fraud at common law it lies solely in an actual design to cheat. It is commonly supposed that the distinction is merely as to the nature and weight of the evidence which retention and possession affords; whether it raises a legal presumption of fraud, of which the court are to take cognizance, or only a natural presumption with which the jury are to deal. But this distinction appears to be merely a derivative one, flowing necessarily, or reasonably, out of the diversity above-mentioned, as to the legal nature and definition of fraud, which is the essential difference at the bottom of the whole affair.

(1). The federal courts, and those which follow them, seem to hold, what there are many and strong reasons for believing to be the true interpretation of the statutes of Elizabeth, that fraud under those statutes, consists in the debtor's reserving to himself some interest or benefit out of the property conveyed: and under this, they have adopted the general principle of evidence settled in *Twynne's case*, that retaining possession of chattels after a conveyance of them, raises in law a presumption of a secret trust, that is, is *prima facie* evidence of a secret trust, or of fraud, but may be explained or rebutted,—*presumptio juris*, though not *juris et de jure*. The presumption is in its nature a *legal* one, for the rights and interests resulting from transactions are matter of law. Now if the law makes the presumption, the law must determine when the presumption is rebutted; for to let the jury decide generally upon the sufficiency of any circumstances to rebut the presumption, would be to make the jury judges of the weight

of the presumption, and would therefore change the nature of this presumption from being one of law, to a merely natural one of fact; or from being *prima facie* evidence, to being merely competent and sufficient evidence. Accordingly, these courts have proceeded to determine, from considerations of good sense, and from the nature and reason of this rule of evidence, what is the legal limit of the presumption; in other words, how far it may be rebutted. And, at once, they say, that if the conveyance itself be in its nature valid and such as the law gives effect to, no possession which naturally or reasonably results from the design, purpose and practical operation of that conveyance can be in its nature fraudulent, or can raise a presumption of any secret trust beyond the import of the conveyance; and therefore, when the law has determined that mortgages, and conveyances to the use of creditors, are valid transactions, it would be contradictory to consider that any retention of possession which is justified and allowed by the nature and purpose of the transfer, can, by its own mere operation, render the conveyance invalid; and, upon absolute sales, such retention of possession as, being reasonable or unavoidable, is practically consistent with an absolute transfer, not only cannot raise any suspicion that the transfer is not absolute, but must be considered as having been ratified and approved by the law, when it sanctions the principle of absolute sales by debtors. But it is very plain that beyond this, rebuttal cannot extend, without upsetting the principle of a legal presumption or *prima facie* evidence altogether, and conflicting with the previous definition of fraud. For, it was an *apparent* irreconcilability of the possession with the conveyance that *raised* in law the presumption of a secret trust behind the conveyance, and unless all *real* irreconcilability is removed, the presumption of law certainly is not removed. The possession of goods constitutes a use in him who possesses, and if the possession be in derogation of the conveyance, it must be by a secret consent or agreement of the parties. (2). The courts referred to in the second class, above-mentioned, which comprise the noted cases of *Sturtevant and Keep v. Ballard*, and *Clow and another v. Woods*, may be regarded as proceeding on the same general notion of fraud, with the first class, and adopting the same rule of evidence as to the presumption of fraud from retention of possession. But they have been led by reasons of public policy, and a desire to prevent debtors from acquiring a false credit in the eyes of the world, to narrow the exception to the presumption, so that the exception shall not embrace all those cases in which a retention of possession is *allowed* by, or is merely not inconsistent with, the nature of the conveyance, but only those in which it is strictly *required* by it; and thus the legal presumption of fraud will apply to all cases except where the law approves of the conveyance and its purpose, and the non delivery of possession is absolutely necessary to give effect to the conveyance and accomplish its purpose. Contingent sales, or mortgages, are therefore within the application of the principle. And as the mortgagee has an immediate right to the possession, any retention is, obviously, as much in derogation of the rights transferred by the conveyance, in case of mortgages as of absolute sales, and therefore should raise the same presumption of a secret trust behind the conveyance. The rule adopted in these tribunals, that the *court* is in all cases to pronounce upon the sufficiency of the motives and reasons for non-delivery, results directly from the principle of *prima facie* evidence, or of

the presumption being one of law. (3). The third class differs widely from both of these; but the diversity, as above remarked, appears to grow out of a difference as to the legal constitution and definition of fraud. These courts hold that, as to sales of chattels, fraud under these statutes as well as at common law, consists only in an actual *intention* to hinder and delay creditors, which is necessarily a mere consideration of fact; and that the reservation of a trust, expressly or impliedly, upon a transfer of chattels, is not, in itself, legally a fraud. It is held, that the retaining of the possession upon a conveyance, inconsistently with the legal completeness of the transaction and the ordinary practice,—which applies therefore only to absolute sales, and not to mortgages,—raises a presumption that the conveyance is colourable; and with this presumption, the whole evidence, as this definition of fraud necessarily requires, is referred to the jury, upon the question whether there was, or not, in point of fact, an intention to hinder and delay creditors. The cases, indeed, in these states, generally speak of possession being *prima facie* evidence of fraud; but their practice necessarily implies that it is merely competent and sufficient evidence, raising a natural presumption; for the court does not exercise the right of judging of the sufficiency of the evidence to rebut the presumption of fraud, but leaves every case to the jury; and to let the jury negative the presumption if they will, is to make them the judges of its weight and extent: it is obvious, too, that in point of reason and good sense, the retaining of possession does not raise the same strong and constant presumption of an actual design to defraud, as it does of a trust; and, it may be added, that the making the test of fraud to consist in the presence or absence of a particular external fact, varying in each separate case, necessarily does away with every thing like a general and permanent presumption. It can therefore hardly be said that the rule in *Twyne's case* exists at all in Massachusetts, Maine, &c.; and it may be considered, that this principle and rule of evidence necessarily perish, when the definition of fraud which gave rise to them, is abandoned.

(1). Following the arrangement suggested above, we may consider the Federal courts, the courts of Kentucky, Illinois, Alabama, and Indiana, first, as agreeing substantially, though sometimes differing from one another in the form in which the principle is laid down, and differing in some points of its application.

In the FEDERAL COURTS, in *Hamilton v. Russell*, the principle of *Edwards v. Harben*, was approved and adopted by Chief Justice MARSHALL. "An unconditional sale, where possession does not 'accompany and follow the deed,' is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. [*Meeker et al. v. Wilson*, 1 Gallison, 419, 423, S. P. dict.; *Phettiplace v. Sayles*, 4 Mason, 312, 322, S. P. dict., where the rule is rested on public policy.] The distinction is, between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title, is incompatible with the deed itself; and a deed made upon condition that does not entitle the vendee to the immediate possession;" *Hamilton v. Russell*, 1 Cranch, 309, 316. In *U. S. v. Hooe et al.* 3 Id. 73, 89, the dicta of the chief justice seem to recognise the rule as being, that retaining possession after an absolute bill of sale, is a fraud in law; but if the conveyance, from its terms, is to

leave the possession in the grantor, as in case of a mortgage, retaining possession is no evidence of fraud. In *Conard v. The Atlantic Insurance Co.*, 1 Peters, 388, 449, it is said, that where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, a fortiori, if flowing from them, is not, per se, a badge of fraud. And in *D'Wolf v. Harris*, 4 Mason, 515, at *Nisi Prius*, it was ruled, in case of a mortgage, or defeasible conveyance—that if, by the terms of the contract, or by necessary implication, the parties agree, that possession shall not pass, there is nothing fraudulent in that. It will be observed, that these cases admit retention, according to the terms of the deed, only where the sale is not absolute; and the rule to be extracted from them appears to be, that if the title be transferred absolutely to the grantee, for his own use, possession must, in every case, be delivered, as soon as practicable, and as far as practicable, according to the circumstances of the property and the parties, or it is void against creditors; but if the title pass only conditionally or defeasibly, possession may then be in either one or the other; provided, it be not held contrary to the intention of the parties, as drawn from the deed; the right to control the possession by agreement in the deed, not existing in case of an absolute transfer of the interest. This distinction is very fully illustrated in the Kentucky case of *Hundley v. Webb*, post; and the principle that inconsistency with the agreement in the deed, will, even in case of a mortgage, render the retaining of possession a fraud, is supported by the decision in *Jordan v. Turner*, in Indiana, post. It is obvious, that the principle of *Hamilton v. Russell*, will not avoid a conveyance for want of immediate possession, where the bill of sale is the transfer of property not within the power of the parties; for the non-accompaniment of possession is then not inconsistent with the conveyance: and, accordingly, it is decided, that an assignment of a ship or goods at sea, will transfer the property, so as to prevail against a subsequent attachment; provided, the vendee take possession within a reasonable time after their arrival; *Wheeler v. Sumner*, 4 Mason, 183; *Conard v. The Atlantic Insurance Co.* But if he do not take possession within a reasonable time, the same presumption of legal fraud arises, as if the possession had originally been practicable, and been withheld; *Mecker et al. v. Wilson*. The case of an assignment to a trustee, for the benefit of creditors, was said by Chief Justice Marshall, not necessarily to fall within the principle of *Russell v. Hamilton*; being a transfer, not to the immediate use of the transferee, but for the trustee to dispose of for a particular purpose: “The continuance of the possession with the donor, until the trust can be executed, may not be so incompatible with the deed, as to render it absolutely void under all circumstances. The court does not mean to express any opinion on this point, further than to say, that it is not supposed to be decided in *Hamilton v. Russell*. *Brooks v. Marbury*, 11 Wheaton, 79, 82. Upon the whole, the principle established in the Courts of the United States seems to be:—that the transaction is fraudulent in law, and void against creditors, if the possession be retained inconsistently with the purpose, trust, and appropriation of the property, as fixed by the legal operation of the deed; that in absolute sales, the possession must be delivered in a reasonable time, for the nature and purpose of the transaction require it; but in mortgages, and other conveyances not absolute,

possession may be retained without fraud; for that is not inconsistent with the object, design and nature of the transaction.

In KENTUCKY, the subject was examined very ably by ROBERTSON, C. J., in *Hundley v. Webb*, 3 J. J. Marshall, 643, and the following rule settled as the true meaning of the rule in *Edwards v. Harben*, and *Hamilton v. Russell*: Unless possession be in conformity with the title and interest as vested by the deed, it is a fraud by judgment of law; it is not a question of morals or intention, but a conclusion of law as to the validity of the sale as against creditors: Therefore an *absolute sale* is invalid, unless possession be given, whatever agreement to the contrary there may be in or out of the deed, and whatever reason, aliunde, may be shown for retaining possession: but in *mortgages*, the title is only contingently transferred; it is, in fact, severed into two parts; the bare legal title passing defeasibly, and the more substantial equitable title, not passing at all; and the retaining of the possession is therefore not inconsistent with the title created by the deed, and is not a fraud in law. These distinctions accord with all that has been decided in Kentucky, before and since; and following them, the other cases may be arranged under the heads of *absolute transfers*, and *transfers not absolute*. That an *absolute sale*, where possession is retained by the vendor, is fraudulent in law, and entirely void, is decided, in *Dale v. Arnold*, 2 Bibb, 605; *Allen, &c., v. Johnson*, 4 J. J. Marshall, 235; *Lyne, &c., v. Bank of Kentucky*, 5 Id. 545, 574; and is recognized and applied in *Laughlin v. Ferguson and others*, 6 Dana, 111, 119; and *Daniel, &c. v. Morrison's Executors, &c.*, id. 182, (A. D. 1838;) and in the latter case, though the consistency of the rule with either "sound policy or the harmony of legal science" was doubted, and it was doubted whether both principle and justice would not have been better served by originally making it only *prima facie* evidence, and a question of actual intent, yet it was declared to be "too firmly established by the authority of adjudged cases to be judicially overruled:" and again in *Woodrow v. Davis, et al.* 2 B. Monroe, 298, where an earnest attack appears to have been made upon the doctrine, the court declared that no principle had been more conclusively settled in that state, by adjudged cases, or more invariably recognized and applied, than that which denounces a retention of the possession, and use, and ostensible ownership of a movable, after an absolute sale of the title, as a fraud, conclusive and intraversable, as against previous creditors, and subsequent creditors who have become such while that possession was retained, and against purchasers, *bona fide*; and that it was beyond the power of the courts now to change it. And still more recently, (1847—8) the Court of Appeals of that state declared that the doctrine that sales of personal property, when the possession does not accompany the sale, but remains with the vendor, are fraudulent and void, as to creditors and subsequent purchasers, is too well established to require a discussion, or reference to authorities for its support; *Waller v. Cralle*, 8 B. Monroe, 11. And "the condition of the parties at the time of the sale, the vendee residing with the vendor, does not take the sale out of the operation of this rule of law. An actual change of possession, so far as the thing sold is susceptible of it, is absolutely necessary to the validity of the sale as to creditors and subsequent purchasers, whenever the vendor at the time of the sale, is in the possession of the property. And this transmutation of possession to be effectual, must not be merely nominal or momentary, but must

be real, actual and open, and such as may be publickly known ;" Waller v. Oralle." And a continued possession by the vendor, as ostensible owner, after an absolute bill of sale, though it be under articles of agreement with the vendee that the vendor shall be employed as his overseer, or under a contract of hire, is equally fraudulent and void ; Stephens' Administrator v. Barnett, Adm., 7 Dana, 257, 261 ; Woodrow v. Davis et al. And not only must possession be delivered, but it must *continue* in the vendee ; Meredith v. Sanders, 2 Bibb, 101 ; for the matter is not helped by a temporary delivery, and a re-delivery on loan, though the sale and loan be honest, and the sale be on valuable consideration, for it is a trust, and gives the vendor a false credit ; and it is error to leave the matter to a jury ; Goldsburly v. May, 1 Littell, 254 ; and a redelivery on hiring or other bailment would be equally bad : and no intervention of third persons, as, by a sale through the medium of a trustee or agent, and a hiring by the vendee to the trustee, and by the trustee to the vendor, or other management, will avail ; if the possession be not actually and visibly transferred and vested with the title, the sale is void by "inexorable judgment" of law, without regard to fairness of purpose or value of consideration ; Laughlin v. Ferguson. Of course, the vendee is not obliged to keep the possession forever ; but he cannot transfer it to any one but a stranger to the contract, unless he has remained in possession long enough to show that the delivery to him was not merely formal and colourable ; Breckenridge v. Anderson, 3 J. J. Marshall, 710, 714. And the two last cited cases show, that where property is held in trust, an absolute sale is equally within the rule ; but in the case of the sale of a chattel, at the time in possession of another on hire, the vendee's not having possession till the hiring is ended, is neither fraud, nor, alone, evidence of it ; for one is the sale of a chattel, and the other of a reversion : and in the latter case, the legal possession is considered as being connected with the right of property, and as following the transfer of it ; Butt v. Caldwell, 4 Bibb, 458. The rule of fraud in law applies only to voluntary sales, and not to coercive sales by process of law ; Greathouse, &c., v. Brown, 5 Monroe, 280 ; yet leaving possession with the former owner in such case, though not a fraud in law, is, without explanation, some evidence of fraud in fact ; Breckenridge v. Anderson ; Laughlin v. Ferguson ; Stephens' administrator v. Barnett, adm. ; and that fact alone would be sufficient to authorize the jury to infer fraud in fact, if they saw fit ; Kilby v. Haggin, 3 J. J. Marshall, 208 ; Allen et al. v. Johnson, 4 id. 235, 237. And this exception extends only to an actual sale by the sheriff, according to the requisitions of the law ; for it is only when the legal formalities are followed, that sufficient fairness and notoriety are presumed ; and a private voluntary sale by the debtor to pay debts for the satisfaction of which an execution is in the hands of the sheriff, would not be within the exception ; Laughlin v. Ferguson, &c. : and though there be a formal sale by the sheriff, yet if it be in fact collusive, and made by the private agreement and understanding of the parties, and not by coercion of law, it becomes subject to the same rules of law in regard to possession, which are applied to private sales : and the bare act of leaving the property in possession of the debtor, renders the sale *ipso facto* fraudulent and void ; Stephens' Administrator v. Barnett, Adm., 7 Dana, 257, 260. As to *transfers not absolute*, the rule is, that if by the legal operation of the deed or convey-

ance, the title does not pass absolutely, but only conditionally or contingently, then the requirement of possession attending the title is satisfied without delivery of possession. The contingency, however, must be in the *title*; for, if the legal effect of the deed be, an executed contract passing the whole property absolutely, a collateral *agreement* inserted in the deed, that the owner will deliver possession when called on, will not have any saving efficacy: the sale will be fraudulent and void in law; *Grimes v. Davis*, 1 Littell, 241; and the contingency or conditionality must spring from the operation of the deed itself; for an extrinsic agreement to convert an absolute transfer into a conditional one, is not admissible: *Hundley v. Webb*, and *Laughlin v. Ferguson*. A mortgage presents a case of that kind of contingency in the transfer of the title, which saves the necessity of delivering possession: the subject is examined in *Head, Hobbs et al. v. Ward, et al.*, 1 J. J. Marshall, 280; and it is determined that, till forfeiture, the title, effectually and virtually, does not pass; and therefore retaining possession is not fraudulent per se: and that, retaining possession, even after forfeiture, is not "of itself, unconnected with any other circumstance of lapse of time or the conduct of the mortgagee, to be considered a strong badge of fraud: the deed is still a mortgage; the right of the mortgagee is still contingent and collateral; and the possession of the mortgagor is not necessarily inconsistent with the title." But though it is conclusively settled that in case of a mortgage non-delivery is not a fraud in law, yet it seems that it will, even before forfeiture, be competent evidence of fraud in fact for the jury; *McGowen v. Hoy*, 5 Littell, 239; and possession after forfeiture certainly "*may be evidence of fraud, and combined with other circumstances, or even alone, may be satisfactory to a jury*;" *Bucklin v. Thompson*, 1 J. J. Marshall, 223, 227; but it is to have no more weight than the circumstances show it to be entitled to; and "in many, perhaps most cases, it may not be any evidence of even a fraud in fact;" *Snyder v. Hitt*, 2 Dana, 204. A conveyance in trust for creditors is another instance of a transfer not absolute, to which the exception applies, that possession consistent with the terms and objects of the deed is not legal fraud, though it is admitted to be a circumstance from which fraud may be inferred, susceptible of being counteracted by proof, and explained or reconciled with honesty and fair dealing; and therefore the fact that one member of a firm which has made an assignment in trust for creditors, remains in possession as an agent employed by the trustees to assist them in executing the trust does not avoid the assignment; *Vernon, &c. v. Morton and Smith*, 8 Dana, 247, 254; *Christopher v. Covington and Smith*, 2 B. Monroe, 357, 358. *Conditional sales* are not affected by this rule of fraud, not being present conveyances of the title; and delivery to the vendee is not fraudulent in law; yet it may go to the jury as evidence from which a fraudulent intent may be found by them; *Baylor v. Smither's Heirs*, 1 Littell, 106.

In ILLINOIS; in *Thornton v. Davenport et al.*, 1 Scammon, 296, (confirmed in *Kitchell v. Bratton*, id. 301,) it was settled, that upon an absolute bill of sale, non-accompaniment of possession, is a fraud in law; but if the possession be in accordance with the right and title created by the deed, it is not fraudulent: that mortgages, marriage-settlements, and limitations over, are valid, without delivery, if possession be with the person at the time entitled to it; and therefore a bona fide mortgage without delivery of

possession was held good. One judge dissented, and held that retention on a mortgage was equally fraudulent as on an absolute sale; and approved the principle in *Clow and another v. Woods*, (*below*.) In the late case of *Rhines v. Phelps et al.*, 3 *Gilman*, 455, 464, the rule in *Thornton v. Davenport*, was repeated and enforced, and the point was declared to be distinctly settled in that state, and it was believed on reason, and the most approved authorities.

In ALABAMA after much confusion and apparent contradiction, the rule appears to be settled substantially to the same effect. In *Hobbs v. Bibb*, 2 *Stewart*, 54, the principle and the cases are examined at length, by LIPSCOMB, C. J., and, with a strong and not very temperate expression of opinion, against the rule of fraud in law, he decides, that on a sale and re-hiring of negroes, it should go to the jury, whether there was a fraudulent intent or not. In *Martin v. White*, *Admn.*, id. 162, on the authority of this case, it was decided, by COLLIER, J., that possession remaining with the vendor, after a bill of sale absolute, was not fraudulent, but only *prima facie* evidence of fraud. In *Ayres v. Moore*, id. 336, before LIPSCOMB, C. J., and SAFFOLD, J., the former held, that the presumption of fraud might be explained and rebutted; but that the facts, that the consideration was ample and bona fide paid, and the bill of sale recorded, were not a sufficient explanation; that the jury must be satisfied that a sufficient reason for the retention existed, and that no person who had used ordinary prudence had been deceived; for, notwithstanding the consideration were ample and bona fide paid, and notice given to all the world, yet if the conveyance was made with a view to defraud creditors, and the purchaser knew of this design, the title was void: SAFFOLD, J., in a long and very intelligent opinion, held, that the true doctrine was that of the Federal courts, that it is constructive fraud, if possession be not consistent with the deed; and, therefore, that the rule in *Hobbs v. Bibb*, should be narrowed, so as to allow the jury the smallest possible discretion; and he says, as has been said in this note, that the substance of the principle in *Edwards v. Harben*, and *Hamilton v. Russel*, is, "that the possession shall not be incompatible with the object of the deed, or that it shall be consistent with its spirit and intent." In *Paulling v. Sturgus et al.*, 3 *Stewart*, 96, the dictum of SAFFOLD, J., is, that the matter must be explained to the satisfaction of the court and jury. In *Miller v. Thompson*, 3 *Porter*, 196, SAFFOLD, C. J., commented on the cases of *Hobbs v. Bibb*, and *Ayres v. Moore*; he says, that the former decided, that retention of possession is not a fraud, *per se*, but a presumption that may be rebutted, but that what would be sufficient to rebut this presumption, was left undecided; that the decision in *Ayres v. Moore*, was, that the consideration being bona fide, and the bill recorded was not enough; "but, it must appear, that the sale was not made to hinder or delay creditors;" and that this is to be determined by the jury from all the circumstances: and he further says, that a consequence of the opinion of the court in *Ayres v. Moore* "would appear to be, that if 'possession does not accompany and follow the deed,' in the true acceptance of these terms—that is, *if the possession be inconsistent with, and not subservient to, the object of the conveyance*, the sale must be found by the jury, under the instruction of the court, fraudulent and void, unless the failure be satisfactorily explained; though there be no other objection to the conveyance;" and he said that the two cases referred to had

been influenced by *Bissell v. Hopkins*, which had since been departed from. In *Bank of Alabama v. McDade*, 4 Porter, 252, negroes sold at public auction by a trustee for creditors, were retained two months to aid in gathering in the crop which they had cultivated: the court held, on the principle of *Kidd v. Rawlinson*, that the publicity of the sale dispenses with immediate delivery; but if the purpose of leaving them was unfair; or if left so unreasonable a time as to afford a presumption that the sale was colourable; then it became fraudulent and void; but that under the circumstances in this case, "the court might with propriety have instructed the jury, that if the possession was bona fide, such possession did not, per se, avoid the sale." In *Blocker, adm'r v. Burness*, 2 Judges' Alabama, 354, (1841,) where possession was retained after an absolute sale, the jury were instructed that if they believed from the evidence, that the transaction was upon fair and sufficient consideration, was bona fide, and not intended to hinder and delay creditors, the sale was valid; and this instruction was approved by a majority of the court. ORMOND, J., approved, because he conceived it to be the point decided in *Ayres v. Moore*, and he agreed to *Ayres v. Moore*, though he could not see the difference between it and *Hobbs v. Bibb*. GOLDTHWAITE, J., concurred, and thought *Ayres v. Moore* did not affect the general principle of *Hobbs v. Bibb*. COLLIER, C. J., dissented, because he thought that the principle established in *Ayres v. Moore* required, that besides repelling the actual presumption of an intent to defraud or delay creditors, the legal presumption of fraud must be removed, by showing sufficient special reasons why possession does not follow the sale; for the sale might be fair and bona fide, and yet possession be retained by subsequent arrangement, in a manner to make it fraudulent. And this opinion of COLLIER, C. J., appears now to be recognized as the law. After any such sale as in its nature contemplates an immediate change of possession, the retention of possession is prima facie evidence, or a legal presumption, of fraud, and if unexplained, would be sufficient to authorize a verdict against the vendee; the presumption, however, may be rebutted, or explained away by circumstances; but it will not be removed, unless special reasons for the retention, sufficient in the judgment of the court, are shown; and when the vendor is insolvent, and no reasons are shown for retaining possession, the inference of fraud is conclusive in law; *Planters' and Merchants' Bank of Mobile v. Borland*, 5 Alabama, 531, 548; *Borland v. Mayo*, 8 Id. 106, 115; *Mauldin & Terrell v. Mitchell*, 14 id. 814; *Noble et al. v. Coleman & Gunter*, 16 id. 77, 83. See, also, dicta in *Adams v. Broughton, adm'r, &c.*, 13 id. 731, 740, 743. In cases of sales not absolute and immediate, possession according to the terms of the deed, is not a badge of fraud; accordingly, in mortgages and deeds of trust, possession until the time of forfeiture or of sale, is not any evidence of fraud; but possession after that time is evidence of fraud, though capable of being rebutted by showing some sufficient *reason* why the possession was permitted to remain; *Magee v. Carpenter*, 4 Alabama, 469; *Ravisies v. Alston, Trustee*, 5 id. 297; *Wiswall v. Ticknor and Day*, 6 id. 179; *Desha, Shepherd and Co. v. Scales*, id. 356; *Dearing v. Watkins*, 16 id. 20, 25; *Beall and Beall v. Williamson*, 14 id. 55, 60; *Simerson v. The Branch Bank at Decatur*, 12 id. 205, 213. In the last case, the exception of public judicial sales is recognized; as well as in *Anderson v. Brooks*, 11 id. 954, 958.

IN INDIANA, the principle and rule established in *Jordan v. Turner*, 3 Blackford, 309, confirmed and acted on in *Watson and Another v. Williams and Another*, 4 id. 26, appears to be in precise accordance with the law of the Federal courts as above stated, and as more fully developed in the earlier Virginia cases, namely, that a possession in the vendor, inconsistent with the conveyance, is a fraud in law; but possession consistent with the deed, though it may be *prima facie* evidence of fraud, may yet be explained, and shown to be necessary and fair: "No evidence can be admitted to explain a possession which is inconsistent with the contract:" but evidence to explain the possession, and prove fairness, may be received, "if such evidence, and such retaining of possession by the vendor, are consistent with the contract (or conveyance); as, if it be a conditional sale, or a mortgage, or if it is part of the original contract, that the vendor should retain possession, until after a default should be made in the condition of the sale; or when the situation of the parties or the goods is such, that immediate possession cannot be taken, as in the case of a ship at sea, or a growing crop; or where, from any other legal and bona fide circumstance, immediate possession cannot be taken." On this distinction all the later cases have gone. On an *absolute bill of sale*, it was held in *Foley and another v. Knight*, 4 Id. 420, that evidence to show an agreement, as part of the contract, that the vendor should retain possession was inadmissible, because it contradicted the bill; but subject to this restriction, that possession contradictory of the bill was inadmissible, evidence might be received to show the possession was not fraudulent. In *mortgages*, as the mortgagee has, upon a simple mortgage, an immediate *right* to take possession, (*Case v. Winship*, 4 id. 425), retention of possession by the mortgagor, is *prima facie* evidence of fraud; *Hankins and another v. Ingols*, 4 id. 35: But a mortgage does not, like an absolute sale, necessarily import that the possession is to be with the grantee, and the parties may agree as to who shall have the possession, and the principle still holds, that inconsistency of possession, with the deed, is fraud in law, but possession not inconsistent with the deed, may be explained; and, therefore, where the mortgage-deed declared, that the property is delivered to the mortgagee in his own right, possession, use and trading with the property, by the mortgagor, was decided, *per se*, to render the mortgage fraudulent and void; *Jordan v. Turner*; but when nothing was said in the mortgage-deed, as to who was to have possession, evidence to show why possession was retained, and that the retainer was not fraudulent, was decided to be admissible; *Watson and another v. Williams and another*; *Hawkins and another v. Ingols*. This is the very rule of the Federal Courts, as declared in *Conard v. Atlantic Ins. Co.* and *D'Wolf v. Harris*. The dicta in *Hankins v. Ingols*, in case of a mortgage, that retention is *prima facie* evidence of fraud, must be understood, it is supposed, to apply to cases like that before the court, where possession was not inconsistent with the conveyance; and not to mean, that possession inconsistent with the deed, is not absolutely fraudulent.

IN VIRGINIA, prior to the case of *Davis v. Turner*, (1848), the construction of the rule had always been, in exact accordance with *Edwards v. Harben*, and *Hamilton v. Russell*; that, though such retention of possession as stood with the nature of the conveyance was not fraudulent, yet retention, or immediate re-delivery, of possession, after an absolute bill of sale, was,

per se, fraudulent in law, however free, in other respects, the case might be, from any evidence of dishonesty or unfairness, and rendered the sale void as against creditors, and subsequent purchasers; *Fitzhugh v. Anderson* and others, 2 Hening & Munford, 289, 303; *Alexander v. Deneale*, 2 Munford, 341; *Robertson v. Ewell*, 3 id. 1, 7; *Thomas v. Soper*, 5 id. 28; *Williamson v. Farley*, Gilmer, 15. And though retention of possession after a mortgage was not fraudulent; *Rose's Adm'x v. Burgess*, 10 Leigh, 186; yet a retention after a release of the equity of redemption, or a sale to the mortgagee, was; *Clayborn v. Hill*, 1 Washington, 177; *Glasscock, &c. v. Batton*, 6 Randolph, 78. It seems, however, that if possession were bona fide taken, or asserted, before the creditor's lien attach, it would be good; *Sydnor v. Gee, &c.*, 4 Leigh, 535; *Lewis v. Adams* and another, 6 id. 320; *Carr's Adm'rs v. Glasscock's Ad'mr, et als.*, 3 Grattan, 343, 354. Since the early cases before cited, the subject has undergone extensive and thorough discussion; but the principle originally settled in accordance with *Hamilton v. Russell*, until *Davis v. Turner*, had not been at all shaken or altered. On the contrary, the principle that possession consistent with the deed is not fraudulent, and possession inconsistent with the deed is fraudulent in law, was maintained up to that time, and appeared to be firmly established. The case of *Land, &c. v. Jeffries, &c.*, 5 Randolph, 211, turned upon the validity and construction of a deed, intended to be for separate use; upon a fraudulent deed being void only against the creditors of the grantor; and upon the husband's possession of the wife's separate property, being not inconsistent with the deed; but the judges expressed their views upon the general principle of retention of possession, and they were all in perfect accordance with those embodied in the decisions of the federal courts, viz.: that the inconsistency of the possession with the deed, is the matter which constitutes fraud. *CARR, J.*, said, that "The doctrine of fraud, per se, is not statute law; and, therefore, not a strict positive thing. It is a rule of the courts, founded in reason and convenience. It is not every possible case, in which possession remaining with the grantor, constitutes fraud. The possession may be consistent with the deed." An absolute conveyance, he said, should be accompanied by possession; and, if possession remain with the grantor, longer than in the natural course of fair transactions it ought, it raises a presumption of a secret trust, and, unexplained, constitutes a fraud; but it may be explained,—as by showing in case of a slave, that the slave was so ill, that a removal would have endangered his life; or in case of the purchase of a horse in the country, where he is left till he can be sent for the next day;—this, obviously, is saying merely, that on an absolute sale, delivery of possession need not be instantaneous, but is good if made as soon as possible or practicable. *GREEN, J.*, said: "A possession and use, inconsistent with the terms and professed objects of the deed, makes the deed, per se, fraudulent and void; since it proves conclusively, notwithstanding any colourable conveyance, that the beneficial right to the property, is in the person who has such use and possession; and, therefore, such use and possession is conclusive evidence of an original fraudulent intent in the making of the deed, and avoids it, ab initio:" that parol proof of an agreement, in relation to the possession of property absolutely conveyed, inconsistent with the legal effect of the deed, was, therefore, inadmissible; but though parol proof of a collateral agreement for a possession inconsistent with the deed, is

inadmissible, parol proof may be given to show, that really there is no inconsistency between the possession and the deed: thus "if the deed be conditional on its face, proofs may be given as to the performance or non-performance of the condition; or, if upon the face of the deed, the property is to be disposed of by the grantor, for the benefit of the grantee; or, if the grantor retains the possession, not for his own use, and does not use it, but only for safe-keeping, until the grantee can take possession, as if the grantee be at a distance; or, the deed is to trustees for the purpose of selling, and paying debts, and the property remains for safe-keeping, in possession of the debtor, (as is usual in such cases,) until a sale can be conveniently made; or, if the property be in such a situation as that it cannot be delivered, (as at sea,) so that it be delivered as soon as practicable; or, if the grantee purchase at a sheriff's sale, and leave the property in the possession of the debtor, and for his use, this possession is not inconsistent with the idea of a bona fide, absolute, and effectual conveyance from the sheriff to the purchaser; or, if the possession be a social possession, so that a possession of the grantee may be implied; such cases do not in fact, come within the rule under discussion; since no proofs are given to contradict or vary the terms or effect of the deed, but only to show that the possession is not, in fact, inconsistent with the terms of the deed itself." COALTER, J., said, "An absolute bill of sale, by one in debt, of his goods, of which he afterwards retains the possession, is deemed fraudulent as to his creditors, because a secret trust in his favour is presumed, even if the grantee is also a bona fide creditor to the full value of the goods." BROOKE, President, said, that the vendor's remaining in possession, is conclusive evidence of fraud unless explained; but such explanation may be given, "when it is confined to unavoidable circumstances, in exclusion of any agreement or assent of the parties, inconsistent with the deed." CABELL, J., in his very able and interesting opinion, (Appendix, i. p. 599,) opened the whole subject with the greatest clearness and comprehension, and reconciled all the cases: he said, *that*, "Inconsistency of possession with the deed, is the principle, the foundation of the rule, and the test of its application:" *that*, Inconsistency of possession, renders the deed fraudulent in law, and absolutely void, without regard to intention; *mere* possession by the vendor, is *prima facie* evidence of fraud; because possession is always *prima facie* evidence of property in, or of a trust for, the person possessing; it may be explained, by showing it to be not inconsistent with the purpose of the deed, as by being only temporary, for the reasonable convenience of the grantee; unless it thus be shown to be not inconsistent with the deed, it is conclusive evidence of fraud; *that*, As to the doctrine of *inconsistency* of possession, there is no difference between a conveyance to trustees, and a direct conveyance to the party beneficially interested; the rule of fraud, *per se*, as the English cases show, is never applied to cases of possession by the former owner, after a sale of property by a sheriff, under an execution to a creditor, or one not a creditor; nor to possession by the former owner after a sale made by trustees, under an assignment for the benefit of creditors, or a sale by a landlord on a distress for rent; indeed it applies only to conveyances by the party himself, for possession by the former owner, cannot be inconsistent with a conveyance from some third person in whom the property has been legally vested, and who has full right to sell and convey it to any fair purchaser; *that*, in

short, the rule applies only to cases of inconsistent possession, and to that it applies, even if there have been no imagination of fraud.—*Clayton v. Anthony*, 6 Randolph, 285, turned on other points; but some of the judges expressed their opinions on this: *CARR, J.* referred to his former opinion in *Land v. Jeffries*, “With the single remark in addition, that I agree fully to the rule of *Edwards v. Harben*, ‘That the absolute transfer of personal chattels, without a delivery of possession, is, in law, fraud, per se;’” but it may be explained; “and where this explanation is satisfactory, to prove the perfect fairness of the transaction, and that the inconsistency of title and possession, formed no part of the original contract, the case is taken out of the rule:” and he held, that the doctrine applied only to cases of conveyance from the party himself; and that, after a fair, open, public sale, by a third person, whether a sheriff, bailiff, or trustee, the purchaser may let the property remain with the former owner:—*GREEN, J.*, examined the principle at large; he considered the doctrine of possession, per se, being a fraud, to be “deeply founded in the early principles of the common law;” that it went “on the ground, that a possession and use of the property professedly transferred to another, inconsistent with the professed object of the transaction, is conclusive proof of a secret trust for the original owner, and, therefore, fraudulent;” this principle he considered long and well settled and that the cases supposed to be exceptions, are not so, for in all those cases, “the possession was not inconsistent with the professed purposes of the transaction; as, if the sale be conditional, or the situation of the parties or property, be such, as that it cannot be conveniently delivered to the purchaser, so it be delivered as soon as it conveniently can; or, it is avowedly pledged, as a security for the payment of debts, by being conveyed to trustees for that purpose; in all of these, and such like cases, the possession is not inconsistent, and the character of fraud is not necessarily stamped upon it;—this rule,” he adds, “is so fortified by the most venerable authority, and so well founded in justice, and sound policy, that I should be very-reluctant to depart from it lightly, or to fritter it away by refined distinctions;” —*COALTER, J.*, thought, that a public sale by a trustee, was like a sale on execution or for rent, and that the purchaser might let the former owner resume possession. In *Glasscock, &c. v. Batton*, 6 Randolph, 78, it was decided, that retention of possession, after an absolute sale, is a fraud in law, and voids the sale; and see dicta to the same effect, in *Burchard et ux. v. Wright, &c.*, 11 Leigh, 463, 470. *Sydnor v. Gee*, 4 Id. 535, and *Lewis v. Adams* and another, 6 id. 320, turned upon the possession being taken, actually or constructively, before the execution came; but as to the question whether after a fair sale, an immediate re-hiring, bona fide, renders the sale fraudulent in law, it appears from these cases, that, of the five judges composing the court at the time of the latter case, three judges were of opinion that it does, and two that it does not; and *CABELL, J.*, in the latter case said, that to hold such a transaction to be not a fraud in law, is directly contrary to *Williamson v. Farley*, 1 Gilmer, 15, a case which he well remembered was most gravely considered by the court: and he said, that where possession remained, he had never known any explanation received as sufficient, if “the possession remained for the use of the vendor, however fair the contract by which he was allowed to retain it, and even although it may have been for a valuable consideration.” In *Charlton, et al. v. Gard-*

ner, 11 Leigh, 281, where there was a deed conveying slaves, and expressly reserving the possession for the grantor's life, which appears to have been construed as a conveyance to the grantor's use for life, and afterwards to grantee, the Court, per TUCKER, P., said, that retention of possession in cases like *Edwards v. Harben*, is a fraud in law, but that in this case the possession was consistent with the deed, and it was like *Cadogan v. Kennet*. But *Tavenner v. Robinson*, 2 Robinson's Virginia, 280, again decided that an absolute sale, with an agreement in the deed that the property shall remain for the present in possession of the vendor, he agreeing to give it up on request, and possession actually remaining till execution is levied, is fraudulent and void in law against such execution; and that the exception in favour of a fair, open and public sale by a trustee, could not extend to the case of a public sale under a trust deed, advertised by the trustee, but in his absence actually authorized and directed by the debtor, that being virtually a sale by the debtor. In *Kroeson v. Seevers, &c.*, 5 Leigh, 434, it was held, that a sale is good, of a slave, at the time in possession of another by contract of hire, the slave being demanded by the vendee, at the end of the hiring, and not taken, but the hirer consenting to deliver him to the vendee when required. In the recent case of *Davis v. Turner*, 4 Grattan, 423, however, the Court of Appeals in Virginia, has departed from the principle and rule considered to have been established by a long series of decisions in that state, and has adopted the doctrine of fraud in fact, but under a modified and limited form. In that case, there had been a bona fide sale of slaves, for an adequate consideration, and the purchase money had been paid. While the slaves were on their way from the vendor's factory to the office of the vendee, who was a slave dealer, the latter, at the urgent request of the vendor, consented to hire the slaves to him for a limited time and for a full price, and they were accordingly sent back to the vendor's factory, and there they were levied upon at the suit of a creditor. It was decided by the Court of Appeals, that the sale was not necessarily and in point of law fraudulent and void. BALDWIN, J., (with whom ALLEN, J. concurred,) expressed his opinion against the doctrine of what is called fraud *per se*, that is, that the mere non-delivery of possession on a sale, is in itself, in all cases, conclusively fraudulent, and also against the principle that the inconsistency of the possession with the terms and effect of the deed, is conclusive evidence of fraud. He held that the fraud contemplated by the statute, is to be found in the falsehood of the transaction; in the pretence of a sale when there is none; in the reservation of an interest for the grantor, under the cover of a transmission of his right to the grantee; and that the essential inquiry in most cases is, whether the consideration be fair and adequate, or false and feigned. He considered that the possession "being retained by the grantor, gives rise to a suspicion of fraud, such as in view of the frequent acts and contrivances against the rights of creditors, warrants a presumption against the fairness of the transaction, requiring full and satisfactory explanation; a presumption which cannot be too strongly stated, to the effect of throwing the whole burthen of proving the genuineness and sufficiency of the consideration upon the grantee, and in the naked case of an alleged absolute sale, and possession notwithstanding retained, requiring the conclusion of fraud;" but he could "not perceive any sound principle upon which the mere non-delivery of possession can be treated as

conclusive against the fairness and good faith of the contract." And upon reviewing the previous Virginia cases, he added, "that it seems now conceded on all hands, the continued possession of the vendor after an absolute sale, is open to explanation in some form or shape; and that we are not so restrained from authority as to prevent our allowing an explanation that shows such possession and the whole transaction to have been fair and honest, and especially where such possession has been held under a bailment, for a valuable consideration, in good faith made from the vendee to the vendor." He said that it seemed "to be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject, in the true spirit of the statute; and that it is better to confine the interposition of the court to guiding, instead of driving them by instructions, and to the power of granting new trials in cases of plain deviation." In the same case, CABELL, P. announced that an entire change had taken place in his views upon this subject. He was now entirely satisfied of the correctness of the modern English decisions, and that there is no such rule known to the common law, as that which was supposed to be established by the case of *Edwards v. Harben*; "that in all cases, the question of fraud or no fraud, as to the possession of the vendor, is a question of fact, to be left to the consideration of the jury on a view of all the circumstances of the case; subject, however, to the accustomed power of the court to instruct the jury, as to the law arising on such *facts* as the jury may believe to be proved; and subject moreover, to the salutary power of the courts to grant a new trial in case the verdict shall be contrary to the evidence." And he considered that the rights of creditors would be sufficiently secured by the rule, that the mere fact of retention of possession by the vendor, is regarded as *prima facie* evidence against creditors of the vendor, and will vacate the transaction as to them, unless the vendee shall prove it to have been fair and bona fide. BROOKE, J., however, adhered to what he had said in *Land v. Jeffries*. In the still later case of *Forkner v. Stuart*, &c., 6 id. 198, 204, the Court of Appeals declared that the proper instruction to be given to the jury was, that if it appeared to them that an absolute sale had been made, but that the possession did not accompany such sale, but remained with the vendor, "then, that such retention of possession by the vendor, was *prima facie* evidence of fraud but not conclusive, and was liable to be repelled by satisfactory legal evidence of the fairness and good faith of the transaction." So much of the character of a practical rule of this kind depends upon the spirit in which it is administered, and the judges in *Davis v. Turner*, particularly Mr. Justice Baldwin, speak so fully of the guidance and control to be exercised by the court in relation to the action of the jury, that Virginia can by no means be considered as having gone over to the practice adopted in Massachusetts and some other states, where the evidence of non-delivery of possession is left with the jury to go for what it may appear to them to be worth. The doctrine now recognized in Virginia appears to be this; that the presumption of fraud created by retaining possession, is not a rule of policy, but a rule of evidence; that the sale is valid or void, according as it appears to be genuine or collusive and fictitious; and that the non-delivery of possession creates a presumption of fraud, which will be conclusive, unless rebutted by evidence satisfactory to the court and jury that the transaction is in fact, fair and reg-

ular. It must be left to future decisions of those courts to manifest to what extent the control of the judges over the jury will be exercised in regard to the evidence deemed satisfactory for the removal of the presumption of fraud. It will be observed, that in *Vance v. Phillips*, 6 Hill's N. Y. 433, (*infra*,) Mr. Justice Bronson asked no more than the right of granting new trials in cases of verdicts against the evidence, in order to retain the whole control of the matter in the hands of the court.

In NEW HAMPSHIRE, the principle appears to be nearly the same as in the Federal courts, though declared in a form somewhat different: in fact, instead of the *rule* of the Federal courts being established, the *principle* and *reason* on which that rule is based are used as guides. In *Coburn v. Pickering*, 3 New Hampshire, 415,—to the opinion in which case, by RICHARDSON, C. J., the reader is specially referred, as containing a very luminous exposition of this subject,—it is said, “to be settled, as firmly as any legal principle can be settled, that the fraud which renders void the contract, in these cases, is a secret trust, accompanying the sale, and that in cases of absolute sales, possession and use, by the vendor, after the sale, is always *prima facie*, and, if unexplained, conclusive evidence of a secret trust. It is, therefore, very clear, that fraud is sometimes a question of fact, and sometimes a question of law. When the question is, Was there a secret trust? it is a question of fact; but when the fact of a secret trust is admitted, or in any way established, the fraud is an inference of law, which a court is bound to pronounce.” The amount of this is, that the presumption of fraud, arising from a reserved trust, cannot be rebutted; but the presumption of a reserved trust, arising from possession, may: in other words, the presumption of fraud arising from possession may be explained and rebutted by showing that the possession was not retained for the secret benefit of the vendor, and no other explanation than one which rebuts a secret trust can be received; and it was therefore decided in this case, that an agreement subsequent to the sale, that the vendor should retain possession and pay rent, was no sufficient explanation of possession, for it did not disprove a secret trust: and the same point is decided in *Paul v. Crooker*, 8 id. 288. See also *Parker v. Patten*, 4 id. 176; *Trask v. Bowers*, id. 309. The later cases are perhaps even more stringent; for it has been decided that upon an absolute sale, the mere fact of possession being retained by the vendor on an agreement to store the property for the purchaser for a certain time, rendered the sale fraudulent against creditors; *Page v. Carpenter*, 10 id. 77. As to the notoriety and length of continuance, that must characterize the transfer of possession before the property can be allowed to go back, on a contract of hiring, to the vendor, see *French v. Hall*, 9 id. 137, 146; *Clark v. Morse*, 10 id. 236. In regard to mortgages, as delivery of possession is not essential to their validity and completeness, the retention of possession was not considered fraudulent, prior to the act of June 22, 1832, “To prevent frauds in the transfer of personal property;” *Haven v. Low*, 2 id. 13; *Ash v. Savage*, 5 id. 545. See, also, *Barker v. Hall and Trustee*, 13 id. 298, 302. But that act provided that no mortgage of personal property thereafter made, shall be valid against any other than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded in the office of the clerk of the town where the mortgagor resides at the time of making

it; see *Hoit v. Remick*, 11 id. 285; and under this act, actual notice, it appears, will have the same effect as recording the mortgage: *Low v. Pettingill*, 12 id. 337, 339; as to what notice is sufficient, see *Stowe v. Meserve*, 13 id. 46. Registration is, under this statute, a substitute for delivery of possession; *Barker v. Hall and Trustee*, 13 id. 298, 302. If the mortgagor reside out of the state, and the property be also out of the state, at the time of the execution of the mortgage, and the mortgagor afterwards move with the property into the state, the validity of the mortgage will not be affected by this statute; *Offutt v. Flagg*, 10 id. 46, 49; but if the property be at the time of the mortgage within the state, and the mortgagor reside out of it, the statute operates upon the transaction, but can be satisfied only by the mortgagee's taking possession, which must be an actual and continued possession such as is required on absolute sales; *Smith v. Moore*, 11 id. 55, 65. Yet even where the mortgage is duly recorded under this statute, it would seem that retention of possession for a very great length of time, may be evidence to the jury, tending to show actual fraud; *North v. Crowell*, 11 id. 251, 254.

In SOUTH CAROLINA, in the recent case of *Smith v. Henry*, 1 Hill, 16, the rule is referred to the same principle of a secret and corrupt trust, or benefit reserved to the grantor; and a further distinction is founded upon it, between the case where the conveyance is upon a new and full consideration, and where it is made to a creditor in consideration of indebtedness; in the former, the transaction not being necessarily a benefit to the grantee, there is no sufficient ground to conclude him of fraud, even if the grantor was actuated by corrupt motives; but as to the latter, as the grantee is directly benefited by gaining a preference over the other creditors, the conclusion is irresistible, that he is a party to this corrupt design of the debtor to gain an advantage to himself out of the property at the expense of his creditors, and that the retainer of possession is a bribe given for the preference; this is the conclusion of law, the fact being generally incapable of proof. In *Anderson et al. v. Fuller et al.*, 1 McMullan's Equity, 27, the same principle is adopted, and applied to lands; and in that case, the Chancellor says: "It is now well settled that a debtor has the right to give a preference among his creditors; but if, in the deed of assignment, he secures any advantage or benefit to himself, this provision invalidates the deed. Now, the circumstance of leaving the debtor in possession of the property, supplies the place of a provision to that effect in the assignment or conveyance. The law presumes an understanding between the parties; infers the existence of a secret trust; and, so far as the rights of creditors are affected, the deed is void." See *Cox et al. v. McBee & Henning*, 1 Speers, 195. This distinction is accordingly established in South Carolina; that where a pre-existing debt is the consideration of a conveyance, or a part of the consideration, retention of possession and use, without a new agreement to that effect, on adequate consideration, is a fraud in law; but if there be a new contract of hiring, on sufficient consideration, it will rebut the presumption of fraud; *Jones & Briggs v. Blake and wife*, 2 Hill's Chancery, 629, 637; *Maples v. Maples*, Rice's Equity, 301; but retention of possession after an absolute sale for a price paid, is not conclusively fraudulent, but only prima facie evidence of fraud, and capable of explanation; *Terry v. Belcher*, *Howard v. Williams*, *Reeves v. Harris*, 1 Bailey, 568, 575. 563: In Ful-

more & Mowzon v. Burrows, 2 Richardson's Equity, 95, 96; where an alleged contract of rehiring was not allowed to rebut the presumption of fraud, arising from retaining possession, where a pre-existing debt was part of the consideration of a sale; it is clear that the court went upon the ground that the rehiring was collusive and fictitious. With regard to the other case, the practice as now settled appears to be, that upon mere retention of possession on an absolute bill of sale, there being no explanation given, the court will instruct the jury that the retention constitutes fraud; but an explanation may be offered sufficient in law to rebut the presumption, and then the whole case will be referred to the jury; the burden of proving fairness being on the party who seeks to sustain the sale; a re-hiring for wages, would be a sufficient explanation. Terry v. Belcher, 1 Id. 568; Smith v. Henry, 2 Id. 118. In the late case of Ryan v. Clanton, 3 Strobhart, 413, 422, the court said, that the *false appearance* arising from permitting possession to be retained after a transfer of the property, in general raises a presumption of fraud, which may in most cases be rebutted by proof that the retention was consistent with the terms of the contract; and in a court of law, wherever the badges of fraud are not conclusive and irrebuttable, they, with all matters of explanation, go to the jury for decision. There is a class of cases, generally sales or gifts of slaves, in which possession is considered as transferred, though not visibly changed. This includes not merely the common case of a conveyance to a trustee for wife and children, where it is held that "the possession of the husband is the possession of the wife and children, and possession and use for their benefit is consistent with the object and provisions of the deed;" but also gifts or sales by a father or grandfather to his *minor* child living with him at the time of the sale or gift; in such case, the possession of the grantor is the possession of the minor under his guardianship; Kid v. Mitchell, 1 Nott & McCord, 335; Howard v. Williams, 1 Bailey, 575; no laches is imputable to the grantee, because of his tender age; Steele v. McKnight, 1 Bay, 64; and as the parties necessarily live together, to hold that the father's possession was not the possession of the child, would render such gifts impossible; Curry's Ex'or v. Ellerbe, Constl. Court, cited 1 Bailey, 578; but this principle does not extend to gifts or sales to a grown-up sister-in-law, living in the house of the donor, for her living there is not necessary, and she is capable of taking possession; Smith v. Henry, 2 Bailey, 118; nor to gifts to daughters of a sister living with the donor; but in such cases retention of possession would be evidence of fraud, till clearly and fully explained; Cordery v. Zcally, Id. 206. See Hudnal v. Wilder, Ex'or of Teasdale, 4 McCord, 295, where it is said, that to repel the general presumption of fraud, the property should be kept for the separate use of the donee, and the profits and labour (of a slave) kept as an accumulating fund for the donee's benefit; and that if it is kept by the donor as his own, and for his own benefit, such possession is as inconsistent with the professed object of the deed, as if made to any other person, and ought to raise the same suspicion. This distinction is not attended to in the later cases, but is not inconsistent with them; it seems indeed, to be supported in Smith v. Henry, 2 Hill, 21. Delivery of possession on a conditional sale,—which is regarded as a species of bailment, transferring a qualified property, the absolute property remaining in the vendor,—does not divest the vendor's title as in

favour of vendee's creditors; whether the condition be written, *Dupree v. Harrington*, (Harper's) State Reports, 391, or only verbal, *Reeves v. Harris*, *Bailey v. Jennings*, 1 *Bailey*, 563. But see *Bennett v. Sims*, *Rice*, 421, where a disposition is shown to consider such sales absolute as to *subsequent* creditors. Retention of possession on a mortgage before condition broken, if contemplated by the mortgage, is no evidence of fraud; and after is not conclusive: *Gist v. Pressley and others*, 2 *Hill's Chancery*, 318, 328; *Maples v. Maples*, *Rice's Equity*, 301; *Bank et al. v. Gourdin et al.*, 1 *Speers' Equity*, 441, 459; *Fishburne v. Kunhardt*, 2 *Speers*, 556, 564; *Dupree v. Harrington*, and *Reeves v. Harris*, *dict. acc.* "All these cases, however," it is said in a late case, "whilst they oppugn the notion of possession by the mortgagor, after breach, being conclusive evidence of fraud, acknowledge that it is a matter requiring explanation, which will be entitled to weight, according to circumstances, in an examination of the question of fraud;" *Ryan v. Clanton*, 3 *Strobhart*, 413, 423. This case also recognises the distinction between slaves and other chattels, in respect to retention by a mortgagor.

In DELAWARE, by a statute passed 14 Geo. 2, "to prevent frauds by clandestine bills of sale," it is provided that bills of sale of chattels shall not pass the property, except as against the vendor, unless the chattels shall be actually delivered into the possession of the vendee, as soon as conveniently may be, after the making of the bill of sale; and that if the property afterwards returns or comes into, and continues in the possession of the vendor, it shall be liable to the demands of all creditors of the vendor; *Laws of Delaware*, p. 75. Under this act, sales without delivery of possession, are void as against creditors; *Bowman v. Herring*, 4 *Harrington*, 458. But this does not apply to public sales by an officer of the law; *Perry v. Foster*, 3 *Harrington*, 293.

In NEW JERSEY, in *Chunar v. Wood*, 1 *Halsted*, 155, it was decided, without hesitation, that "a conveyance of chattels unaccompanied by possession, is absolutely void" against subsequent purchasers; but in *Sherron v. Humphreys*, 2 *Green*, 217, 220, it seems to be doubted whether a sale, unaccompanied by possession, is in itself void against creditors.

In MARYLAND, by statute of 1729, recording of a deed of sale, or mortgage, is equivalent to a transfer of possession; and the want of both renders the sale, gift, or mortgage, nought, except as between the parties; and actual notice is equivalent to recording. 1 *Maxey's Laws of Maryland*, 192; *Bruce's Admins. v. Smith*, 3 *Harris & Johnson*, 499; *Hambleton's Ex'ors v. Hayward*, 4 *id.* 443; *Hudson v. Warner and Vance*, 2 *Harris & Gill*, 416, 432. As between the parties, the sale without delivery is good; *Gough v. Edelen*, 5 *Gill*, 101.

(2). The second class, in which no difference is recognized between absolute sales and mortgages, includes New York, (before the late statute,) Pennsylvania, Connecticut and Vermont.

In NEW YORK, at an early period, in *Vredenberg v. White & Stout*, 1 *Johnson's Cases*, 137, the court seems to have proceeded directly upon the rule adopted in the Federal courts; but in *Sturtevant & Keep v. Ballard*, 9 *Johnson*, 337, (1812) the dead reckoning was corrected by a new observation of the English cases, by Chief Justice Kent, and the rule defined in a new and stricter form. A voluntary sale of chattels, absolute or contingent,

with an agreement in or out of the deed, that the vendor may keep possession, or, if possession be kept without any agreement, *Jennings v. Carter & Wilcox*, 2 Wendell, 446, "except in special cases, and for special reasons, to be shown to, and approved of by, the Court," is fraudulent and void as against creditors. This rule, being founded on public policy, and the preventing the debtor from acquiring a false credit with the public, steers quite clear of any consideration of intention, *that* not being the seat of this species of fraud; when the facts are settled, it is a principle of legal policy to be applied by the courts, and not a question of motive or design to be dealt with by the jury; *Jennings v. Carter & Wilcox*; *Divver & Gunton v. McLaughlin*, id. 596; and the "special reasons" upon which the court have, in certain cases, excused retention, will be found to be not reasons tending to prove that the intent of the parties was fair, but reasons founded either on *necessity*, which is a policy stronger than the policy of the rule, or on such *notoriety*, as satisfied the reason of the rule. The principle of necessity has operated to the extent of modifying the application of the rule, so as to require the delivery to be, not immediate and absolute, but only as soon and as far as practicable; as, in *Beals v. Guernsey*, 8 Johnson, 446, where, on the sale of articles then in the storehouse of a third person, delivery was attempted, but could not be had, on account of the sickness of the bailee; and in *Butts v. Swartwood*, 2 Cowen, 431, where on the sale of an unfinished article, it was taken from the shop of the vendor, and left at his house until it could be trimmed, and the vendee could come for it in his sleigh; but in *Jennings v. Carter and Wilcox*, where the purchase was of cattle, the fact that the vendee had no farm or forage was held no sufficient excuse. In *Bissel v. Hopkins*, 3 Cowen, 166, the court, upon special verdict, held, that where the transaction was so public and notorious that nobody was deceived, and the retaining of possession was necessary to enable the vendor to settle his business as a public officer, the case might be an exception; but in *Divver & Gunton v. McLaughlin*, this case was considered as going extremely far; and the circumstances are obviously so peculiar, that it could not be a precedent for any other case. Marriage-settlements were considered, in *Sturtevant & Keep v. Ballard*, as not being within the rule; in truth, the law regards the possession as being transferred according to the settlement, as was held in *Ludlow v. Hurd & Sewell*, 19 Johnson, 218. Leaving possession after a sheriff's sale seems not entirely to be excepted; for though apparently it is not in itself conclusive of fraud, it at least raises a strong presumption of fraud. *McInstry v. Tanner*, 9 Johnson, 135; *Farrington & Smith v. Caswell*, 15 id. 430; *Dickenson v. Cook*, 17 id. 332; *Gardenier v. Tubbs and others*, 21 Wendell, 169.—Thus the matter stood before the Revised Statutes, which enacted that after January 1, 1830, every sale, mortgage, and conditional sale, without immediate, and actual, and continued change of possession, (see *Camp v. Camp*, 2 Hill's N. Y., 628,) shall be "presumed to be fraudulent and void," &c.; "and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers;" 2 Rev. Stat., 136, ch. 7, t. 2, s. 5. There is a pretty obvious inconsistency between the latter branch of this statute and the former; indeed it now appears that the section, as introduced by the revisers,

was without the latter clause, and that it was added by the legislature; 20 Wendell, 548; and this repugnancy, and the obscurity of the whole statute, have led to an extraordinary and most interesting conflict between the judiciary, and the more popular constitution of the Court of Errors. The view taken of the statute by the majority of the Supreme Court, appears to have been, that, as the presumption of fraud was made a legal presumption, the court must judge what reasons and motives would be satisfactory for the rebuttal of it. Mr. Justice BRONSON's view appears to have been a little different; believing that these two clauses of the statute, if they were in *pari materia*, could not stand together; and knowing that there is one principle in the law which deduces legal fraud, consisting in a secret trust, from retention of possession, and another by which an actual fraudulent intent is made to avoid all sales; he considered, that if the latter clause called for the intervention of the jury, then the two clauses must be treated as referring to these two principles respectively; and that the second of them must be looked upon as providing how far the non-delivery of possession shall be evidence of actual fraud, when actual fraud is the point to be proved. Both of these views led to the same practical result; and the rule was brought back to the form in which it had been laid down by Chief J. KENT: *Randall v. Cook*, 17 Wendell, 54; *Wood and others v. Lowry & Douglas*, *id.* 492. As before, the law, only, was to judge of the cases which did not come within the conclusion of law; and if the jury negatived a fraudulent intention, when the legal objection remained unsatisfied, a new trial was to be granted; *Stevens & Munn v. Fisher & Whitmore*, 19 *id.* 181. It was further held an insufficient excuse in law, that the retention was for the mortgagor's accommodation; *Gardner v. Adams*, 12 *id.* 297; or that it was for carrying on his vocation, *Doane v. Eddy*, 16 *id.* 523; or was to enable the mortgagor better to pay the mortgagee his debt; *Beckman v. Bond*, 19 *id.* 444; the excuse should be in the nature of an impracticability, as, in case of ponderous articles or growing crops; *Randall v. Cook*. The principle of the Supreme Court was held by the Chancellor in *Butler v. Stoddart and others*, 7 Paige, 163; and the case being brought before the Court of Errors, that body was equally divided, upon the question whether the inference was one of law for the court, or of intention for the jury; *Stoddart, &c. v. Butler, &c.*, 20 Wendell, 507. The subject was again brought into the Court of Errors in *Smith & Hoe v. Acker*, 23 *id.* 653; and it was then decided by a large majority, that the question of fraud was in all cases one of fact for the jury, and that the clause making it matter of intention, applied to all cases. In *Butler & Barker v. Van Wyck*, 1 Hill's N. Y. 438, this was reluctantly submitted to by a majority of the Supreme Court, and the effect was justly considered to be, the abolition of the principle in *Twyne's case*, and the leaving of all cases to the proof of such "actual mental fraud" as would vitiate any transaction whatever; but one of the judges openly rebelled. In *Prentiss v. Slack and another*, *id.* 467, the court resigned the whole matter into the hands of the jury. In *Cole & Thurman v. White*, 26 Wendell, 511, the Court of Errors confirmed their decision, that all legal evidence tending to satisfy the jury that there was no intent to defraud creditors or purchasers, must be received and submitted to the jury. In the recent case of *Hanford v. Archer*, the judge below had told the jury, that the vendee, not having taken possession, must show some good reason sat-

isfactory to the jury, why the possession was not changed; and a majority of the Court of Errors, 4 Hill's N. Y. 273, reversed the judgment for this error, and decided that the only question for the jury was that of fair or fraudulent intention; but Chancellor Walworth dissented, and six others, including Senators Paige and Varian, voted with him. See *Baskins v. Shannon*, 3 Comstock, 310. But when the Supreme Court thus seemed finally defeated, it suddenly gained a complete victory, by suggesting that these decisions of the Court of Errors did not affect the right of the courts to grant new trials, and therefore that although it was necessary in all cases that the evidence should be submitted to the jury, who alone are to decide upon the question of fraud, yet that it is the right and duty of the court to grant a new trial whenever the jury fall into an error on the subject of fraud, and come to a conclusion against the weight of evidence; fraud, said *Bronson, C. J.*, must always be left as a question of fact to the jury, but "if the jury come to a wrong conclusion, we must, as we do in other cases, grant a new trial;" *Vance v. Phillips*, 6 Hill's N. Y. 433. In *Butler v. Miller*, 1 Comstock, 497, 499, *Johnson, J.*, said, that the question of bona fides, in case of a mortgage which was not accompanied by possession, was properly submitted to the jury, and that their verdict in favour of the honesty and fairness of the transaction was conclusive. In 1833, a law was passed requiring mortgages to be filed, where immediate possession was not delivered, or else to be absolutely void against creditors and purchasers; 2 R. S. 136; *Seymour v. Lewis*, 19 Wendell, 515; this act does not cause the filing of the instrument to give the mortgage validity where possession is retained; it superadds another and an absolute cause of invalidity. *Wood and others v. Lowry & Douglas*, 17 Wendell, 492; *Smith & Hoe v. Acker*, 23 id. 653, 658.

In PENNSYLVANIA, the rule is carried to a greater extent than in any other state; and the broad principle appears to be established, that to transfer a title or to create a lien, by the act of the owner, that shall be valid against creditors or bona fide purchasers, delivery of possession is indispensable. The leading case is *Clow and another v. Woods*, 5 Sergeant & Rawle, 275. Previously to that decision, the principle was not carried so far. In *Wilt v. Franklin*, 1 Binney, 502, 521, and in *Dawes v. Cope*, 4 id. 258, 265, *Tilghman, C. J.*, had adopted the rule of *Edwards v. Harben*, and *Hamilton v. Russel*, and said that though an absolute immediate assignment must be accompanied by a delivery of possession, yet that if the conveyance was conditional, or to take effect at a future time, the retaining of possession according to the intent of the deed, would not be fraudulent. The latter of these cases was in 1811; the next year, *Sturtevant and Keep v. Ballard* was decided, in which the application of the principle was enlarged upon considerations of public policy, and extended to mortgages; and that case has led the later Pennsylvania decisions. In *Clow and another v. Woods*, (1819), the case of a mortgage, the whole subject was examined, and it was decided that there is no difference, in respect to this rule, between absolute sales, and contingent sales or mortgages, and that, as to both, retention of possession beyond what is necessary or unavoidable, is a fraud in law: and *Gibson, J.*, said that public policy should induce a construction of the statute so comprehensive as to take in all cases, except those in which, from the very nature of the transaction, possession either could not

be delivered at all, or not without defeating wholly or in a great degree, the purpose of the conveyance, and that purpose is such as the law approves of and protects; such would be the case of a marriage-settlement. This rule has never since been deviated from. In *Streeper v. Eckart* and another, 2 Wharton, 302, KENNEDY, J., citing the decisions, says, "If there be any principle established by these cases, it is, that a transfer of personal property against creditors:" and the same thing is repeated in *Stark v. Ward*, 3 perty, unaccompanied by a corresponding transmutation of possession, is void Barr, 328. See dictum in *Dorneck and others v. Reichenback*, 10 Sergeant and Rawle, 84, 90, that it is a matter for the court to pronounce on, not the jury, approved in *Carpenter v. Mayer*, 5 Watts, 483, and *Young v. McClure*, 2 Watts & Sergeant, 147; and *Forsyth v. Matthews*, 2 Harris, 100, 103; *Cadbury v. Nolen*, 5 Barr, 320; see remarks of GIBSON, C. J., on legal fraud in *Avery v. Street*, 6 Watts, 247. That mortgages are within the rule is again expressly decided in *Welsh v. Bekey*, Ex'or of Hayden, 1 Penrose & Watts, 57; and it is now established in Pennsylvania, as a general principle of law, that by no devise whatever, whether of sale and agreement of resale, or by the title at the time of the purchase being vested in one who is a surety for the purchaser who takes possession, can a lien be created on personal property separate from the possession of it. *Jenkins v. Eichelberger*, 4 Watts, 121; *Trovillo v. Shingles*, 10 id. 438; see *McCullough v. Porter*, 4 Watts & Sergeant, 177. The delivery must be *actual* and not merely symbolical, where actual delivery is practicable, and if it be not practicable, the parties should leave nothing undone to secure the public from deception; see *Cadbury v. Nolen*, 5 Barr, 320: in such a case, delivery of the muniments of title, or of the key of a store-room, would be sufficient; *Cunningham v. Neville*, 10 Sergeant & Rawle, 201: In *Babb v. Clemson*, id. 419, 428, it is said there must be a bona fide, substantial change of possession, and that concurrent possession is fraudulent: In *Hoffner v. Clark*, 5 Wharton, 545, 550, it is said there must be an actual transfer of the possession, so far as the nature and condition of the property will admit of it, and the circumstance of the buyer and seller, brothers, living in the same house, 'furnished no ground for dispensing with such actual change of the possession as will render it distinct and visible, so that it may become notorious:' see, however, *McVicker v. May*, 3 Barr, 224: In *Hoofsmith and others v. Cope*, 6 id. 53, the court below ruled, that there must be an accompanying, actual, visible, and notorious possession, and this was approved of above: see *Herron v. Fry*, 2 Penrose & Watts, 263, the case of a growing crop.—As to the time when the possession must be delivered, it is decided in *Carpenter v. Mayer*, 5 Watts, 483, that it is not enough that the possession has past before the execution is levied; it must "accompany the transfer or follow it within a reasonable time thereafter, that is, as soon as the nature of the property and the circumstances attending it will admit;" but the same court in *Hoofsmith and others v. Cope* appears to have been decided differently, and the decisions in Virginia, Vermont and Massachusetts, are different, and the rule in respect to the analogous case of executions is laid down differently in *Berry v. Smith*, 3 Washington C. C. 60, and *Eberle v. Mayer*, 1 Rawle, 366, approved in *Hentz and another v. Hanman*, 5 Wharton, 150; and it seems clearly that these latter cases are right; that is, that the legal fraud has ceased, though

if the transaction were found by the jury to be collusive it would be void; the use or trust in which the legal fraud consisted is at an end when the possession is delivered. It *Wilt v. Franklin*, in case of an assignment to a trustee, absent at the time, it was held that a delay from Saturday night till Monday morning was not fraudulent, and that the execution coming on Monday and rendering a delivery impossible, excused it afterwards.—The vendee's possession must *continue*, for if the property goes back after a brief interval, the transaction is colourable and fraudulent; *Streeper v. Eckart* and another; *Young v. McClure*; *Cunningham v. Neville*; *McBride v. McClelland*, 6 Watts & Sergeant, 94; dictum in *Cameron* and another v. *Montgomery*, 13 Sergeant & Rawle, 128, 131: but see *Jordan v. Brackenridge*, 3 Barr, 442.—In case of retention of possession, the transfer is fraudulent and void against subsequent bona fide purchasers as well as creditors; *Shaw* and another v. *Levy*, 17 id. 99; *Stark v. Ward*, 3 Barr, 328; *Dawes v. Cope*.—The exceptions to the application of this legal presumption of fraud are well settled. Upon an assignment, sale, or mortgage of goods or a ship at sea, delivery of the muniments of title is sufficient, if possession be taken within a reasonable time after the arrival of the property; *Morgan's Ex'rs v. Biddle*, 1 Yeates, 3. And a sale of articles at the time in possession of a bailee, if there be no accompanying delivery, will be good if the vendor does not retake possession, especially if the vendor before execution has possession and control; *Linton v. Butz*, 1 Barr, 89. After a sale by a sheriff or constable upon execution or distress, the property may be left in possession of the former owner; because the sale being the act of the law is presumed not to be fraudulent, and because of the notoriety of the transfer; *Water's Ex'ors v. McClellan et al.*, 4 Dallas, 208; *Myers v. Harvey*, 2 Penrose & Watts, 481; *Walter v. Gernant*, 1 Harris, 515; *Heitzman v. Divil*, 1 Jones, 264, 267; approved in *Streeper v. Eckart* and another, upon the same reason; in *Bellas v. McCarty*, 10 Watts, 13, 44, the reason given is that every body is bound to take notice of judicial sales and transfers. In *Wager v. Miller*, 4 Sergeant & Rawle, 117, it was decided that possession by an insolvent with consent of his assignees is good against a then existing creditor who had made himself an immediate party to the insolvent proceedings, because it is by consent of one who is the creditor's trustee under a proceeding which he had taken part in, but it was said that it would have rendered the assignment void against subsequent creditors: however, it is pretty clear upon the later decisions that insolvents' assignments are not within the legal presumption of fraud, at all; they are the act of the law and not of the party, and all the world is bound to take notice of them; *Wickersham v. Nicholson*, 14 Sergeant & Rawle, 118; *Ruby v. Glenn*, 5 Watts, 77; approved in *Bellas v. McCarty*, 10 Watts, 13, 44; and therefore the same reasons exist for taking them out of the rule as have been given in the case of sheriffs' sales. Before the Act of 14 June, 1836, relating to assignments, it was said that voluntary assignments for the benefit of creditors were within the rule; *Cunningham v. Neville*, 10 Sergeant & Rawle, 201; *Hower v. Geesaman* and others, 17 id. 251; but under that Act, an assignment duly recorded stands upon the footing of a transfer by law, because, as the Act gives the creditors a right to have the trust that is expressed in the deed executed for their benefit by the court, the whole trust becomes vested in them in equity, under the

immediate administration of the court, and therefore an assignment recorded is in effect a transfer to the creditors by the act of law, and the recording gives the transaction all the publicity of a judicial proceeding; assignments recorded are therefore not within the rule as to possession, neither during the thirty days allowed for recording, nor after record; *Mitchell v. Willock*, 2 *Watts & Sergeant*, 253; *Fitler v. Maitland*, 5 *id.* 307; *Dallam v. Fitler*, 6 *id.* 323; *Klapp's assignees v. Shirk*, 1 *Harris*, 589, 592. These seem to be the only exceptions recognized in the Pennsylvania cases. The case of the sale of an unfinished article, not to be delivered till finished, which had been left an exception in *Clow and another v. Woods*, is declared in *Pritchett and another v. Jones*, 4 *Rawle*, 260, not to be one: and the case of *Bucknel v. Royston*, also recognized as an exception in *Clow and another v. Woods*, appears to be over-ruled by *Hoofsmith and others v. Cope*. The better opinion appears to be that conditional sales are not affected by this presumption of fraud; for though it was held in *Martin v. Mathiot*, 14 *Sergeant and Rawle*, 214, that delivery of possession in such cases would divest the vendor's property in relation to the vendee's creditors, and there is in *Rose et al. v. Story*, 1 *Barr*, 191, 196, a dictum in approval of this decision, yet it seems to have been over-ruled by *Myers v. Harvey*, 2 *Penrose & Watts*, 478, where it is said that such a transaction consists of two parts, a bailment, which is not fraudulent, and a superadded executory agreement to sell, which does not transfer the title, and that the title is in the conditional vendor as in favour of his own creditors; and again to be effectively overruled in *Lehigh Company v. Field*, 8 *Watts & Sergeant*, 232, 241, notwithstanding the subtle distinction suggested by the Chief Justice between *Martin v. Mathiot* and the case before him. In *Welsh v. Bekey*, Ex'or of *Hayden*, it was said that the rule applies to choses in action; but in *United States v. Vaughan*, 3 *Binney*, 394, and *Commonwealth v. Watmouth*, 6 *Wharton*, 117, it is decided that an assignment of stock in a bank with a delivery of the certificate and power of transfer, is valid against an execution, though the stock be not transferred on the books of the bank. Upon the whole, in Pennsylvania, the distinction established appears to be between conveyances by the *act of the owner*, and by the *act of the law*. The principle upon which all the cases may stand, is this: that every transfer of the title by the act of the owner, whether to the transferee as purchaser, or to him for his security as a creditor, or as a trustee for creditors, where the owner is allowed to keep possession, and use or traffic with the goods, longer than is reasonably necessary under the circumstances, is fraudulent under the statutes of Elizabeth, and void, because it is a transfer which deprives his creditors of all benefit from his property, but does not so deprive himself: but that where the transfer is an operation of the law, being by sheriff's sale, insolvent's assignment, or voluntary assignment recorded, it is, *prima facie*, fair and valid, for the whole interest and right and control have certainly past, clean and absolute, by the command of the law; and though possession remain with the debtor, the presumption of a trust reserved in the conveyance cannot arise.

In CONNECTICUT; in *Patten v. Smith*, 5 *Connecticut*, 196, the rule of *Hamilton v. Russel*, and that of *Sturtevant v. Ballard*, are considered to be the same: the meaning of "possession accompanying and following the deed" is, that "the possession must be found where it ought to be, consi-

dering the subject in its true light;" and as possession ought to be delivered in case of mortgages as much as absolute sales, the rule of *Sturtevant v. Ballard* is settled in that case with increased precision; "a voluntary sale, or mortgage, of chattels, with an agreement in or out of the deed, that the vendor may keep possession, is, except in special cases, and for special reasons, to be shown to, and approved by the court, fraudulent and void against creditors and bona fide purchasers:" and in this case, a mortgage with possession retained was adjudged void against a subsequent vendee. In *Swift v. Thompson*, 9 id. 63, the above rule is re-affirmed; and it is said, "This has been the law of Connecticut for the last forty years, if not from the beginning. It is not according to the course of the court to call this a fraud per se, and to direct the jury to find the sale void, but the question is submitted to the jury as a question of fact, with instruction that if they find none of the established exceptions, they will find the transaction fraudulent." The possession in the transferee must be actual and bona fide; 5 id. 196; if practicable, immediate possession must be taken; if not practicable, it must be done within a reasonable time; due diligence must be used; on an assignment to a trustee for creditors, the trustee is allowed a reasonable time to give notice to the bailiff or take possession; and whether this diligence was used, or there was such remissness as would infer fraud, is for the jury; *Ingraham v. Wheeler*, 6 id. 277; the presumption of fraud is repelled by the fact, that it was not practicable for the vendee to take possession immediately, but that he did so in a reasonable time, which is considered due diligence; *Meade v. Smith*, 16 id. 347, 364. Under this rule, if a ship at sea be sold or mortgaged, possession must be taken "as soon as may be" on her return; *Starr v. Knox*, 2 id. 215; 5 id. 200; or "within a reasonable time," *Ingraham v. Wheeler*. The rule of *Patten v. Smith* applies equally to choses in action; so that if the assignor retain an assigned bond, no right passes, and he may assign it to another; *Smith v. Patten*, citing 1 Atk. 171. The usual exception of marriage-settlement, &c., are recognized in *Swift v. Thompson*: and property exempt from execution is another exception; *Patten v. Smith and Shepherd*, 4 id. 430. In *Mills v. Camp and others*, 14 id. 219, *Carter and another v. Watkins*, id. 241, and *Oshorne v. Tuller and another*, id. 530, in which last, all the cases are reviewed, the old principle is maintained, and the result of these decisions appears to be, that the rule is one of policy, and not of intention; that is not enough that the jury find that the sale was bona fide and for full consideration, though evidence of that is proper to be submitted to the jury to repel actual fraud; there must be shown some reason for the retention, *legally* sufficient and satisfactory; the presumption of fraud is a presumption of law, and the law judges of the cases in which it does not arise, and the jury are to be instructed by the court as to the sufficiency of the facts and reasons alleged to justify the retention. In the last case the court held that assignments for creditors under the act of that state of 1828, were not within the general principle, unless the assignee allowed the assignor to treat the assignment as void by suffering him to hold himself out to the public as being the real owner of the property: and the reason of this exception appears to be that the proceedings under that act are of a legal kind, and the transfer is in a great degree a judicial proceeding. In the recent case of *Kertland v. Snow*, 20 id. 23, 28, 29, where the rule of the last cited cases, is

confirmed, it is said by the court, that "the reason of extending it from a mere rule of evidence, calling it a badge of fraud only, and arbitrarily declaring, as matter of law, that it renders the sale void, as to creditors, notwithstanding the highest evidence of the honesty of the sale, is, because it has been thought better to take away the temptation to practise fraud, than to incur the danger arising from the facility with which testimony may be manufactured, to show that a sale was honest."

In VERMONT, the principle of *Sturtevant and Keep v. Ballard* is received, and maintained with great strictness. On a sale of chattels, there must be a delivery, and a substantial, visible change of possession, or the sale is fraudulent by construction of law, and void as to creditors; *Durkee v. Mahoney*, 1 Aiken, 116; *Mott v. McNeil*, id. 162; *Weeks v. Wead*, 2 id. 64, where the principle is examined at length, and the rule ably vindicated; in later cases it is repeatedly declared, that the invalidity of the sale does not depend on any fraudulent intention—that "no matter how honest the conveyance may be in point of fact, the law from principles of policy, pronounces it fraudulent per se, and void"—that, this rule has ever "been most undeviatingly adhered to"—and, that "experience shows it to be a doctrine founded in the soundest policy, from which there is no disposition to recede;" *Fuller, Jr. v. Sears et al.*, 5 Vermont, 527; *Gales v. Gaines*, 10 id. 346; *Foster v. McGregor & Stiles*, 11 id. 595; *Lynde & Morse v. Melvin*, id. 683; *Wilson v. Hooper*, 12 id. 653; *Rockwood v. Collamer et al.*, 14 id. 141. The possession of the vendee must be exclusive; at least, the sale is fraudulent, if the vendor retain joint or concurrent possession, that is, such as appears to be of the same description, in use, occupancy and disposition, as that of a joint owner; *Kendall v. Samson*, 12 id. 515; *Allen v. Edgerton*, 3 id. 442; *Hall v. Parsons*, 17 id. 272, 279: and the court after defining to the jury what constitutes possession, are to leave it to them to determine whether the vendor was in possession, or in possession jointly with the vendee; *Hall v. Parsons*, 15 Vermont, 358; S. C. 17 id. 272, 276. The possession must also be continuing; and if the vendee, or his agent even without his knowledge, suffer the thing to go back to the vendor, the sale is rendered fraudulent; *Morris et al. v. Hyde*, 8 id. 352; *Rogers v. Vail et al.* 16 id. 327, 329; *Mills v. Warner*, 19 id. 609: but if the thing be bailed at the time of sale, and the bailee let it return, it will not vitiate the sale, for the bailee then acts as the servant of the vendor; *Lynde and Morse v. Melvin*. In the case of *Dewey v. Thrall et al.* 13 id. 281, the rule was said to be, that the possession of the vendee must be so visible, notorious, and continued, that the creditors may be presumed to have notice of it; and in *Farnsworth v. Shepard*, 6 id. 521, seven months' continuance was held to be sufficient. The general rule of fraud in law does not apply, if the delivery be perfected at any time before an execution comes; yet even non-delivery would be competent evidence, from which the jury might infer a fraudulent intent in fact; *Kendall v. Samson*. The rule does not apply, if at the time of the sale, the goods are in possession of a bailee; *Barney v. Brown*, 2 id. 374; *Spaulding v. Austin*, id. 555; *Harding v. Janes*, 4 id. 462; *Lynde and Morse v. Melvin*; but then notice must be given to the bailee, *Moore v. Kelly*, 5 id. 34, by the purchaser, or by his orders, through some other person than the creditor; *Judd and Harris v. Langdon*, id. 231; *Pierce v. Chipman*, 8 id. 334; *Whitney v. Lynde*, 16 id. 579, 586; and the bailee

must assent and agree to keep the article for the purchaser; *Whitney v. Lynde*; and the reason of the exception is, that the possession being with a third person is notice to creditors and others that the title may have been parted with; they are put upon inquiry, and if they will ask the bailee, he can inform them accurately:—see to the same effect, *Meritt v. Miller*, 13 id. 416; *Potter v. Washburn*, id. 558; and see *Rockwood v. Collamer et al.* 14 Vermont, 141. The rule also does not apply if the property is such as is exempt from execution; *Foster v. McGregor and Stiles*: nor does it apply to a sale by the sheriff on execution, partly on the ground of notoriety, and partly because the sale is the act of the law; *Boardman v. Keeler et al.* 1 Aiken, 158, 2 id. 70; *Bates v. Carter*, 5 Vermont, 602; *Gates v. Gaines*; *Cilley v. Cushman*, 12 id. 494; but it must be a regular compulsory sale according to the course of legal process, and a sale by public auction will not form an exception; *Rogers v. Vail et al.* 16 id. 327; *Batchelder v. Carter*, 2 id. 168; and if the sale, though made publicly by the sheriff, be not legally under the process in his hands, but by consent of parties, it will not be within the exception, because it is not a transfer of the title by operation of law; *Kelly v. Hart*, 14 id. 50. With regard to the principle of possession in accordance with the deed, and the consequent exception of contingent sales, which is recognized in *Weeks v. Wead*, (A. D. 1826,) it is there held to mean, that the possession must be in accordance with the limitation of interest made by the deed, as in the case of a settlement of furniture on marriage, and that the mere insertion of an agreement to the effect that possession should be kept, would not do; “an assignment,” it is said in that case, “of goods, with condition that possession shall not be taken till forfeited, or the insertion of a clause in the bill of sale, when the sale is otherwise absolute, that the vendor shall remain in possession, will not make his possession consistent with the deed, or take the case out of the rule;”—the form of the conveyance can make no difference, if from the nature of the transaction, the sale is absolute, and possession can accompany it;—indeed, the rule appears to apply to all cases, except where the purpose of the conveyance and the nature of the transaction entitle or require the vendor to continue in possession, and the law, considering it necessary and justifiable, approves and permits it;” and the court give as instances, *Maggott v. Mills*, *Kyd v. Rawlinson*, and *Bucknall v. Royston*. This is in effect the rule of *Sturtevant and Keep v. Ballard*, and *Clow and another v. Woods*. According to the dicta of *Weeks v. Wead*, mortgages are within the rule; and in the case of a sale and mortgage back to secure the purchase-money they were determined to be so, in *Tobias v. Francis*, 3 Vermont, 425, and *Woodward v. Gates and Cheney*, 9 id. 358; though the case of common mortgages was left undecided in *Gifford v. Ford*, 5 id. 532. It may be remarked as an illustration of the extreme nicety of the considerations belonging to this subject, that in Kentucky, where precisely the same explanation is given of the meaning of “consistency with the deed,” as in *Weeks v. Wead*, a different conclusion is reached as to mortgages being embraced by it: the truth is, that the notion of a mortgage of chattels at common law, is very uncertain. In Vermont, as to conditional sales, (viz. where the possession is delivered, but the property does not pass till payment,) it is decided in *Bigelow v. Huntley*, 8 Vermont, 151, that the goods are not rendered by the delivery liable to the vendee’s creditors, though

fraudulent representations as to the title would render them so. An assignment for the benefit of creditors is fully within the rule; *Rogers v. Vail et al.*, 16 id. 327

(3). The other courts of the Union seem to have adopted the practice of referring the question of fraud to the jury.

In MASSACHUSETTS and MAINE, the principle appears to be, that retention of possession upon an absolute conveyance of chattels, is sufficient evidence of fraud: but retention consistently with the nature, operation and purpose of the conveyance, is no evidence of fraud: and that it is in no case fraud, or conclusive evidence of fraud. *Brooks v. Powers*, 15 Massachusetts, 244; *Fletcher v. Willard*, 14 Pickering, 464; *Briggs v. Parkman*, 2 Metcalf, 258; *Haskell et al. v. Greenly*, 3 Greenleaf, 425; *Reed v. Jewett*, 6 id. 96; *Holbrook v. Baker*, id. 309. In absolute sales, possession is evidence, and generally very strong evidence, of fraud for the jury; *Brooks v. Powers*; *Ulmer v. Hills*, 8 Greenleaf, 326; a secret trust, or agreement upon a bill of sale of chattels, absolute on its face, is still but evidence of fraud; *N. E. Marine Ins. Com. v. Chandler and Trustee*, 16 Massachusetts, 275, 279; *Oriental Bank v. Haskins*, 3 Metcalf, 332, 337; and secrecy in the sale does not add to the legal presumption of fraud; *Glover et al. v. Austin*, 6 Pickering, 209, 221; and even an express agreement to keep the sale secret, is not, per se, fraudulent, but "mere matter of evidence," "strong perhaps;" *Gould v. Ward*, 4 id. 104; 5 id. 291, S. C.: and this evidence may, in all cases, be rebutted by showing the transaction to be bona fide, and on valuable consideration; and the question of fraud is to be decided by the jury upon the whole evidence; *Homes et al. v. Crane*, 2 id. 607. See *Clark v. French*, 23 Maine, 221, 228. If possession is assumed before an execution is levied, the sale is valid; *Bartlett v. Williams*, 1 id. 288; *Shumway et al. v. Rutter*, 8 id. 443, 447. Where, at the time of the sale, it is stipulated by fair and open agreement, that the vendor shall retain possession for a given time; (*Wheeler v. Train*, 3 id. 225;) and in case of mortgages, and other contingent conveyances, for the security of the grantee; and, generally, where the retention is consistent with "the terms of the contract, the intention of the parties, and the nature of the transaction," non-delivery of possession is sufficiently explained, and is no longer evidence of fraud; *Badlam v. Turner*, 1 id. 389; *Homes et al. v. Crane*; *Glover et al. v. Austin*; *Adams v. Wheeler*, 10 id. 199; *Lunt v. Whitaker*, 1 Fairfield, 310; *Cutter v. Copeland*, 6 Shepley, 127; *Lane v. Borland*, 2 id. 77; *Pierce v. Stevens*, 30 Maine, 184. However, in the recent case of *Robbins v. Parker*, 3 Metcalf, 117, the principle of *Summerville v. Horton*, 4 Yerger, 541, is adopted, and it is decided, that the mortgage and non-delivery of perishable articles, which cannot be kept, or the mortgage of any articles under an agreement or understanding that they are to be used and consumed by the mortgagee, is in itself fraudulent against creditors. In Massachusetts, by statute of 1832, sec. 157, Revised Statutes, p. 473, no mortgage of chattels, except ships at sea, is valid but between the parties, unless possession is delivered to, and retained by, mortgagee, or the mortgage is recorded by the town clerk: recording is equivalent to delivery of possession; *Bullock v. Williams*, 16 Pickering, 33. In case of sales or mortgages of ships at sea, or in a distant port, the sale transfers the property at once, and will prevail against subsequent attachments, unless the first vendee is guilty

of gross negligence and delay in taking possession after the property arrives: *Putman v. Dutch*, 8 Massachusetts, 286; *Joy et al. v. Sears*, 9 Pickering, 4; *Turner and another v. Coolidge*, 2 Metcalf, 350.

In OHIO, it is considered as settled, that retention of possession upon absolute sales is not conclusive of fraud, though it is such presumptive evidence of it, as puts upon the vendee the burden of satisfying the jury that the sale was fair and bona fide. *Rogers v. Dare et al.*, *Wright*, 136; *Burbridge v. Seely*, *Morley & Co. id.* 359. See *Shaw and Ball v. Lowry*, *id.* 190, as to what circumstances will make the conveyance void. In the late case of *Collins & McElroy v. Myers et al.*, 16 Ohio, 547, 552, the court said that they regarded it as perfectly well settled law, that on a sale or mortgage of personal property a continuance of possession by vendor or mortgagor, is only prima facie evidence of fraud, which may be explained away or rebutted, by showing that such possession was honest and fair. But they held that a continuance of possession with a power of disposition and sale on the part of the mortgagor, either express or implied, is necessarily fraudulent and void as against creditors, as such a mortgage is no security to the mortgagor, and of no effect, but to ward off other creditors.

In TENNESSEE, we find the distinction taken as to possession according to the title in the deed; but the presumption is broken down to be a mere matter of evidence for the jury. Originally the principle of *Hamilton v. Russel*, was adopted, and it was held, that retaining possession upon an absolute sale was a fraud in law; *Ragan v. Kennedy*, 1 *Overton*, 91, (A. D. 1804): but in *Callen v. Thompson*, 3 *Yerger*, 475, (A. D. 1832,) the cases, and the reasons of them, were examined, and it was held, that possession is not in itself a fraud, but is only such prima facie evidence of it, as puts upon the vendee the burden of proving fairness, and that proof of fairness, and a full and adequate consideration, will repel the presumption of fraud; confirmed in *Young & Young v. Pate* and *Kernigog*, 4 *id.* 164; *Maney v. Killough*, 7 *id.* 440, and *Wiley v. Lashlee*, 8 *Humphreys*, 717, 720. It is evidence of fraud, when the possession is retained contrary to the right and title transferred by the deed, but not if the retention be in accordance therewith; thus, it is not evidence of fraud if the mortgagor remain, with the assent of the mortgagee, in possession, till default, for he is in that case, entitled to do so, whether it be so agreed by the deed or not; but to remain after default is evidence of fraud, for that is not consistent with the title. And whenever it is made to appear, that a deed, absolute on its face, was intended by the parties as a mortgage only, the presumption of fraud that may have existed on account of the assignor's possession, disappears; *Wiley v. Lashlee*, 8 *Humphreys*, 717, 720. So upon an assignment to a trustee for the benefit of creditors, it is evidence of fraud if the grantor remain in possession after the time when the trustee ought to take possession and sell; and if, by the deed, the trustee is to take possession and sell immediately, then, retaining possession at all is evidence of fraud; *Darwin v. Hanley*, 3 *id.* 502; *Manley v. Killough*. But should the property be of a kind which is consumed by the use of it, as domestic stores, then the debtor's continuing in the use of it, is evidence of fraud, in fact, for the jury; *Darwin v. Handley*; *Charlton v. Lay*, 5 *Humphreys*, 496; and if the use of such things be retained by a stipulation in the deed, the conveyance would be absolutely void, for it would necessarily be in trust for the debtor, and

in hindrance of his creditors; *Somerville v. Horton*, 4 id. 541; confirmed in *Maney v. Killough*; *Simpson v. Mitchell*, 8 id. 419; *Richmond v. Cardup*, Meigs, 581; *Trabue v. Willis*, id. 583, n.; and now adopted in Massachusetts; and approved of in Alabama; *Ravisies v. Alston*, trustee, 5 Alabama, 297, 302; *Wiswall v. Ticknor & Day*, 6 id. 179, 184. Delivery of possession on a conditional sale, gives no title to those purchasing from the conditional vendee; *Gambling v. Read*, Meigs, 281.

In MISSOURI, in the earlier cases, it was held, that retention of possession on sales and mortgages, was fraudulent in law; but the later decisions determine that possession remaining with a person who professes to have parted with the legal title, is *prima facie* evidence of fraud only, and evidence is admissible, to show that the transaction is fair; *Shepherd v. Trigg*, 7 Missouri, 151, 157; *Ross v. Crutsinger*, id. 245; *King v. Bailey*, 8 id. 332. *Milburn v. Waugh*, *Corthron et al.* 11 Missouri, 369, 373.

In GEORGIA, it is agreed that, formerly, an absolute sale of chattles unaccompanied by possession, was fraudulent in law, and void as against creditors, but that the modern rule is, that the possession is susceptible of explanation. The rule now well established in the courts of that state is, that possession in the vendor, in case of an absolute sale, is *prima facie* evidence of fraud, but may be explained, and the onus of explanation, after possession is proved is upon the grantee, and the question of fraud, or not fraud is to be submitted to the jury; if no explanation is given, the presumption becomes conclusive: *Peck v. Land*, 2 Kelly 1, 12; *Fleming v. Townsend*, 6 Georgia 104, 105; *Beers and others v. Dawson*, 8 id. 557.

In Texas, also, it has been decided that retention of possession after an absolute sale is not fraud *per se*, but affords a reasonable presumption of fraud, which like other presumptions, admits of explanation showing it to be honest, and if there be such explanatory circumstances, they are to go to the jury to rebut the presumption of fraudulent intent; *Bryant v. Kelton*, and *Uzzell*, 1 Texas, 415, 431; *Morgan v. The Republic*, 2 id. 279.

In North Carolina, it appears to be agreed that retaining possession after a sale, is not fraud in law, but is only evidence of fraud: *Rea v. Alexander*, 5 Iredell, 644.

EXECUTIONS to hinder and delay creditors, are included in the statute 13 Eliz. ch. 5. In the Circuit Court of the 3rd circuit, the distinction is established between a delay by the officer, and a delay by the order or advice of the plaintiff in the execution; the officer, after a levy, need not remove the property nor sell immediately, if the sale be within a reasonable time; but the only legal purpose of an execution is to obtain satisfaction of the debt, and therefore if the plaintiff *directs* the sheriff not to execute it till a certain time, or till further orders, or directs him to levy, and leave the property with the debtor until otherwise directed; this at once renders the execution fraudulent and void against later executions levied before the order not to proceed is countermanded; and the goods remaining in the debtor's hands an unreasonable length of time with the knowledge and assent of the plaintiff in the execution, is legal evidence of the delay being his act: *U. S. v. Conyngham, et al.*, *Wallace's C. C. R.* 178; (brief note of S. C. without arguments or opinions, in 4 Dallas, 358;) *Barnes et al. v. Billington et al.*, 1 Washington C. C. R. 29, 37; *Berry v. Smith*, 3 id. 60.

The establishment of this clear and satisfactory principle, which has been adopted in New York and Pennsylvania, and other states, is due to Judge GRIFFITH, of New Jersey, whose opinion in the case of *U. S. v. Conyngham et al.* is a fine specimen of the powers of that able lawyer, and highly accomplished scholar.

In NEW YORK, the same distinction is established in *Rew v. Barber*, 3 Cowen, 272, and *Russell v. Gibbs*, 5 id. 390; *Ball v. Shell*, 21 Wendell, 222; *Knower v. Barnard*, 5 Hill, 877; *The Herkimer County Bank v. Brown*, 6 id. 232; and the older cases accord with this distinction, though not expressed to be grounded upon it; the executions being held fraudulent, where the possession or use was left a long time with the debtor by direction of the plaintiff, in *Storm & Beekman v. Woods*, 11 Johnson, 110; *Farrington & Smith v. Sinclair*, 15 id. 428, and *Kellog v. Griffin*, 17 id. 274; and it being held in *Whipple v. Foot*, 2 id. 418, and *Doty v. Turner*, 8 id. 20, that *mere* delay does not avoid the levy, though *great* delay might authorise the jury to infer the consent and direction of the plaintiff.

In PENNSYLVANIA, the law now appears to be precisely the same, though formerly different, or, rather, unsettled. It is evident, indeed, from *Levy v. Wallis*, and *Chancellor v. Phillips*, 4 Dallas, 167, 213, and other cases referred to in *U. S. v. Conyngham et al.*, Wallace C. C. R. 178, that the early decisions in Pennsylvania had fluctuated, because the true principle was not discovered; but upon that principle being stated by Judge GRIFFITH, and more clearly explained by Judge WASHINGTON, the decisions in Pennsylvania have ever since been in accordance with it. Merely leaving the property in possession of the debtor is not fraudulent; but an *order* by the plaintiff in the execution to the sheriff to delay proceedings, renders the execution fraudulent against later executions levied during the stay, or against subsequent purchasers; whether the levy be returned or not, and whether or not the later claimant had notice; *Eberle v. Mayer*, 1 Rawle, 366; *Commonwealth v. Stremback* and others, 3 id. 341; *McClure v. Ege*, 7 Watts, 74; *Metz* and another *v. Hanman*, 5 Wharton, 150; the test is, "the presence or the absence of a direction to stay proceedings on the levy. The principle of this test is, that to levy with directions to proceed no further, can be referred to no object but the creation of a lien, which the law does not tolerate;" per GIBSON, C. J., in *Hickman v. Caldwell*, 4 Rawle, 376; and that an order to stay proceedings in case of household furniture, will have the same fraudulent effect, is the point decided in *Commonwealth v. Stremback* and others. An order will have this effect, though there be no fraudulent intent, and of course taking out execution with intent not to have it executed bona fide, and it be not so executed, though there be no order to proceed, will postpone the execution. *Weir v. Hale*, 3 Watts & Sergeant, 285. A postponement of the sale to any time within the return-day, is a mere adjournment and not fraudulent; but an adjournment to a time beyond the return-day, would be equivalent to an indefinite postponement and a badge of fraud, because no sale could then be made on the writ; *Lantz v. Worthington*, 4 Barr, 153, 155. But a delay proceeding from the officer, though by sufferance of the plaintiff, without fraud on his part, will not postpone the plaintiff's execution; *Howell v. Atkyn*, 3 Rawle, 282, explained in *Hickman v. Caldwell*; *McCoy v. Reed*, 5 Watts,

300. But though the rule in Pennsylvania is, that the officer need not "remove the property, nor put a person in charge, nor sell immediately;" *Commonwealth v. Stremback and others*; yet it is required that he should do it in a reasonable time; *Wood v. Vanarsdale*, 4 Rawle, 401; for if the property be left unreasonably long, the delay will afford evidence of the plaintiff's being the fraudulent cause of it, and will therefore vitiate the execution; *Corlies & Co. v. Stanbridge*, 5 Rawle, 286, 290; especially if the levy is not returned; *Lewis v. Smith*, 2 Sergeant & Rawle, 142. Household goods cannot be left more than a reasonable time; *Cowden v. Brady and others*, 8 id. 505, 510; as to the reasonable length of time in such cases, see *Commonwealth v. Stremback and others*, and *Dean and others v. Patton*, 13 Sergeant & Rawle, 341, 345; and as to what is a reasonable time in general cases, see Judge GRIFFITH'S opinion in *U. S. v. Conyngham et al.* 1 Smith, 73.

In ALABAMA, also, it is settled that if an execution issued is stayed or held up by direction of the plaintiff, the proceeding is fraudulent in law, and the execution constitutes no lien as against junior ones regularly levied and enforced; *Wood v. Gary et al.* 4 Alabama, 43; *Patton v. Hayter, Johnson and Co.* 15 id. 18, 21.

In KENTUCKY, a similar principal has been adopted; the officer is not obliged to take exclusive possession under a levy on chattles, and therefore, the simple retention of the property by the debtor, if it be not continued longer than a vigilant officer may conveniently require to sell the property, is not alone, even *prima facie* proof of a fraudulent intent, though it might be some slight evidence of collusion; but a retention of possession, with a right in the debtor to consume or sell the property, or any indefinite holding by the debtor, without any effort by the creditor to sell the property, within the ordinary or usual time, is *prima facie* evidence of fraud; and therefore, if there be a continued possession by the debtor for months after the levy, and there be no evidence to rebut the presumption of fraud, the jury will be directed to find that the levy is void against a subsequent execution creditor; *Swigert, &c. v. Thomas*, 7 Dana, 220, 222.

In NEW JERSEY, the rule in *Berry v. Smith* is not strictly adopted: mere delay, or an order from the plaintiff not to proceed, will not postpone an execution to a subsequent one; *Casher v. Peterson*, 1 Southard, 317; *Williamson v. Johnston*, 7 Halsted, 86; *Sterling v. Van Cleve*, id. 285; *James v. Burnet, Spencer*, 636, 641. To have that effect, the conduct of the prior execution creditor must be fraudulent; but it is not necessary to prove actual fraud in the concoction of the judgment, or an actual design to defeat or delay other creditors; it is enough if the proceedings of the prior execution creditor are an abuse of the process of the law. Accordingly, it has been determined that although the creditor when he delivers his execution, or at any time afterwards, may direct the sheriff not to proceed to a sale without further orders from him, or unless urged on by other executions, and will not thereby lose his priority, if he act in good faith; yet that if the debtor is permitted with the knowledge and consent of the execution creditor, express or implied, not only to retain the possession of the property, and to use and enjoy it for ordinary and appropriate purposes, as in the case of household goods, but to exercise an unlimited control over all the property levied on, whatever may be its nature, and to use, sell, exchange or consume

it, as the rightful and absolute owner, it is such evidence of a fraudulent and colourable use of the process of the court, whether the debt be a real and just one or not, as to postpone the execution to younger ones sued out and prosecuted in good faith; *Cumberland Bank v. Hann*, 4 Harrison, 167, 169; *Cook v. Wood*, 1 id. 254. In DELAWARE, also, a mere order to the sheriff to hold the execution in his hands and not proceed unless instructed to do so, or compelled by other judgment creditors, does not postpone an execution; *Houston v. Sutton*, 3 Harrington, 37. The practice of allowing executions to be used for the purposes of a lien, is also avowedly established in SOUTH CAROLINA, and dormant executions are never postponed but for actual fraud; *Snipes v. The Sheriff of Charleston district*, 1 Bay, 295; *Brown v. Gilliland*, 3 Desaussure, 539; *Greenwood et al v. Naylor*, 1 M'Cord, 414, where it is decided, that endorsing on a fi. fa. "lodged to bind," which was regarded as a stay, did not prevent the execution taking the money made on a younger writ; *Adair v. McDaniel & Cornwell* 1 Bailey, 158.

In the Eastern States, where attachment is a usual mesne process, it is generally held that possession must be taken and kept, or the property is liable to future attachments. See *Bagley v. White*, 4 Pickering, 395, and cases cited; *Taintor v. Williams*, 7 Connecticut, 271; *Mills v. Camp*, 14 id. 219; *Harding v. Janes*, 4 Vermont, 462, 465, dictum.

H. B. W.

[*15]

DUMPOR'S CASE.

HIL. 45 ELIZ.—IN THE KING'S BENCH,

[REPORTED 4 COKE, 119.]

A condition not to alien without license is determined by the first license granted.—Apportionment of Conditions.

IN trespass between Dumpor and Symns, upon the general issue, the jurors gave a special verdict to this effect: the President and Scholars of the College of Corpus Cristi, in Oxford, made a lease for years in anno 10 Eliz. of the land now in question, to one Bolde, *proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessor by their deed, anno*

13 Eliz., *licensed the lessee to alien*, or demise the land, or any part of it, to any person or persons quibuscunque. And afterwards, anno 15 Eliz., the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The President and Scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought: *(b)* and that upon the lease made to Bolde, the yearly rent of 33s. 4d. was reserved, and upon the lease to the plaintiff, the yearly rent of 22s. was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved; 1st. *That the alienation by license to Tubbe, *had(c) determined the condition*, so that [*16] no alienation which he might afterwards make could break the proviso, or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee who has his estate and interest shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256, in com. Banco inter Leeds, *(d)* and Compton, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one alienated by his assent, and afterwards the other two without license, and it was adjudged, that in this case the condition being determined as to one person (by the license of the lessor) was determined in all. And *(e)* Popham Chief Justice, denied the case in 16 Eliz., Dyer *(f)* 334; that if a man leases land upon condition that he shall not alien the land, or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or *(g)* apportioned by the act of the parties; and in the same case, as to parcel which was alienated by the assent of the lessor, the condition is determined; for, although the lessee

(b) See 3 Wilson, 234.

(c) 1 Roll. Rep. 70, 390. 1 Roll. 422, 471. 2 Bulst. 291. Cro. Jac. 398. 3 Co. Penant's case. 3 Ed. 6 Dyer, 66, a.

(d) 1 Roll 472. Cro. El. 816. Godb. 93. Noy, 32. 4 Leon. 58. 2 Bulstr. 291.

(e) Styles, 317.

(f) Dy. 334. pl. 32. Cro. El. 816. Styles, 334. Moor. 205.

(g) Co. Litt. 215, a.

aliens any part of the residue, the lessor shall not enter into the part aliened by license, and, therefore, the condition being determined in part, is determined in all. And therefore the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota*, [*17] reader, Paschæ 14* Eliz. Rot. 1015, in Com. Banco, that where the lease was made by deed indented for twenty-one years of three(g) manors, A., B., C., rendering rent, for A. 6*l.*, for B. 5*l.*, for C. 10*l.*, to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one and his heirs, and afterwards, by another deed indented and enrolled, bargained and sold all the residue to another and his heirs, and if the second bargainee should enter for the condition broken or not, was the question: and it was adjudged, that he should not enter for the(h) condition broken, because *the condition being entire, could not be apportioned by the act of the parties*, but by the severance of part of the reversion it is destroyed in all. *But it was agreed, that a condition may be(i) apportioned in two cases.* 1. *By act in law.* 2. *By act and wrong of the lessee.* By act in law, as if a man seised of two acres, the one in fee, and the other in(j) borough English, has issue two sons, and leases both acres for life or years, rendering rent with condition, the lessor dies, in this case by this descent, which is an act in law, the reversion, rent, and condition are divided.(k) 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste(l) in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee; and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that *he who enters for a condition broken, ought to be in of the same estate which he had at the time of the condition created*, and *that* he cannot have, when he has departed with the reversion of part: and with that reason agrees Litt. 80, b. And vide 4 & 5 Ph. & Mar. Dyer,(m) 152, where a proviso in an indenture of lease was, that the lessee, his executors or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee; the lessee died, his executor assigned it over to one of his sons, it is held by Stamford and Catlyn, that the son might alien to whom he pleased, without license,(n) for [*18] the condition, as to the son, *was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the statutes of 13 Eliz. cap. 10, and 18 Eliz. cap. 11, concerning leases made by Deans and Chapters, Colleges, and other ecclesiastical persons are(o) general laws whereof the court ought to take knowledge,

(g) Dyer, 308, 309, pl. 75. 5 Co. 55, b. Moor, 97, 98.

(h) Co. Lit. 215, a. Cro. Jac. 390. 5 Co. 55, b.

(i) 3 Bulstr. 154; Co. Lit. 215, a. (j) 1 Rol. Rep. 331; Co. Lit. 215, a.

(k) See Baron and Baronness de Rutzen v. Lewis, 5 Ad. & Ell. 277.

(l) 1 Rol. Rep. 331; Moor, 203.

(m) Dy. 152, pl. 7; Co. Lit. 215, a; Cro. Eliz. 757, 816.

(n) Quære, see Lloyd v. Crispe, 5 Taunt. 249, *post in nota*.

(o) Antea 76, a; 2 Rol. 765; Yelv. 106; Doct. pl. 337, 338; Noy, 124; 2 Brownl. 208; Cro. El. 816; Moor, 593; 1 Leon. 306, 307.

although they are not found by the jurors, and so it was resolved between Claypole and Carter, in a writ of error in the King's Bench.

"The profession have always wondered at Dumpor's case," said Mansfield, C. J., in *Doe v. Bliss*, 4 Taunt. 736, "but it has been law so many centuries that we cannot now reverse it." "Though Dumpor's case always struck me as extraordinary," (said Lord Eldon in *Brummel v. Macpherson*, 14 Ves. 173,) "it is the law of the land." Accordingly it is affirmed by many subsequent decisions, nay, has been even carried further, for it is held that whether the license to assign be general, as in the principal case, or particular, as "to one particular person subject to the performance of the covenants in the original lease;" still the condition is gone, and the assignee may assign without license. *Brummel v. Macpherson*, 14 Ves. 173. But the license, in order to put an end to the condition, must be such a license as is therein contemplated, for where the condition is, not to assign *without license in writing*, a *parol* license is no dispensation. *Roe v. Harrison*, 2 T. R. 425; *Macher v. Foundling Hospital*, 1 V. & B. 191; *Richardson v. Evans*, 3 Madd. 218, though it is said that if such *parol* license were used as a snare, equity would relieve. *Richardson v. Evans*, 3 Madd. 218. It seems, too, that if the condition be not in general restraint of assignment, but permit the lessee to assign in one particular way, *ex gr.* by will; an assignee, to whom the lease has been transferred in the permitted way, cannot assign in any other mode. *Lloyd v. Crispe*, 5 Taunt. 249. "The ground of Dumpor's case" (says Gibbs, J.) "was this: the proviso was that the lessee or his assigns should not alien the premises to any person or persons without the special license of the lessors; the lease was therefore to be void if any assignment was made. And there the court was of opinion that if the condition was once dispensed with, it was wholly dispensed with, because the provision for making void must exist entire, or not exist at all. But here is an exception out of the original restriction to alienate, so that in the alienation by will made by the lessee, there was

nothing to license." [Also by defeasance properly framed to revive the condition, a license to assign may virtually be limited to the particular assignment. See 3 Jarman's *Conv.* by Sweet, 685. But it has been intimated by Gibbs, C. J. that there would be great difficulty in giving that effect to any merely restrictive words in the license. *Mason v. Corder*, 7 Taunt. 9.]

Although, when such a condition as that in Dumpor's case exists, alienation without license operates as a forfeiture of the term; still, if the lessor, with knowledge of the forfeiture, receive rent due since the condition broken, such conduct upon his part operates as a waiver of his right to take advantage of it. [But not so if the landlord be unaware of the fact of the forfeiture at the time of receiving the rent, *Roe v. Harrison*, 2 T. R. 425; *Doe v. Birch*, 1 M. & W. 402, unless, perhaps, where it appears from other circumstances, that the rent is accepted with an intention of continuing the tenancy notwithstanding *any* forfeiture that may have occurred.] In *Goodright v. Davies*, Cowp. 803, the lease contained a covenant not to underlet without license, and a power of re-entry to the lessor in case of non-observance of the covenants; the lessee underlet various parts of the premises, but the lessor knew of it, and received rent afterwards. "The case," said Lord Mansfield, "is extremely clear. To construe this acceptance of rent due since the condition broken, a waiver of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition the landlord had a right to enter. He had full notice of the breach, but does not take advantage of it, but accepts rent subsequently accrued. That shows he meant that the lease should continue. Forfeitures are not favoured in law; and when a forfeiture is once waived, the court will not assist it." See *Browning and Beston's case*, Plowd. 133; *Roe v. Harrison*, 2 T. R. 425; *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384. And other acts of the lessor, besides acceptance of

rent, have been held to waive a forfeiture, *when they show an intention on his part that the lease should continue. Doe v. Meux, 4 B. & C. 606; see Doe v. Birch, 1 Mee & Welsby, 408; and Doe d. Baron and Baroness de Rutzen v. Lewis, 5 A. & E. 277. It has been laid down that there is a difference in this respect between cases where the lease is on breach of the condition to be *void* and those where it is only to be *voidable* on the lessor's re-entry. In the latter case, acceptance of rent operates as a waiver of the landlord's right to re-enter, but in the former, the lease becoming void immediately upon the breach of the condition, it has been laid down by great authorities that no subsequent acceptance of rent will set it up again. This distinction is laid down by Lord Coke, 1 Inst. 214, b., in the following terms: "Where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of a lease or estate voidable by entry." The same law is laid down equally strongly in Pennant's case, 3 Rep. 64; in Browning and Beston's case in Plowden; see too Finch v. Throckmorton, Cro. Eliz. 221; Mulcarry v. Eyres, Cro. Car. 511; Doe d. Simpson v. Butcher, Dougl. 51, *et notas*. But this distinction was never [before 7 & 8 V. c. 76, 8 & 9 V. c. 106] applied to any lease for years, for if a lease for lives contain an express condition to be *void* upon the breach of any covenant by the lessee, still it is in contemplation of law only *voidable* by re-entry; for it is a principle that an estate which begins by livery can only be determined by entry. Browning and Beston's case, Plowd. 133; Doe v. Pritchard, 5 B. & Ad. 765. [Since the statutes referred to, estates for life may commence without livery, and to such estates, the reasoning above seems inapplicable.] Even in the case of a lease for years, where the direction is that it shall become *void* on breach of the condition; it will only be void at the option of the lessor; for the lessee shall not take advantage of his own wrongful non-performance of his contract, in order to destroy the lease, which had perhaps turned out a disadvantageous one. Doe v. Bancks, 4 B. & A. 401; Read v. Farr, 6 M. & S. 121; and see Malins v. Freeman, 4 Bingh. N. C. 395, [and Hyde v. Watts, 12 M. & W. 254,] decided on a

similar principle; nor can any third person treat it as void until the landlord has declared his option. Roberts v. Davey, 4 B. & Ad. 664. In that case, in trespass *quare clausum fregit*, the defendant pleaded a license from a previous owner of the fee. Replication, that the license was, on breach of a certain condition, "*to cease, determine, and become utterly void and of no effect,*" and that the condition had been broken and the license thereupon become void. Demurrer, and judgment for the defendant on the ground that, according to Doe v. Bancks, and Read v. Farr, the license was determinable only at the *option of one* who had not signified such option. In Doe v. Banks, and Read v. Farr, the lease was by the terms of it, *to be utterly void to all intents and purposes*. But in Arnsby v. Woodward, 6 B. & C. 519, where, in addition to the words rendering the lease void, it was stated "*that it should be lawful for the lessor to re-enter and expel the tenant,*" the court held that the addition of those words showed, that it was the intent of the parties that the lease should be only voidable by re-entry; and consequently, that the landlord had, by a subsequent receipt of rent, waived the forfeiture; and in Doe v. Birch, 1 Mee. & Welsby, 403, a clause that, on the breach of certain stipulations, "*it should be lawful for the lessor to re-take possession of the premises, and that the agreement should be null and void,*" was held to have the same effect, and to admit the question of waiver. See also Dakin v. Cope, 2 Russ. 170. This shows with what strictness the courts will read such a proviso in order to prevent an absolute forfeiture. Indeed, in Arnsby v. Woodward, Lord Tenterden said, that, supposing the proviso had been in the very same words as in Read v. Farr, and Doe v. Bancks, he should have still thought that a receipt of rent by the landlord would be an admission, *that the lease* was subsisting at the time when that rent became due, and that he could not afterwards insist upon a forfeiture *previously* committed; and his lordship said, that to hold the contrary would be productive of great injustice, for it would enable a landlord to eject a tenant, after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on that supposition, expended his money in improving the premises. We must therefore look on this distinc-

tion between the possibility of waiving the breach of a condition which is to render the lease *void*, and that of one which is to render it *voidable*, as shaken; and indeed in *Roberts v. Davey*, 4 B. & Adol. 667, *Sir W. Follett argued [*20] that it had been virtually overruled. Still there is no express decision to that effect, unless *Roberts v. Davey* be so considered; nor does it appear a necessary consequence, that, because the tenant is prevented from taking advantage of his own wrong by insisting that the lease is absolutely void, it shall therefore be taken to be only voidable when that construction makes *for* the tenant and *against* the landlord; and, when we consider the high authorities adducible in support of the distinction in question, and their analogy to the cases in which it has been determined that no acceptance of rent by a remainderman will confirm a lease void as against him, *Simson v. Butcher*, Dougl. 51, et notas, *Jenkins v. Church*, Cowp. 483, we may conjecture that it will not be quietly allowed to become obsolete; and that further controversy may arise upon the question, whether the landlord, in case of a stipulation that the lease shall become void on breach of a condition which has been broken, is precluded by a subsequent receipt of rent from treating the lease as determined. On that question the words of Lord Coke are express, that "*where the lease is ipso facto void by the condition no acceptance of rent after can make it to have a continuance*," 1 Inst. 214; and see also the other authorities above cited. On the other hand, the case of *Roberts v. Davey* is extremely strong. There, the person seeking to treat the license as void was not the licensee nor any one connected with him in interest; he was not taking advantage of any wrong done by himself; nor was he enabling the licensee to do so, which differs the case from *Read v. Farr*, where the defendant, who sought to take advantage of the tenant's wrongful act, was connected with him in interest; so that, (unless there be a difference between the right of a landlord to consider the lease absolutely void before any expression of his election, and that of a third party to do so,) *Roberts v. Davey* is no doubt an authority that it is only voidable, in point of law, and with relation to all persons, including the landlord. And if the landlord as well as the tenant must treat it as

voidable, no doubt the receipt of rent may operate as a waiver of the forfeiture. Perhaps the true rule may be ultimately held to be, that the effect of the proviso rendering the lease *void* is only to dispense with *entry*, and to substitute for it any formal expression of the lessor's election to avoid the lease. [See *Bowser v. Colby*, 1 Hare, 109]. On the question what is a sufficient *entry* where *entry* is requisite, see [*Doe d. Hanley v. Wood*, 2 B. & Ald. 724]; *Doe v. Pritchard*, 5 B. & Ad. 765; *Doe v. Williams*, *ibid.* 783.

Although acceptance of rent falling due after a forfeiture operates as a waiver, yet acceptance after forfeiture of rent which became due before the forfeiture will not do so. Nor does the lessor waive his right to recover such rent in an action, although the words of the condition may be that the lessor shall have the premises again, "*as if the indenture of lease had never been made*." The proper construction of such a proviso being, that from the time of re-entry the lessor should have the lease again, as if the indenture had never been made," *Hartshorne v. Watson*, 4 Bing. N. C. 178. [It is conceived, that the mere receipt of subsequent rent does not, of its own proper force, operate as a waiver of the forfeiture. It is only evidence of the election of the lessor to retain the reversion *and its incidents, instead [* 20a] of the possession of the land; and, as an election once made and expressed cannot be retracted (*quod semel placuit in electionibus amplius displicere non potest*, Co. Litt. 146 a), the receipt of subsequent rent as such, without more, binds the landlord by proving an election. But rent to the amount of that reserved in the lease may be received under circumstances, showing it to be paid and accepted merely as compensation for use of the land, and not with the intention of setting up the lease; nay, a contrary intention may be expressed at the time of its receipt. A receipt of rent under such circumstances would not, it seems, amount to a waiver of the forfeiture. See *Doe v. Batten*, Cowp. 243. It is not supposed that the naked question of intention to waive would in such a case be left to the jury. The question should perhaps be, Did the lessor receive the rent *eo nomine as rent due under the lease*? See per Parke, J., *Doe v. Pritchard*, 5 B. & Ad. 776. A receipt of rent after the lessor has by

some unequivocal act, such as bringing ejectment, expressed his election to treat the lease as void, cannot operate to revive it. *Jones v. Carter*, 15 M. & W. 713.]

There is some distinction, in respect of *waiver*, between a condition against underletting and one against assignment; for in the former case, if the lessee underlet, and the lessor accept subsequently accruing rent, so as to waive the forfeiture, still, if the lessee, after the expiration of that term, make another underlease, the lessor may re-enter, *Doe v. Bliss*, 4 Taunt. 735; but if the lessor were, by acceptance of rent, to waive the forfeiture incurred by the lessee's assignment, there would be an end of the condition altogether, exactly as there would be if he had licensed it. *Lloyd v. Crispe*, 5 Taunt. 249; 1 Wm. Saund. 288 b. n. x. See 5 B. & Ad. 781. And it has been thought that, even if the lessor were expressly to license the lessee to underlet, still the lessee might incur a forfeiture by making a fresh underlease after the expiration of that licensed; for that the license would in that case only operate as a suspension of the condition, and a condition may be *suspended*, though it cannot be *apportioned*. 1 Wm. Saund. 288, n. s.

With respect to what will amount to a breach of such conditions—When the condition was “not to assign, transfer, set over, or otherwise do and put away the indenture of demise or the premises thereby demised, or any part thereof,” an underlease was held no breach of it. *Crusoe v. Bugby*, 3 Wils. 234; [so, of an equitable mortgage, *Exp. Drake*, 1 M. D. & De. G. 539; *Doe v. Hogg*, 4 D. & R., 226]; but a condition not to “set, let, or assign over the demised premises, or any part thereof,” comprehends underleases; *Roe v. Harrison*, 3 T. R. 425; *Roe v. Sales*, 1 M. & S. 297; and a covenant not to “let, set, or demise for all or any part of the term,” assignments. *Greenaway v. Adams*, 12 Ves. 395. An assignment *by operation of law* is no breach of a condition not to assign, *ex. gr.* if the lessee become bankrupt, or the lease *be taken in [*21] execution, *Philpot v. Hoare*, 2 Atk. 219; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Carter*, 8 T. R. 57, unless such an event be brought about by the fraudulent procurement of the lessee himself. *Doe v. Carter*, 8 T. R. 300. See *Doe v. Hawkes*, 2 East, 481. But

the lessor may, if he please, by the insertion of express words for that purpose, [provided they be clear and distinct, for the court will not be astute to find them a meaning, *Doe d. Wyndham v. Carew*, Q. B. 317,] render even such an assignment a forfeiture. *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154. See *Doe v. Hawkes*, 2 East, 481; *Doe v. Clarke*, 8 East, 185; *Doe v. David*, 5 Tyrwh. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarmold v. Moorhouse*, 1 R. & Myl. 364; *R. v. Robinson*, Wightw. 386. And the landlord re-entering for such a forfeiture is entitled to the emblements and fixtures. *Davis v. Eyton*. Marriage does not operate as a forfeiture. *Anon. Moor*, 21. Whether a devise be a breach of the condition not to assign, has been disputed. *Fox v. Swann*, Styles, 483; *Dumpor v. Symons*, Cro. Eliz. 816; *Berry v. Taunt*, ib. 331. And see some observations in *Doe v. Bevan*, 3 M. & S. 353. It has been thought that if executors and administrators be not expressly named in the condition, an assignment by them would not create a forfeiture. *Anon. Moor*, 21; *Seers v. Hind*, 1 Ves. jun. 295; but the mention of *assigns* includes administrators, for they are *assigns* in law. *Moor's case*, Cro. Eliz. 26. See *Cox v. Browne*, Cha. Rep. 170. [So are executors, *Wollaston v. Hakewill*, 3 Scott, N. R. 593.]

A general condition not to assign, inserted in a lease, to a man, “*and his assigns*,” was considered in *Strickley v. Butler*, Hob. 170, to be void for repugnancy, though it was admitted that a condition against assignment to a particular person would, even in such case, be good. But the former part of the above doctrine has been denied. *Dennis v. Loring*, Hard. 427; and in *Wetherall v. Geering*, 12 Ves. 511, the Master of the Rolls said, that assigns would in in such a case be taken to mean such assigns as the lessee might lawfully have, viz. by license, and that there was no repugnancy. [It is laid down, see *Sheppard's Touchstone*, 131; Co. Lit. 223 a, that in an assignment of the entire interest in a term already created, a condition against assignment is void.]

A court of equity will not relieve against the forfeiture occasioned by breach of a covenant not to assign, for it could not place the parties *in statu quo*; and besides, such a forfeiture must always be incurred by the wilful act of the lessee, and cannot be the result of

accident, which seems to be the true foundation on which equity supports itself when relieving against forfeitures. *Hill v. Barclay*, 18 Ves. 63; *Lovat v.*

Lord Ranelagh, 3 V. & B. 31; *Davis v. Moreton*, 2 Cha. Ca. 127; see *Maddock's Cha. Prac.* 2nd edit. vol. 1, p. 31.

In *Dickey v. McCullough*, 2 W. & S. 100, the Supreme Court of Pennsylvania decided in accordance with *Dumpor's case*, that when a party once dispensed with a condition, he could not enter for any subsequent breach of the same condition; though perhaps such breach might afford ground for an action of covenant, based on the condition. The doctrine of this case was also recognized by the Supreme Court of New York, in *Bleecker v. Smith*, 13 Wend. 530; 22 Id. 201; where it was however decided, that it only applied to negative conditions, when the breach could be consummated by a single act, and not to those of an affirmative character, where the default might extend continuously throughout a long period of time. The opinion was also expressed, that in order to destroy a condition, there must be an express waiver, by a license dispensing with its performance; and, that a mere waiver of the forfeiture, by acceptance of rent, although after breach of a condition not to assign, would not prevent the grantor from availing himself of another forfeiture, subsequently incurred. No doubt can be entertained that such is the law, where the nature of the obligation which the condition imposes is clearly continuous, as where it is for the performance of a continuing covenant. In such cases a receipt of rent, or any other act affirming the tenancy, will merely waive the forfeiture antecedently incurred, but will not relieve the tenant from the effects of a subsequent failure of performance; and even where the language and conduct of the landlord have amounted to a license of the breach, it will at the utmost only bind him, and will not enure as an estoppel upon a subsequent assignee of the reversion; *Doe v. Gladwin*, 6 Q. B. 953.

In the subsequent case of *Dakin v. Williams*, 17 Wend. 447, the authority of *Dumpor's case* was again admitted, but it was held not to apply to covenants uncoupled with conditions, which were said to be always susceptible of apportionment by the act of the parties.

Conditions in deed are so entirely insusceptible of apportionment, that they cannot be apportioned even to meet the exigencies arising from the division of the estate to which they are attached, and that where part of the land subject to a condition is assigned, the grantor may enter if any portion of the condition remain unperformed, notwithstanding a proportional performance by the assignee. Thus, it was held in *Van Rensselaer v. Jewett*, 5 Denio, 121, that where a lease was made with a right of re-entry, in case of the non-payment of the rent, the whole rent might be demanded from a purchaser of part of the land, and an entry made upon his failure to pay it. The same insusceptibility of apportionment, prevents an assignee of the reversion in part of land granted for life or years, from availing himself of the breach of a condition contained in the grant; *Coke*, Lit. 215, a., *Van Rensselaer v. Jewett*; but it does not apply in the case of an assignee of part of the

reversion in the whole of the land, for he is entitled to the benefit of the whole condition. Coke, Lit. Ib. *Wright v. Burroughes*, 3 C. B. 684.

It seems now well established, that where an estate in land has been forfeited by the non-performance of a condition at the day, the right to enforce the forfeiture will be waived by accepting a performance at a subsequent period. *Chalker v. Chalker*, 1 Conn. 79. This however, is an application of the doctrines of equity, and an innovation on the rule of the common law, which at the utmost allowed a subsequent payment to operate as a discharge of the debt, and not of the forfeiture incurred by a failure to pay at the day. Coke Lit. 211, a. But the forfeiture will be waived, both at law and in equity, by the acceptance of rent, accruing subsequently, or by any other act recognising the continuance of the estate. *Newman v. Rutter*, 8 Watts, 51. Thus an attempt to levy the rent in arrear by distress, will operate as an affirmation of the tenant's interest, even when the distress is insufficient, for the right to distrain can only be based upon the existence of the relation of landlord and tenant. Coke Lit. 211, b. *Jackson v. Sheldon*, 5 Cowen, 448. The same principle was applied in *Coon v. Brickett*, 2 New Hampshire, 163, although the lessor had actually entered for the breach of the condition, before the acceptance of rent, which was set up as a waiver. It was said that where the words of forfeiture are absolute, and the lease wholly avoided, it cannot be made good by a subsequent act, but that the rule is different when the estate is merely voidable. In *Kenrick v. Smick*, 7 W. & S. 41, the Supreme Court of Pennsylvania also expressed the opinion, that when a lease for years is conditioned to be absolutely void upon the breach of a condition, no subsequent recognition of the tenancy can set it up. It is, however, well established under the more recent English authorities, whatever may have been the rule at an earlier period, that even when a condition is expressed in terms of absolute avoidance and attached to a lease for years, it only renders the lease voidable at the option of the party entitled to enforce the forfeiture; the difference between the effect of such a condition and one of re-entry, being merely that it entitles the lessor to manifest his intention to determine the lease in any manner which he may think fit, instead of confining him to an entry made in fact, or confessed by an ejectment. *Jones v. Carter*, 15 M. & W. 718. This view of the law was adopted in *Clark v. Jones*, 1 Denio, 517, where it was said that it made no difference, whether the condition merely rendered the lease voidable upon breach, or were of complete avoidance, nor whether it were attached to a lease for life or merely for years. In either case, it was held that the landlord by affirming, might continue the tenancy, and that the tenant could not set up his own wrong, for the purpose of getting rid of his liabilities.

Even if the distinction taken in *Coon v. Brickett*, between estates conditioned to be absolutely void, and those which are merely voidable were sound, the facts of the case were not within it. For whatever difference may exist between estates void and voidable, must disappear upon entry made with an intent of avoidance, and no interest which has once been absolutely avoided, can be set up again at law by the acts of the parties. Whether, therefore, the terms of the condition make the lease void or merely voidable, it will become absolutely void as soon as the party entitled to take advantage of the forfeiture, manifests his intention to do so in the manner provided by law, and although the subsequent payment and acceptance of

rent may create a new tenancy, it will not renew that which existed originally. Thus it was held in *Doe v. Meux*, 1 C. & P. 848, that the receipt of rent by the landlord, after an ejectment brought against the tenant for a forfeiture, would not operate as a bar to the action, because the entry admitted by the consent rule, was to be regarded as an absolute avoidance of the lease, after which no act of either party could render it valid. The same effect will follow when the condition is one of absolute avoidance, from the service of a declaration in ejectment, or any other act showing an intention to enforce the forfeiture, which will then become irrevocably binding at law, both on the lessor and lessee; *Jones v. Carter*; although relief may still be afforded to the latter in equity, when the breach of condition is one which admits of compensation. *Walker v. Walker*, 2 Conn. 299. *Baxter v. Lansing*, 7 Page, 350. It was notwithstanding, decided in *Atkins v. Chilson*, 11 Metcalf, 112, that when the forfeiture has been incurred through the mistake of the tenant, in tendering the rent before, instead of on the day, a writ of entry brought by the landlord, will be stayed by an order of court, on the payment of the rent, with interest and costs, under the course of practice now adopted by the courts of common law, and without a recourse to the assistance of chancery.

It was held in *Jackson v. Allen*, 3 Cowen, 120, that to make the receipt of rent amount to waiver of a forfeiture, the rent must not only be received, but have accrued subsequently to the time of condition broken, otherwise the transaction amounts to no more than would the payment of any other debt. It was further held, that where the breach is of a continuous character, payment and acceptance of rent after it happens, will only waive the forfeiture previously incurred; and that a subsequent re-entry, on the ground of the continuance of breach, will consequently be valid. In the cases of *Jackson v. Brownson* and *Jackson v. Schietz*, 7 Johnson, 227; 18 Johnson, 174, the further distinction was taken, that no acts of the grantor can amount to a waiver of a forfeiture, unless he is cognisant of its existence. And in the latter case, the knowledge of the agent appointed to collect the rent was held sufficient, unless shared by the principal.

It was also determined in *Jackson v. Schutz*, that where there was a conveyance in fee, by deed conditioned that the grantee should not alien the land, without the license of the grantor, nor without offering him the pre-emption, and paying one-tenth of the purchase money, if such license were obtained, the condition was valid, and gave a right of entry when broken by alienation, without offer of pre-emption, or payment of one-tenth of the produce of the sale, and without license to alien. But the court seem to have doubted whether that part of the condition, which was in restraint of the right to alien without license, was good, and whether had it stood alone, any remedy could have been afforded for the breach. It was said, that a condition not to alien at all, would be clearly void, although a condition not to alien to a particular person, or class of persons, might be valid. A similar decision was made in *Jackson v. Groat*, 7 Cowen, 285. Such restrictions are strictly construed, and a condition that a lessee shall not assign, has been held not to extend to the grant of a less estate operating as an underlease, and not as an assignment, nor to a sale by legal process, which, unless collusive, is the act of the law, and not of the tenant; *Jackson v. Silvernail*, 12 Johnson, 278; *Jackson v. Kip*, 3 Wend. 231. But there is no reason

to doubt, that a condition may be so worded as to avoid the estate, either on the event of an underlease by the tenant, or of a sale under an execution.

It may be doubted whether the court did not go too far in the cases above cited, in support of a condition which imposed a permanent restraint upon the alienation of property, perhaps injurious to the interests of the public, and certainly more disadvantageous to the tenant than beneficial to the landlord. A condition will be contrary to the policy of the law, and therefore void, whenever it materially interferes with the capacity of property, to pass from hand to hand, which is one of the incidents inseparably attached to it for the public good, and therefore beyond the control of individual owners; and in *Schermerhorn v. Negus*, 1 Denio, 448, a proviso attached to a devise in fee, that the devisees should not alien save to each other, and to their descendants, was held repugnant to the estate devised and void. A condition restraining the power of alienation, may notwithstanding be good, when attached to an estate for life or years, for in such cases the limited nature of the interest in question, diminishes the inconvenience of the restriction, and removes the disability attached to every limitation, which tends towards a perpetuity. And restraints on the power of alienation are good, even in the case of estates in fee, when their operation does not go beyond the limits within which the law of perpetuities, permits the caprice or discretion of the donor of property, to control its incidents or direction after it has passed from his hands. The law was so held in *McWilliams v. Nisby*, 2 S. & R. 507, where it was decided, that although a perpetual restraint attempted to be imposed by the grantor, upon the alienation of land conveyed by him in fee, was not binding, a partial restraint, whether against aliening to a particular person, or for a definite time, was good, if the duration of the restraint did not extend beyond a life or lives in being. In the case before the court, the restraint was imposed in a conveyance passing an estate in fee, subject, among others, to the following restrictions: "that the grantee is not to sell the land during the life of the grantor; and if the grantee should die before the grantor, then he is to leave the lands to his wife, or the lawful issue of her body; but if the grantor should die before the grantee, then the grantee to be at liberty to sell and bequeath as he chooses." This clause was held to create neither a condition, nor a conditional limitation, and yet so to qualify the estate of the grantee, as to deprive him of the right to sell during the life of the grantor. The grantee made a sale during the life of the grantor, whom he survived, and after his death his children, heirs at law of the grantor, brought their ejectment against the vendees. The court, while holding that there was no condition, and yet that the sale was invalid, also determined, that as the father of the plaintiffs acquired a full right to pass the property in question, before his death, by the prior decease of the grantor, his children were estopped by his deed, though made when he had no such right, and consequently that they could not recover against the defendants who claimed under it.

It would appear that the restraining clause in the case just cited, if valid at all, could only have been so as a condition, since the operative words in the deed passed the whole estate, legal and equitable, to the grantee. The subsequent case of *Fisher v. Taylor*, 2 Rawle, 33, affords, however, an instance of a mere restraint upon the enjoyment of property, not effected by means of a condition, but which may be cited with the pre-

vious decision, to indicate how far the law of Pennsylvania will suffer such restraints to extend. Money was devised to executors for the purchase of land, "in trust for S. T., the said S. T. to have the rents, issues, and profits thereof, but the same not to be liable to any debts which may be contracted by him." As the legal title vested in the executors, and the trust was purely executory, it would seem that the restraint was valid although not enforced by a condition, unless contrary to the policy of the law. The court decided in favour of its validity, and that neither the legal estate of the executors, nor the equitable interest of S. T. could be taken in execution by the creditors of the latter. As he might undoubtedly have aliened his interest under the will to his creditors, or to any body else, the case presents the anomaly of an estate susceptible of alienation for the benefit of the owner, but not for that of his creditors. The judgment in this case is opposed by the authority of the English decisions on the same subject, which were recognised as law by the Supreme Court of Pennsylvania, in *Hammersley v. Smith*, 4 Wharton, 128. *Fisher v. Taylor* has however been since fully sustained as part of the law in that state, by the determination of the same tribunal, in *Vaux v. Parke*, 7 W. & S. 19, where it was decided, that the expressed intent of the testator, would suffice to exempt an equitable estate given by his will, from alienation or execution. The introduction of such limitations as those upheld in *Fisher v. Taylor* and *Vaux v. Parke*, must be regarded as an innovation wholly unsustained by anything in the previous law of conditions. For when a condition, whether standing alone, or coupled with a limitation has once taken effect, its power is at an end, and the estate vests in the grantor or remainderman free from all qualification. But to allow a donor to impose a restraint on the alienation of a vested interest, co-extensive with its duration, is to permit the creation of a right of property apart from its incidents, and to authorise the donee to hold the gift for the purposes of enjoyment, freed from the duty of applying it in discharge of his obligations. This cannot be done in England, either at law or in equity, nor as it would seem in most of the states of this country. Thus where the devise was of the use of a farm, not subject to conveyance or attachment, the restriction was held to be repugnant to the estate, and therefore void. *Blackstone Bank v. Davis*, 21 Pick. 42. And although it was decided in *Russel v. Lewis*, 2 Pick. 509, that where the legal estate was vested in trustees, the interest of the cestui que trust could not be taken in execution, the case went on the familiar principle, that a mere equity cannot be extended at common law.

In *Gray v. Blanchard*, 8 Pick. 284, the Supreme Court of Massachusetts sustained an action brought to recover possession of an estate in fee, as forfeited by the breach of a condition, contained in the original conveyance by the plaintiff, that no window should be made in the north wall of a house, which was part of the premises conveyed. The land on which the window in question looked, and which belonged to the grantor at the time of condition made, had since been aliened, but the right to take advantage of the condition, to the extent of regaining an absolute fee in the premises, was held to remain in him and his heirs, and to be well exercised against the alienee from the original grantee, and a mortgagee under him, although the breach occurred subsequently to the mortgage, and was the act of the mortgagor. A condition said PARKER, C. J., that there should be no windows in any part of the house would be bad, but a condition not to have windows in a particular

wall is good. In *Haydyn v. Stoughton*, 5 Pick. 528, these principles were applied to the grant of an estate conditioned for the erection of a school-house; which was held to be absolutely forfeited by a failure on the part of the grantees, during the space of twenty years, to erect the building. And in the subsequent case of *Simmonds v. Simonds*, 3 Metcalf, 562, the validity of conditions in restraint of alienation during a limited period, was recognised by the same tribunal, who held that on a devise in fee to one of the sons of the testator, a condition not to alien during the life of the other, would have been good, although it was determined, that such was not the intent of the proviso, of which the construction was before the court.

In the case of *Taylor v. Mason*, 9 Wheaton, 350, it was held by the Supreme Court of the United States, that a condition in a devise of a reversion, after a previous estate for life given by the same will, that the devisee should "take an oath before he has possession, that he will not make any change in the will of the devisor relative to his real property," was repugnant to the nature of the estate, and void. It was farther held, that the possession meant was an actual and corporeal possession, and not the legal vesting of the estate; and that, as the condition must, therefore, be considered as subsequent, not precedent, the devisee took, in consequence of its invalidity, an estate absolute. Had the condition although void, been precedent, it was admitted that the devise could not have taken effect.

A question arose in *Cook v. Turner*, 15 M. & W. 277, as to the validity of a condition in avoidance of a devise, in case the devisee, who was the heir at law, should contest the validity of the will, which gave the greater part of the testator's property to other persons. It was contended, against the validity of such a condition, that it was in restraint of the right of the subject to apply to the law for protection against a forgery by a stranger, or a devise made by a lunatic ancestor; and that, in view of the inconveniences which might arise from such restrictions in some cases, they should not be permitted in any. It was, however, held by the court, that as such conditions tend to prevent litigation when the will is valid, and must fail of effect when it is void, they do not come in conflict with legal or general policy, and should be sustained and enforced by the courts.

It was, however, fully admitted in the course of this decision, that every condition imposing an arbitrary and injurious restraint upon the freedom or usefulness of the citizen, is essentially void, and that no effect, therefore, can be given to a condition in restraint of marriage, or of commerce or agriculture. This salutary doctrine was applied by the Supreme Court of New York, in *Newkirk v. Newkirk*, 2 Caines, 345, to a condition in a devise that the devisees should inhabit the town, where the land devised was situated, which was held to be useless and frivolous, and without operation on the estate devised. And, the better opinion undoubtedly is in accordance with that expressed in *Cook v. Turner*, that conditions in restraint of marriage are void, unless justified by the circumstances under which they are imposed. Thus where a gift is limited to the widowhood of the donee, with a view to prevent a re-marriage injurious to the offspring of her first husband, the restriction will be valid: but a condition prohibiting the marriage of an unmarried son or daughter is essentially void, and will not sustain a limitation over: *Scott v. Tyler*, 2 Brown's C. C. 431; *Morley v. Reynolds*, 2 Hare, 570; *The Commonwealth v. Stauffer*, 10 Barr, 250; *Phillips v. Medbury*, 7 Conn.

588; *Parsons v. Winslow* 6 Mass. 169; *Bennet v. Robinson*, 10 Watts, 348. And every condition in restraint of marriage attached to bequests of personality, will be construed as intended merely in terrorem, and therefore inoperative, unless coupled with a limitation over in the event of a breach; *McIlvain v. Githin*, 3 Wharton, 375; *Hoopes v. Dundas*, 10 Barr, 75.

No estate of freehold could be created at common law without livery, or be determined without some act in pais of equal notoriety. Whatever, therefore, the terms of a condition attached to such an estate, and whether it be merely for re-entry, or of complete avoidance, the estate will continue notwithstanding a forfeiture, unless the forfeiture be enforced by an actual entry, or a claim, when entry is impossible; *Coke Lit.* 214, b.; *Spear v. Fuller*, 8 New Hampshire, 174; *Hamilton v. Elliott*, 5 Sergeant & Rawle, 375; *The Fifty Associates v. Howland*, 11 Metcalf, 99; *Holly v. Brown*, 14 Connecticut, 255; *Bowen v. Bowen*, 18 id. 585; *Chalker v. Chalker*, 1 id. 92; *Garrett v. Scouten*, 3 Denio, 334. But where a condition in absolute avoidance, is attached to an estate for years, which may be created by parol, no entry is necessary, and the interest of the lessee will be determined by any act of the lessor, showing an intention to determine it; *Coke Lit.* 214, b.; *Jones v. Carter*, 15 M. & W. 718. In this case, however, as well as in all others, the effect of the condition cannot go beyond its terms, and where the lessor has merely reserved a right of re-entry upon breach, he cannot claim any thing more, nor treat the estate of the tenant as at an end until a re-entry has been made actually, or by implication. This seems to be the true ground on which to put the decision in *The Fifty Associates v. Howland*, and not the distinction taken by the court, between the effect of conditions and conditional limitations on estates of freehold, which was wholly inapplicable in a case where the condition was one of re-entry, reserved in a lease for years. But although the necessity for an entry, to take advantage of a breach of condition of any sort, attached to a freehold, or of a condition merely of re-entry attached to an estate for years, still continues to form part of the theory of the English law, it has long ceased to be of much importance in practice, and it is thoroughly well settled, that the confession of lease, entry, and ouster contained in the consent rule in ejectment, will estop the tenant from setting up the want of an actual entry as a bar to the action, when brought to recover possession for condition broken; *Little v. Heaton*, 2 Lord Raymond, 750; *Goodright v. Cator*, 2 Douglas, 286; *Doe v. Masters*, 2 B. & C. 290; *Doe v. Rollings*, 4 C. B. 188.

The same rule applies in this country, wherever entering into the consent rule still forms a part of the proceedings in an ejectment; *Jackson v. Crysler*, 1 Johnson's Cases, 126; *Matthews v. Ward*, 10 Gill & Johnson, 443. But, in many of the states, the action of ejectment exists only in a modified form, in which the fictions of the English practice are dispensed with, and the action proceeds adversely as in other cases, without calling for admissions of any sort from the defendant. Unless, therefore, it retain its former incidents by implication, it can no longer be relied on as a substitute for an actual entry. In *Hamilton v. Elliott*, 5 Sergeant & Rawle, 375, an entry was treated as necessary, to sustain an action of ejectment for a breach of condition attached to an estate of freehold, save where the grantor is in actual possession; and although an entry was dispensed with in *Bear v. Whisler*, 7

Watts, 144, yet the language of the court leaves it doubtful, whether this was on legal or equitable grounds. In the New England states, the course of decision requires an actual entry, not only in those cases where the plaintiff proceeds by writ of entry when it is undoubtedly necessary; *Chalker v. Chalker*, 1 Connecticut, 92; *Sperry v. Sperry*; *The Fifty Associates v. Howland*; but when he brings ejectment, which seems to be regarded as a substitute for the real actions which were originally the ordinary mode of trying the title to land, throughout that part of the country, as they still are in Massachusetts; *Holly v. Brown*. If as these decisions indicate, the change in the manner of prosecuting an ejectment, prevents it from serving as a substitute for an actual entry, the result is to be regretted as interposing a technical and useless obstacle in the way of the plaintiff, without any real or corresponding advantage to the defendant, and tending, in the language held by Lord Mansfield in *Goodright v. Cator*, 2 Douglas, 477, and repeated by Wilde, C. J., in *Doe v. Rollings*, 4 C. B. 188, to entangle the right, in a net of form without meaning.

Whatever doubt may exist on this point, there is none, that whenever a condition is for the non-payment of rent, a demand on the land is necessary to constitute a breach and complete the forfeiture, and that an actual entry is essential for this purpose, even when unnecessary to take advantage of the breach when completed. Agreeably to the common law, such a condition only bound the tenant to be present with the rent ready for payment, at any time before the close of the day on which it was payable, at the most notorious place on the land, so that the only mode in which the landlord could show, that the condition had been violated, was by appearing, at that place, in person, or by attorney, and after making a formal demand of the rent remaining there in readiness to receive it, until sun down; *Coke Lit.* 201, b, 202, a.; *McCormick v. Connell*, 6 *Sergeant & Rawle*, 151; *McKubbin v. Whitcraft*, 4 *Harris & McHenry*, 135; *Garrett v. Scouten*, 3 *Denio*, 334; *Spear v. Fuller*, 8 *New Hampshire*, 477; *Conner v. Bradley*, 1 *Howard*, 211; *Goodright v. Cator*, 2 *Lord Raymond*, 751; *Doe v. Wandlass*, 7 *Term*, 120. And an entry for the purpose of demanding the rent and thus completing the forfeiture, seems to be necessary even in the case of a condition in absolute avoidance attached to a lease for years, where no entry is requisite to take advantage of the forfeiture when completed; *Coke Lit.* 202, a.; *Clun's Case*, 1 *Coke*, 128. But this necessity for a demand on the land, only exists in the case of conditions for the payment of rent, it being the duty of the grantee of land, subject to the payment of a sum in gross to seek out the person entitled to receive the payment; *Shepherd's Touchstone*, 136; *Coke Lit.* 210, a. If, however, the latter reside without the state, this duty will be excused, and no breach of the condition will occur until a failure to pay on demand, which must, however, be personal, and need not be on the land; *Coke Lit.* 210, b.; *Bradstreet v. Clark*, 21 *Pick.* 389. And it was held in this case, that whenever a demand is a necessary preliminary to a forfeiture, it must be of the precise sum due, or at all events, not of a larger amount.

It must be understood, that when the condition is for the non-payment of rent, entry and demand are essential to complete the forfeiture, for it is not until demand and non-payment that the condition is broken. An entry, either constructive or real, is necessary to take advantage of the breach; but

there is nothing either in authority or principle, to prevent the grantor from effecting this at any subsequent period, although the entry to make the demand for the purpose of completing the breach, may be made to answer also, as an entry to take advantage of it when completed. Conditions in deed, however, like most other parts of common assurances, may be moulded by the agreement of the parties to any intent not inconsistent with the policy of the law; and consequently by special consent, there may be re-entry for default of payment of rent without demand of it. *Dormer's Case*, 5 Coke, 41. In such a case the mere failure to pay with or without demand, constitutes the breach, and of course a subsequent entry at any time is good: for as it has already been stated, the necessity for coming on the land at the day, arises from the period fixed by law, not for the entry, but the demand; and as the entry need not be at any particular time, the constructive entry confessed or implied by an ejectment will be as effectual, in England, as though the grantor had actually gone upon the land in person or by an agent. This doctrine was applied, in England, in the case of *Goodright v. Cator*, 2 Douglas, 477, and in that of *Doe v. Masters*, 2 Barnewall & Cresswell, 490, in which it was held, that where there is an express stipulation that the lessor may enter without demand, no demand is necessary.

There can be no doubt, that to constitute a legal entry in avoidance of an estate, when an entry is necessary, there must be an intent to enter for the purpose of taking actual or constructive possession of the land, and not merely for that of making a demand on the tenant; *Bowen v. Bowen*, 18 Conn., 585; or removing goods belonging to the landlord from the premises; *Holly v. Brown*, 14 Conn. 255; for if the law were not so, a mere visit or an accidental trespass, might subsequently be construed as an entry. And in *Atkins v. Chilson*, 9 Metcalf, 52, it was decided that where a lessor declared that the entry was made for the breach of a condition, which had not in fact been broken, he could not subsequently sustain it, by proving that another proviso in the lease had been violated, as to which he had said nothing at the time of entering. The court held that although he might have been silent as to the reason for his act, yet as he had chosen to assign one ground, he was bound to adhere to it, and could not subsequently put forward another. But some doubt may exist as to the propriety of this determination, for it seems well settled, that where there is a right to enter on land, the law will refer the entry to the right, and will not allow it to be made wrongful, by the declaration of the party, that he enters under another and insufficient title; *Doe v. Woodroffe*, 10 M. & W. 608; *Buard v. Williams*, 7 Wheaton, 59.

The same principle which allows an agreement between the landlord and tenant, in derogation of the requisites necessary at common law to constitute a forfeiture for the non-payment of rent, necessarily permits the interposition of additional formalities in favour of the tenant. When, therefore, a right of entry is reserved, in case of the non-existence of a sufficient distress, or the non-performance of any of the covenants or conditions of the lease, that the clause will be read conjunctively, and an entry can not be made unless a sufficient distress is wanting.

From what has been said, it appears, that although the English decisions have removed from the landlord, as from all other parties proceeding for condition broken, the burden of making an actual entry, to take advantage of a

breach of condition, by holding the constructive entry implied by an action of ejectment, sufficient for that purpose; even when the estate to be avoided is one of freehold; *Doe v. Masters*, 2 Barn. & Cress., 290; *Little v. Heaton*, 2 Lord Raymond, 750; *Goodright v. Cator*, 2 Douglas, 286; *Jackson v. Cryster*, 1 Johnson's Cases, 126; yet, that the necessity for proving a strict common law demand, both as to time and place, still remains, unless dispensed with by the agreement of the parties, whenever a forfeiture for non-payment of rent is to be established. *Goodright v. Cator*, 2 Lord Raymond, 751, in margin; *Doe v. Wandlass*, 7 Term, 120; *McCormick v. Connell*, 6 S. & R. 151, and even where the condition is one of absolute avoidance, and attached to a term for years; *Jackson v. Kipp*, 3 Wendell, 231. There is some difficulty in determining what will amount to such an agreement. In the English cases quoted above, the agreement to waive the demand was express; but it is possible that where the condition of the deed is, that if the rent be for a certain number of days in arrear, the grantor may avoid the estate by notice, the parties would be held to have agreed to substitute another mode of completing the forfeiture, for that provided by the common law, in the case of an ordinary condition of re-entry; *Doe v. Wandless*, *Jones v. Clark*. However this may be, it is evident that an actual entry is no longer an essential part of the remedy to take advantage of a breach of condition, either in England or New York, and that the confession of entry by the defendant, implied or made in an action of ejectment, is sufficient to enable the plaintiff to recover, whether the estate in question be for years or for freehold, and whether the condition be of absolute avoidance or merely for a re-entry.

An action of ejectment for the breach of a condition, in avoidance of an estate of freehold, must still, however, in all cases, be based upon an entry either actual or constructive, and must therefore be brought by a party entitled to enter. At common law, an entry to avoid an estate for condition broken, can only be made by the grantor and his heirs; such an entry being widely different from one made merely in the exercise of a present right on one side, and not for the purpose of defeating a vested interest on the other. When, however, the estate is for years, and conditioned to be absolutely void, it will determine on one side and revest on the other, immediately upon breach; and a grantee of the reversion may consequently enter, not to defeat the estate of the tenant, which is already gone, but merely to take possession of what is his own; *Coke Lit.* 214, b.; *Davy v. Matthew*, *Croke Eliz.* 649. But except in this single instance of a condition for absolute avoidance, attached to an estate for years, in which the benefit of the condition, passes incidentally, rather than the condition itself, the assignee of a grantor cannot take advantage of a condition reserved by deed; *Lit. sect.* 347; *Coke Lit.* 214 a. 214, b. Although some dicta may be found supporting the idea, that the reversion carries with it the implied covenant, arising on the *reddendum* at common law, and independently of statutory enactment; *Harper v. Burgh*, 2 Levinz, 206; *Shepard's Touchstone*, p. 120; the impossibility of passing the right to take advantage of a condition, to an assignee, has never been questioned. The statute 32 H. 8, c. 34, rendered conditions attached to estates for life, or years, susceptible of transfer to the assignees of reversions, who were also invested with all covenants made by or with their assignors, which were

capable of running with land. By analogy to the constructive restraint imposed on the passage of covenants, and which was derived from the previous law regulating their capacity for running with land, it has been held, that the assignee cannot take advantage of conditions merely collateral.

When, however, the condition relates to the estate itself, or to the performance of a duty attached to the possession of the estate, as in the case of a condition binding the lessee to repair the premises demised, or giving the lessor the right to determine a lease for twenty-one years at the end of seven, it will be within the remedial purpose of the statute, and may be taken advantage of by an assignee of the reversion; *Wright v. Burroughes*, 3 C. B. 684; *Roe v. Hayley*, 12 East, 464. But this distinction between collateral conditions, and those relating to the subject-matter granted, has no application when the assignment is of the estate in the land, for that may always be avoided in the hands of the assignee for breach of any valid condition, however foreign to the land itself, although the contrary seems to have been supposed in *Verplank v. Wright*, 23 Wend. 506.

It has been stated above that the rule against the apportionment of conditions, prevents them from operating in favour of a grantee of the reversion in part of the land, but that when a lesser estate is granted out of the whole of the reversion, the grantee will be within the statute, and may enforce the condition, (*supra*.)

Of course, after the grantor of an estate has taken advantage of a condition, by the proper means, he is in of his old estate, and may convey it to whom he pleases; and as the law never requires a party to enter on himself, it follows, that if the grantor has an estate in possession in the land, at the time of the breach, he may convey the whole at once, as the forfeiture will be complete, without entry or claim, which is merely a substitute for entry; *Coke Lit.* 218, b. This doctrine, which is undeniably law, was recognised and applied in *Hamilton v. Elliot*, 5 *Sergeant & Rawle*, 385. In *New Hampshire*, however, it has been decided, that even where the grantor is in possession, he must give notice of his intention to take advantage of the forfeiture, in order to avoid the estate; *Willard v. Henry*, 2 *New Hampshire Reports*, 120. But this opinion seems to have gone upon a misapplication of the law, with regard to the breach of conditions attached to a reversion, where the grantor has no possession, to the case of a condition attached to a present estate, and broken while possession was in him. In *Frost v. Willard*, 7 *Greenleaf*, 225, a grantor in possession, was allowed to take advantage of a breach of condition, but as notice was given, the question of its necessity was not determined.

It is important to observe, that conditions attached to estates in fee or tail, do not come within the provisions of the statute, and are as insusceptible of assignment now, as they were at common law.

A brief examination of the authorities will render this evident. It is well known that since the passage of the statute of *Quia Emptores*, there has been no tenure in England, between the grantee of an estate in fee, and the grantor, and that no reversion, or possibility of reverter, has subsisted in the latter. As the statute of 32 Henry 8, speaks only of grantees of reversions, and as it only gives the capacity for transfer to conditions, when coupled with reversions, it follows, that a condition reserved on the grant of an estate in fee, is incapable of being assigned to a third party, so as to give

him the right to take advantage of it, either by entry or by action of ejectment. This is the more obvious, since even the reversion reserved upon a grant in tail, is not within the meaning of the statute, which, in fact, applies only to conditions attached to estates for life or years; *Coke Lit.* 215, a; *Winter's case*, *Dyer*, 309, a; *Lewes v. Ridge*, *Croke Eliz.* 863; 18 *Conn.* 335.

Although the point has never been directly adjudged in Pennsylvania, the general opinion of the profession there has been, that the assignees of rents reserved on conveyances in fee, might take advantage of all conditions, in those conveyances, for the payment of the rent, or the performance of any other act not collateral to the estate granted. It is, however, obvious, from what has been said, that such a right is not capable of being supported either by the common or statute law; and that, if valid, it must be so merely by the general usage of the State in question. It has been decided, that the assignees of such rents may bring covenant against the original grantee of the land, or those claiming under him by descent or purchase; *Stephen v. Fisher*, 1 *Rawle*, 155; *Miles v. St. Mary's Church*, 1 *Wharton*, 229; but no express decision has been made, giving them the right to enter for condition broken. It is however well settled, that the assignee of a ground rent is entitled to priority of payment, on the sale of the land under an execution, over all encumbrances, subsequent to the reservation of the rent, and this necessarily implies, under the jurisprudence of Pennsylvania, that he is entitled to the benefit of the condition.

It is necessary here to make some observations on the case of *Haverhill v. Hare*, *Croke Jac.* 511, which has sometimes been mistaken as an authority for the position, that a condition annexed to an estate, acting under the statute of uses, may be assigned. In that case, a rent-charge in fee was granted out of land, but there was no grant or conveyance of the land itself; and thus, no condition for defeating the estate in the land, and vesting it in the tenant of the rent was possible. *Litt. sect.* 349; *Browning v. Boston*, *Plowden*, 133. There was, however, a covenant to levy a fine of the land, to the use, that upon rent arrear, the tenant of the rent and his assigns, might enter and hold the land until satisfied. An assignment being made, parcel of the rent in arrear, and a fine afterwards levied, one of the questions raised was, whether the contingent springing use, arising under the fine, could be assigned before it vested. This, the court held it might, as it was attached to the rent for security, though not otherwise. It may perhaps be questioned, whether, instead of passing while contingent, by the assignment of the rent, the use did not arise and vest in the assignee, by the force of the fine, and by virtue of the descriptive words in the covenant, leading the use. Be this as it may, it is perfectly evident, as, indeed, all the judges held, there was no condition whatever in the case, and, consequently, that the decision is not applicable to cases arising under conditions.

It was a rule of the common law, that an estate which began by livery, required some act equally notorious to avoid it; and, consequently, to determine an estate of freehold, even after condition broken, an entry was necessary. This was equally true, even when the estate was to become absolutely void on breach, for whatever might be the terms of the condition, the grantor had nothing until entry made; *Coke Lit.* 215, a. It might be supposed that this rule would have been inapplicable, to estates arising under

the statute of uses, but even in the case of a bargain and sale, conditioned on the happening of a certain event to be void, the estate does not revest in the bargainor, on the breach of the condition, without entry. *Fitzwilliam's case*, 6 Coke, 34; Coke Lit. 218, a. It would, however appear, that in conveyances under that statute, as all conveyances necessarily are, which pass a freehold, and are not accompanied by livery of seisin, the parties may be entitled to provide some other mode of avoiding an estate of freehold, on breach of condition, than that of re-entry. It is well settled that no entry is necessary to determine a particular estate passed in such conveyances, where there is a limitation over on condition broken, although such limitation would have been bad at common law. The act by which a power of revocation is executed, is nothing more, when unaccompanied by a new declaration of uses, than the performance of a condition to avoid an estate, which has arisen under the statute; *Fitzgerald v. Fauconbirge*, *Fitzgibbon*, 207, 219. *Sugden on Powers*, vol. 1, 227, 228; *Sheppard's Touchstone*, by Preston, 120; *Preston on Estates*, 48. And it would seem that the effect of such a power, is to revest the estate in the grantor, without the necessity of an entry; *Sugden on Powers*, vol. 2, p. 33. A power of revocation is therefore a collateral condition in avoidance annexed to the person or will of the holder of the power, and is well reserved, when in any conveyance to uses, it is declared that on the performance of a specific act, or the delivery or execution of a notice, or writing, the estate granted by the conveyance shall become void. *Sugden on Powers*, vol. 1, 226, 227, 231; Coke Lit. 237, a. Such conditions, moreover, may take effect as powers of revocation, as well in bargains and sales, or covenants to stand seised, as in conveyances operating by transmutation of possession. *Sugden*, vol. 1, 160. It may, therefore, be thought that a proviso in a conveyance in fee or for life, reserving a rent, that if the rent be behind for a certain number of days, the estate shall be void on notice by the grantor, would amount to a valid power of revocation, and as such, avoid the estate, without entry or claim. If this be so, it must follow, that although the assignee of the rent might be unable to take advantage of the proviso, either as condition or power, before the forfeiture of the estate under the condition, or its avoidance under the power; yet, that an assignment after a non-payment of the rent, and delivery of the notice, would pass both the right of property and the right of immediate possession to the assignee.

On the whole, the distinction between a power of revocation and an ordinary condition, reserved in a conveyance under the statute of uses, would seem to depend upon whether the intention of the parties is to proceed under the common law, and create a condition subject to a strict common law interpretation, or to take advantage of the statute, and raise a resulting use in favour of the grantor, upon the determination of the estate vested in the grantee. In the latter case, an entry may, as it seems, be dispensed with; while in the former it is essentially necessary to enforce the forfeiture. And this seems to have been the meaning of Lord Coke, in saying that a power of revocation is in the nature of a limitation, and may therefore be apportioned, although a condition cannot; Coke Lit. 215, a.

When it is said, in general terms, that a condition cannot be taken advantage of, save by the grantor and his heirs, and, of course, that it is not

assignable, two very distinct points of law, resting on different reasons, are involved in the assertion. Before breach, the reason why an assignee cannot take advantage of a condition, really depends upon the want of capacity for transfer, of the condition itself. But after breach, the condition itself is gone, and there arises in its stead, whatever may be its terms, in the case of freehold estates, at all events when created by common law conveyances, nothing more than a right of entry in the grantor. Now this right of entry is as little capable of assignment, in England, as the condition, since its transfer is forbidden both by common law and the statutes of maintenance; but evidently the obstacles to its assignment rest on different grounds, from those which prevented the passage of the condition before breach. Lit. sect. 214, Coke Lit. 214 a. The law is the same in most of the states of this country. *Jackson v. Todd*, 2 Caines, 183; *Williams v. Jackson*, 5 Johnson, 489; *Jackson v. Demont*, 9 id. 55; *Dame v. Wingate*, 12 New Hampshire, 291; *Hanman v. Hanman*, 4 Conn. 575; *Gibson v. Shearer*, 1 Murphy, 114. In Pennsylvania, however, it has long been settled, that an ordinary right of entry may be assigned. *Stoever v. Whitman*, 6 Binney, 416. And as this is the case, there would seem to be no conclusive reason why the right of entry, which takes the place of a condition after breach, should not be assigned, although the condition itself could not have been transferred before breach.

It must, however, be observed, that there is a deeply-seated distinction between the right of a grantor after condition broken, and the common right of entry in a party, against whom there is a mere naked adverse possession, unaccompanied either by the right of property, or the right of possession. Both these rights are, in such a case, in the party against whom there is the adverse holding. And if we are to believe with Lord Mansfield in *Taylor v. Horde*, 1 Burrows, 60, that even where a disseisin exists, we have no means of recognising its existence, there would seem to be no sufficient reason against holding with the courts of Pennsylvania, that these rights create a constructive legal seisin, sufficient to enable the statute of uses to operate. There is, therefore, some colour for asserting, that a party against whom there is a mere adverse possession, may, where the statutes of maintenance are not in force, convey all his rights to an assignee. And many of the decisions in other states, treat such a conveyance as valid between the parties, and only void as against those in the actual and adverse possession of the land conveyed. *Livingston v. Parsons*, 2 Hill, 526; *Edwards v. Roys*, 11 Vermont, 473. But this reasoning does not apply in the case of the breach of a condition, even in absolute defeasance of a freehold estate. Except in so far as the doctrine of powers, already referred to, may be applicable, not merely does the possession of the tenant of the estate continue after breach and before entry, but it continues with all its incidents; with the right of possession, and the right of property. Of course, no portion of these rights can be at the same time in the grantor. This is evident, because he could bring no action, requiring a right of possession or a right of property for its support, having neither a writ of right nor a writ of entry. Coke Lit. 214, b. 240, a; *Chalker v. Chalker*, 1 Conn. 92. From this absence of all right to the estate, on the part of the grantor before entry, it happened that a descent cast did not toll his power to enter; since if it had, as

he could bring no action, he would have lost all remedy. In fact, strictly speaking, the grantor had, on breach of the condition, a title of entry, but no right of entry nor title to the estate. Lit. sect. 391, 392; Coke Lit. 240, a; Gilbert on Tenures, 26. Until, therefore, there shall be some express decision in Pennsylvania to that effect, it may be doubted whether according to the law of that state, the title of entry, subsisting in the grantor of a freehold after condition broken, and which is unaccompanied either by the right of property or possession, raises a legal seisin sufficient to support a conveyance either at common law, or under the statute of uses. And whatever the law may be in Pennsylvania, as to this point, there is no reason for supposing that it varies from the common law doctrine held in the rest of the United States, and in England, as it regards the assignment of conditions before breach.

The doctrine that a condition uncoupled with words of limitation, cannot be taken advantage of, save by the grantor or his heirs, requires to be received with a certain degree of qualification, arising out of the principles of equity. Under those principles, a condition intended for the benefit of a third person, will often be regarded as a trust, and be enforced in his favour, as a charge upon the land, or upon the person holding the land to which it is attached. Thus, in many cases what once was held, perhaps even in equity, a mere condition, will now be there viewed as a trust, or power coupled with a trust; as in the case cited by Littleton, sec. 383, where lands were devised to an executor to be sold, and the proceeds distributed for the good of the testator's soul, and on neglect to sell, and an assize of novel disseisin brought by the heir, judgment was rendered in his favour, as for breach of condition in law. Here, according to Coke, the profits taken before sale, were not assets in the hands of the executor for the payment of debts, although such payment was the principal object of the devise. Coke Lit. 236 a. In equity, at the present day, if not then, a devise, even with express words of condition, for the payment of debts, would be treated as raising a trust for creditors, and as making the executor accountable as trustee, for whatever he received from the land. And in *Haydyn v. Houghton*, 5 Pick. 528, the residuary devisees, and not the heir, were held entitled to take advantage of the breach and condition in a will. At the same time, it does not appear that this equitable right in the parties for whose benefit a condition is designed, affects the right of the heir to enter for condition broken, where a condition undoubtedly exists, or would justify a court of common law in refusing him the exercise of that right; although after he had availed himself of it, equity would no doubt follow him up, and affect him with the trust. In the case of *Jackson v. Topping*, 1 Wend. 388, where a father had conveyed lands to a son, upon condition to maintain him for life, and to pay his debts, an ejectment by another son for condition broken, was supported, although the breach averred was the non-payment of a debt not presented for discharge, till after the decease of the father. As far as the condition then subsisted, it would seem to have been solely for the benefit of the creditors of the father, and although gone in law by the breach and entry, we may presume that it would have been enforced in equity, as a trust against the heir, notwithstanding his recovery in the ejectment. It was, however, held in this case, as it has been in many others, that the right of entry for a condition broken,

vests in all the parties entitled by descent under the statute law, and not solely in the heir at common law. *Bowen v. Bowen*, 18 Conn. 635; *Wheeler v. Walker*, 2 id. 196.

Upon a devise to A. for life, remainder to B. in fee, upon condition that if the rents and profits were not sufficient during the life of A. for his support, B. should supply the deficiency, the Supreme Court of Massachusetts very recently decided, that the remainder devised to B., was not affected with any trust in favour of A. He had refused the devise of the remainder, which was consequently held to have descended to the heirs of the testator; but the court were of opinion, that had it been accepted, the right to enjoy it for condition broken, would equally have remained with the heirs, and would have given no claim, even in equity, to the party in whose favour the condition was created. *Temple v. Nelson*, 4 Metcalf, 586. Had express words of trust for the support of A. been attached to the devise of the inheritance in remainder to B., such trust would certainly have been enforced in favour of A.'s estate on his death, and perhaps by a sale during his life.

The estate in remainder conveyed in this case by the devise, vested immediately in interest, upon the death of the devisor; and therefore the condition would seem to have been subsequent, although necessarily to be performed or broken, before the devisee could acquire the right of possession. On breach before possession taken, whether before the death of tenant for life or not, the remainder to which the condition was attached might, however, have been avoided by claim on the land, made by the heir-at-law. *Coke Lit.* 218, a.; *Browning v. Beston*, Plowden, 183.

H.

[22*]

*SPENCER'S CASE.

PASCH. 25 ELIZ.—IN THE KING'S BENCH.

[REPORTED, 5 COKE, 16.]

Covenants.—What Covenants run with the Land.

SPENCER and his wife^(a) brought an action of covenant against Clark, assignee to J. assignee to S., and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of the wife) to S. for term of twenty-one years, by which indenture S. covenanted for him, his executors, and administrators, with the plaintiffs, that he, his executors,

(a) 2 Bulstr. 281, 282. Comberb. 64. Carth. 178. Skinner, 211, 297. 3 Wilson, 27. Cro. Jac. 459.

administrators or assigns, would build a brick wall upon part of the land demised, &c. S. assigned over his term to J., and J. to the defendant; and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them would run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not, and where he shall not be bound, although he be expressly named, and where not..(b)

1. When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force of the covenant is quodammodo annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee,(c) although he be not bound by express words: but when the covenant extends to a thing which is not in *being at the time of [*23] the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is quodammodo annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not in esse at the time of the demise made,(d) but to be newly built after, and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his(c) assigns, that they would make a new wall upon some part of the thing demised, that ferasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a(f) Warrantia Chartæ, F. N. B. 135. & 9 E. 2; Garr' de Charters, 30. 36 E. 3; Garr, 1, 4 H. 8; Dyer 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is

(b) Moor, 159.

(c) Moor, 27, 399. Cro. El. 457, 553, 553. 1 Rol. 521, 522. Postea, 24. 1 Sand. 239. Cr. Jac. 125. Cr. Car. 222, 523. 1 Jones, 245. 1 Siderf. 157. 1 Anders. 82. 1 Show. 284. 4 Mod. 80. 3 Lev. 326. Salk. 185, 317.

(d) Cr. El. 457. Cr. Car. 439. Dyer, 14, pl. 69. 1 Anders. 82. Moor, 159.

(e) Cr. Car. 25, 188. 1 Jones, 223. 1 Rol. Rep. 360. Moor, 159, 399.

(f) F. N. B. 135, d.

assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

3. It was resolved, if a man leases(*g*) sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good [**24*] as the **things* letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such(*h*) privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods, there is not any privity, nor any reversion,⁽ⁱ⁾ but merely a thing in action in the personalty, which cannot bind any but the covenantor,^(k) his executors, or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent,[†] and the lessee covenants for him, his executors, administrators and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum,^(l) but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee. And it is not certain that the stock or sum will come to the assignee's hands, for it may be wasted, or otherwise consumed or destroyed by the lessee, and therefore the law cannot determine, at the time of the lease made, that such covenant shall bind the assignee.

4. It was resolved, that if a man makes a feoffment by this word(*m*) *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch: but if a man makes a lease for years by this word *concessi*(*n*) or *demisi*, which implies a covenant, if the assignee of the lessee be evicted, he shall have a writ of Covenant: for the lessee and his assignee hath the yearly profits of the land, which shall grow by his labour and industry, for an annual rent; and therefore it is reasonable, when he hath applied his labour, and employed his cost upon the land, and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant, as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to.

5. Tenant by the courtesy, or any other who comes *in* in the *post*, shall not vouch (which is in lieu of an action). But if(*o*) a ward be granted by deed to a woman who takes husband, and the woman dies, [**25*] the husband shall vouch by **force* of this word *grant* although he comes to it by act in law. So if a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the

(*g*) 2 Jones, 152. 1 Leon. 43. Swinb. 324.

(*h*) Cr. Car. 188.

(*i*) 1 Leon. 43.

(*k*) Swinb. 324.

† See Dean & c. of Windsor v. Gover, 2 Wins. Saund. 301. Gardiner v. Williamson, 2 B. & Ad. 336. Lord Mountjoy's case, 5 Co. 4. Jewel's case, ib. 3.

(*b*) Kelw. 153 b. 1 And. 4. Dyer, 56. pl. 15, 16, 212. pl. 37, 257, 38. 21. E. 4. 29, a. 3 Bulst. 291. 9 E. 4, 1, b.

(*m*) 2 Inst. 275. 4 Co. 81, a. 1 Co. 2, b. Co. Lit. 384, a. Yelv. 139. Perk. Sect. 124.

(*n*) 4 Co. 81, a. Yelv. 139. Co. Lit. 384, a. Perk. Sect. 124. Dall. 101. Cr. Jac. 73. 2 Inst. 276. F. N. B. 134, h. Hob. 12. 1 Vent. 44. 1 Rol. 521.

(*o*) 2 Rol. 743.

houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant as on the express covenant. The same law is of tenant by statute-merchant or statute-staple or *elegit* of a term, and he to whom a lease for years is sold by force of an execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act in law; as if a man grant to lessee for years, that he shall have so many estovers(*p*) as will serve to repair his house, or as he shall burn in his house, or the like, during the term, it is as appurtenant to the land, and shall go with it as a thing appurtenant, into whose hands soever it shall come.

6. If lessee for years covenants to repair the houses during the term, (*q*) it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires that they, who shall take benefit of such covenant when the lessor makes it with the lease, should on the other side, be bound by the like covenants when the lessee makes it with the lessor.

7. It was resolved, that the assignee(*r*) of the assignee should have an action of covenant. So of the executors of the assignee of the assignee; so of the assignee of the executors or administrators of every assignee, for all are comprised within this word (*assignees*), for the same right which was in the testator, or intestate, shall go to his executors or administrators; as if a man makes a warranty to one, his heirs and assigns, the assignee(*s*) of the assignee shall vouch, and so shall the heirs of the assignee; the same law of the assignee of the heirs of the feoffee, and of every assignee. So every one of them shall have a writ of Warrantia Chartæ. Vide 14 E. 3, Garr. 33; 38 E. 3, 21; 36 E. 3, Garr. 1; 13 E. 1, Garr. 93; 19 E. 2, Garr. 85, &c. For the same right, which was in the ancestor, shall descend *to the heir in such case without express words of the heirs of the [*26] assignees.

Observe, reader, your old books, for they are the fountains out of which these resolutions issue; but perhaps by these differences the fountains themselves will be made more clear and profitable to those who will make use of them. For example(*t*), in 42 E. 3, 3, the case is; grandfather, father, and two sons. The grandfather was seised of the manor of D., whereof a chapel was parcel; a prior, with the assent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor and his servants, &c. The grandfather did enfeoff one of the manor in fee, who gave it the younger son and his wife in tail; and it was adjudged, that the tenants in tail as(*u*) terretenants (for the elder brother was heir), should have an action of covenant against the prior, for the

(*p*) 5 Co. 24, b. F. N. B. 181, n.

(*q*) 5 Co. 16, a. b. 5 Co. 24, b. Cr. Jac. 240, 309, 439. 1 Jones, 223. Cr. El. 373. 1 Sid. 157.

(*r*) 1 Roll. 521. 1 Roll. Rep. 81, 82. 2 Bulst. 231. Owen, 151, 152.

(*s*) Cr. El. 534. Co. Litt. 384, b.

(*t*) Co. Lit. 384, a. 1 Rol. 520, 521. Br. Covenant 5. Statham Covenant, 3.

(*u*) Co. Lit. 385, a. 8 Co. 145, a.

covenant is to do a thing which is annexed to the chapel, which is within the manor, and so annexed to the manor, as it is there said. And Finchden related, that he had seen it adjudged, that two(*v*) coparceners made partition of land, and one did covenant with the other to acquit him of suit, which was due, and that coparcener to whom the covenant was made did alien, and the suit was arrear; and the feoffee brought a writ of covenant against the coparcener to acquit him of the suit; and the writ was maintainable, notwithstanding he was a stranger to the covenant, because the acquittal fell upon the land; but if such covenant were made to say divine service in the(*w*) chapel of another, there the assignee shall not have an action of covenant, for the covenant in such case cannot be annexed to the chapel, because the chapel doth not belong to the covenantee, as it is adjudged in(*x*) 2 H. 4, 6, b. But there it is agreed, that if the covenant had been with the lord of the manor of D. and his heirs, lords of the manor of D., and inhabitants therein, the covenant shall be annexed to the manor, and there the terretenant shall have the action of covenant without privity of blood. Vide 29 E. 3, 48, and 30 E. 3, 14. Simpkin Simeon's case, (*y*) where the case was, that the Lady Bardolf by deed granted a ward to a woman who married Simpkin Simeon, against whom the Queen brought a [*27] *writ of right of ward, and they vouched the Lady Bardolf, and afterwards the wife died, by which the chattel(*z*) real survived to the husband, (and resolved that the writ should not abate), the vouchee appeared and said, what have you to bind me to a warranty? The husband showed, how that the lady granted to his wife, before marriage, the said ward; the vouchee demanded judgment for two causes.

1. Because no word of warranty was in the deed; as to that it was adjudged, that this word(*a*) (*grant*), in this case of grant of a ward (being a chattel real), did import in itself a warranty.

2. Because the husband was not assignee to the wife, nor privity. As to that it was adjudged, that he should vouch, for this warranty implied in this word (*grant*), is in case of a chattel real so annexed to the land, that the husband who comes to it by act in law, and not as assignee, should take benefit of it. But it was resolved by Wray, Chief Justice, and the whole court, that this word (*concessi* or *demisi*), in case of(*b*) freehold or inheritance, doth not import any warranty; 11 H. 6, 45, *acc'*. Vide 6 H. 4; 12 H. 4, 5; 1 H. 5, 2; 25 H. 8.; Covenant, Br. 32; 28 H. 8; Dyer, 28; 48 E. 3, 22; F. N. B. 145; C. 146 & 181; 9 Eliz. Dyer, 257; 26 H. 8, 3; 5 H. 7, 18; 32 H. 6, 32; 22 H. 6, 51; 18 H. 3; Covenant 30; Old N. B. Covenant, 46 H. 3, 4; 38 E. 3, 24. See the statute of(*c*) 32; H. 8, Cap. 34; which act was resolved to extend to covenants which touch or concern the thing demised, and not to collateral covenants.

(*v*) 1 Roll. 521. Co. Lit. 384, b. 385, a. 42 E. 3, 3 b. Br. Covenant, 5. 1 Roll. Rep. 81.
(*w*) 1 Roll. 521.

(*x*) Co. Lit. 385, a. Fitz. Covenant 13. Br. Covenant 17. F. N. B. 181, a.

(*y*) Co. Lit. 384, a. 2 Roll. 743, 744. 3 Bulst. 165. Hob. 47. 1 Rol. Rep. 81. Cr. El. 436.

(*z*) 1 Rol. 345. Co. Lit. 351, a.

(*a*) Co. Lit. 384, a. 101, b.

(*b*) Co. Lit. 384, a.

(*c*) 32 H. 8 c. 34. Moor, 159. Cr. Jac. 523. 2 Bulst. 281, 282, 283. 1 Sand. 238, 239. Cr. Car. 25, 222. 1 Anders. 82. 2 Jones, 152. Owen, 152. Stile, 316, 317. Co. Lit. 215, a.

This is the leading case referred to upon every question whether a particular covenant does or does not run with particular lands, or a particular reversion.

A covenant is said to run with land, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

Questions upon this branch of the law generally arise between the lessor of lands or his assignee, and the lessee thereof or his assignee; and we will, therefore, briefly consider the subject with reference to persons holding those characters, before inquiring into it with reference to persons not occupying those relations to each other.

An opinion has sometimes been intimated that there were, even at common law, some covenants which ran with the reversion. The authorities, however, seem to preponderate in favour of the doctrine of Serjeant Williams, who, in *Thursby v. Plant*, 1 Wms. Saund. [*28] 240, *n. 3, says that "the better opinion seems to be, that the assignee of the reversion could not bring an action of covenant at common law." And the cases will be best reconciled, and the whole subject rendered far more intelligible, if we adopt the view taken by the learned and eminent personages who have since edited that work, vol. 1, 240, a. n. o. viz. "that at common law covenants ran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant and to be entitled to bring covenant, but the assignee of the lessor was not."

Such being the state of the common law, st. 32 H. 8, cap. 34, after reciting among other things, "that by the common law no stranger to any covenant could take advantage thereof, but only such as were parties or privies thereunto," proceeded to enact "that all persons and bodies politic, their heirs, successors and assigns, having any gift or grant of the king of any lands or other hereditaments, or of any reversion in the same, which belonged to any of the monasteries, &c., dissolved, or by any other means come to the king's hands, since the 4th day of February, 1535, or which at any time before the passing of this act belonged to any other person, and

after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by any other persons than the king, and their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture, and, by action only, for not performing other conditions, covenants, or agreements expressed in the indentures of leases and grants against the said lessees and grantees, their executors, administrators, and assignees, as the said lessors and grantors, their heirs, or successors, might have had."

Section 2 enacted, "that all lessees and grantees of lands, or other hereditaments, for terms of years, life or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors and assigns, having any gift or grant of the king, or of any other persons, of the reversion of the said lands and hereditaments so letten, or any parcel thereof, for any condition or covenant expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors."

[Leases not under seal are not within the meaning of this statute. *Brydges v. Lewis*, 3 Q. B. 603; *Standen v. Christmas*, 10 Q. B. 135.]

Although the words of this act are very general, and taken literally would comprehend every covenant expressed in the lease; yet it is settled, as we are informed in the principal case *ad finem*, that it extends only to covenants which touch and concern the thing demised, and not to collateral covenants. See also *Webb v. Russell*, 3 T. R. 402; 1 Inst. 215, b.; *Shepp. Touch*, 176. It is also settled, that an assignee of part of the reversion, e. g. for years, is an assignee within the meaning of the act, 1 Inst. 215, a. *Kidwelly v. Brand*, Plowd. 72; [*Wright v. Burroughes*, 4 Dowl. & L. 438;] and so also is the assignee of the reversion in part of the land, as far as covenants are concerned, *Twynam v. Pickard*, 2 B. & A. 105; [*Simpson v. Clayton*, 4 N. C. 758, 780; 6 Scott, 469, S. C.]; though he is not so for the purpose of availing himself of conditions, for they cannot be apportioned by the act of the party: see *Dumport's case*, ante, and the notes thereto; and see *Doe*

d. B. de Rutzen v. Lewis, 5 A. & E. 277. [So is the assignee of the term in part of the land, Palmer v. Edwards, Doug. 121; and see Twynam v. Pickard, the judgments, 2 Wms. Saund. 181 d.] A grantee of the reversion in copyhold lands is an assignee within the meaning of the statute, Glover v. Cope, 3 Lev. 326; Skinner, 305, S. C.; Whitton v. Peacock, 3 Myl. & K. 325; and where lands were devised to A. for life, remainder to B. for life, with power to A. to make leases, and A. made a lease to C. and died during the term demised, it was held that B. should sue upon the covenants. Isherwood v. Oldknow, 3 M. & S. 382. See too Rogers v. Humphrey, 4 A. & E. 299. "The question," said Le Blanc, J., "is—*Is the plaintiff an assignee?* He is the person next in remainder to the person granting the lease: true, he is not assignee of the lessor, he is assignee of the deviser. But I take it to be clear that the lease must be considered as emanating from the person who creates the power, and that it derives its force and authority from him. The argument is, that he cannot have this action because he must be assignee of the person of the lessor or grantor. But he is the assignee of the person who, in the eye of the law, is the lessor: because the person empowering the tenant for life to grant the lease is, [*29] in the eye of the law, *the lessor. The doctrine of Lord Coke in Whitlock's case, entitles the court to say upon principle, that this plaintiff was the assignee of him who, in contemplation of law, was the lessor, and that as such, he is entitled to this action." [It seems, that a tenant from year to year, who demises by indenture for a term of years however long, has, by reason of the possibility of his estate continuing longer than the demised term, a reversion with which the benefit of the covenants in the indenture may pass to an assignee during the existence of the tenancy from year to year. Oxley v. James, 13 M. & W. 209.]

Both the benefit and burden of covenants, therefore, now run with the reversion from assignee to assignee, in the same manner that they ran at common law from assignee to assignee of the land. In order, however, that the covenants might continue available for the benefit of the reversioner, it was held to be absolutely necessary that he should continue to be seised or possessed of the

same reversion to which the covenants were incident; for, if it happened to be merged by his becoming the owner of some other reversion in the same land, the covenants were altogether gone. Thus in Moor, 94, a person made a lease for 100 years, the lessee made an under-lease for 20 years, rendering rent, with a clause of re-entry; afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term. It was held that the grantee should not have either the rent or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee; see also Webb v. Russell, 3 T. R. 402, 3. [Wootton v. Steffenoni, 12 M. & W. 132, where Parke, B., puts the question—If tenants in common demise their undivided interests, and there is a joint covenant with both, will that run with the reversion?] One of the consequences of the above doctrine was, that when lands were leased with a stipulation for renewal, and the lessee accepted a new lease, his remedy for rent and on the covenants contained in any under-lease he might have made were completely gone, since the reversion was destroyed to which they were incident. To obviate these evils, st. 4 G. 2, c. 28, s. 6, enacted, that in case any lease shall be surrendered, in order to be renewed, the new lease shall be as valid, to all intents, as if the under-leases had been likewise surrendered before the taking of the new lease; and that the remedies of the lessees against their under-tenants shall remain unaltered, and the chief landlord shall have the same remedy by distress and entry for the rents and *duties* reserved in the new lease, so far as the same exceed not the rents and *duties* reserved in the former lease, as he would have had in case such former lease had been still continued. See on the construction of this latter provision, Doe d. Palk v. Marchetti, 1 B. & Ad. 715. Note that in Ayley, 39, it is said that a covenant is not a *duty*. [The loss of the reversion by *merger* has now, however, in certain cases, ceased to operate as an extinguishment of the rent and covenants, st. 8 & 9 Vict. c. 106, sec. 9, having enacted "that when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the first day of Octo-

ber, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being, confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." See the previous act, now repealed, 7 & 8 Vict. c. 76, s. 12.]

Let us now see what covenants have been decided to *relate to*, or, in the words of the text, *touch and concern*, the *land*, in such a way that their benefit or burden is capable of running with it. On this subject it may be laid down as a general rule, that all *implied* covenants run with the land. Thus it was resolved in Spencer's case, 4th resolution, "that if a man makes a lease for years by the word *concessi*, or *demisi*, which implies a covenant, if the assignee of the lessee be evicted he shall have a writ of covenant." [Since the 7th & 8th Vict. c. 76, sec. 6, 8 & 9 Vict. c. 106, sec. 4, *concessi* does not imply a covenant.] Whether a particular *express* covenant sufficiently "*touches and concerns the thing demised*," to be capable of running with the land, is not unfrequently a question of difficulty. The following, however, certainly do so. For quiet enjoyment, *Noke v. Awder*, Cro. Eliz. 436; *Campbell v. Lewis*, 3 B. & A. 392. Further assurance, *Middlemore v. Goodale*, Cro. Car. 503; *Renewal*, *Roe v. Hayley*, 12 East, 464; [*Simpson v. Clayton*, 4 N. C. 758.] To repair, *Dean and Chapter of Windsor's case*, 5 Rep. 24, and the *principal case*. [To leave possession peaceably to the lessor and his assigns, or to leave in good repair. *Semble Vin. Abr. Covenant*, K. 19; but see per *Parke, B.*, *Doe d. Strode v. Seaton*, 2 C. M. & R. 730.] To discharge the lessor, *de omnibus oneribus ordinariis et extraordinariis*, *Dean and Chapter of Windsor's case*, 5 Rep. 25. To permit the lessor to have free passage to two rooms excepted in the demise, *Colc's case*, 1 Sal. 196, reported as *Bush v. Cales*, 1 Show. 389; *Carth. 232*. To cultivate the lands demised in a particular manner, *Cockson v. Cock*, Cro. Jac. 125. To reside on the premises, [admitted by the Court in] *Tatem v. Chaplin*, 2 H. Bl. 133. [See

1 Rolle Abr. 521 (l), and see the cases cited in the note to *Hinde v. Gray*, 1 M. & Gr. 208.] Not to carry on a particular trade, *Mayor of Congleton v. Pattison*, 10 East, 136. A covenant to keep buildings within the bills of mortality insured against fire was in *Vernon v. Smith*, 5 B. & A. 1, held to run with the land, for st. 14 G. 3, c. 78, enables the landlord to have the sum insured employed in reinstating the premises, so that the covenant, with the aid of the statute, amounts to a covenant to repair. In *Vyvyan v. Arthur*, 1 B. & C. 415, the lessee covenanted to grind at the lessor's mill, called Tregamere Mill, all such corn as should grow upon the close demised. This covenant was, in an action brought by the devisee of the lessor against the administratrix of the [*30] lessee, held to run with the [*30] land, at all events so long as the mill remained the property of the reversioner. In *Easterby v. Sampson*, 9 B. & C. 505, and 6 Bing. 644, where an undivided third part of certain mines was leased; and the lease contained a covenant by the lessee that he and his assigns should build a new smelting mill, and keep it in order for working the mines; this covenant was held, first by the King's Bench, and afterwards in the Exchequer Chamber, to run with the lands. [In *Hemmingway v. Fernandes*, 13 Sim. 228, A. agreed to make a lease of certain land, to B., who was the lessee of a colliery, B. covenanting for himself and his assigns to make a railway over the land, and to carry thereon all coal gotten out of the colliery, or any other land in the same township, that should be intended for shipment or water sale, paying for the carriage 2d. per ton. B. made the railway and afterwards assigned his interest in the land agreed to be demised and the colliery to C., who also worked other collieries in the township. The Vice-Chancellor is reported to have held that the case fell within the second resolution in Spencer's case, and that the covenant ran with the land and bound the assignee.]

The liability of the lessee to be sued on his *express* covenants, is not determined by his assigning over his term, and the lessor's acceptance of his assignee. *Barnard v. Godscall*, Cro. Jac. 309; *Thirby v. Plant*, 1 Wms. Saund. 240, et notas; but he may be sued on them either by the lessor or [if he have

assigned by] his assignee; *Brett v. Cumberland*, Cro. Jac. 521, 2; and so may his personal representative having assets, *ibid.* *Hellier v. Casbard*, 1 Sid. 266; 1 Lev. 127; *Coghill v. Freeclove*, 3 Mod. 325; 2 Vent. 209; *Pitcher v. Tovey*, 4 Mod. 76; and the Notes to *Thirby v. Plant*, 1 Wms. Saund. 241. But though the lessee may, after he has assigned and his assignee has been accepted, be sued on his *express* covenants, it is said he cannot be so on his implied ones. *Batcheleur v. Gage*, 1 Sid. 447; *Sir W. Jones*, 223; see *Mills v. Auriol*, 4 T. R. 93; 1 Wms. Saund. 241, in notis; [*Williams v. Burrell*, 1 C. B. 402]. *Sed quare de hoc*. Nor will any action of covenant lie against the assignee of the lessee, except for breaches of covenant happening while he is assignee, and therefore an assignee may get rid of his future liability by assigning even to a mere pauper. *Taylor v. Shum*, 1 B. & P. 21; *Le Keux v. Nash*, Str. 1222; *Odell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330; though not of his liability for breaches already committed during the continuance of his interest. *Harley v. King*, 5 Tyrwh. 692.

[It has been made a question whether, in cases in which the right of action is given to the assignee by 32 H. 8, c. 34, the original covenantee may not still sue. The better opinion is, that he cannot. See *Beeley v. Purry*, 3 Lev. 154, where the point was however not decided. It appears to have been taken for granted in *Green v. James*, 6 M. & W. 656. And the cases which have settled that the statute transfers the privity of contract, militate strongly against the existence of any right in the original covenantee. See *Thursby v. Plant*, 1 Wms. Saund. 240.]

Next, as to covenants running with the lands in other cases than those between landlord and tenant. These may be divided into the two following classes:—

1. Covenants made *with* the owner of the land to which they relate.

2. Covenants made *by* the owner of the land to which they relate.

With respect to the former of these classes, viz. covenants made *with* the owner of the land to which they relate, there seems to be no doubt that the benefit, *i. e.* the right to sue on such covenants, runs with the land to each successive transferee of it, provided that

such transferee be in of the same estate as the original covenantee was. Of this description are the ordinary covenants for title; see *Middlemore v. Goodale*, 1 Roll's Ab. 521; K. Pl. 6. Cro. Car. 503, 505, *Sir W. Jones*, 406; *Shepp. Touch*. 171; [*Kingdon v. Nottle*, 4 M. & S. 53]; *Campbell v. Lewis*, 3 B. & A. 392; *Lewis v. Campbell*, 8 Taunt. 715; which latter case, as well as *Noke v. Awder*, Cro. Eliz. 373, 436, shows that there is no difference between the right of an assignee of freehold, and that of the assignee of a chattel real, to sue on covenants running with the land. Of this description also is the case of the Prior reported in the text, that of the two Coparceners, and the anonymous case in *Moor*, 179, cited by *Littledale*, *arguendo*, in *Milnes v. Branch*, 5 M. & S. 417.

In all these cases the covenant is for something relating to the land, and the assignee of the land is the person entitled to sue upon it. See *Middlemore v. Goodale*, 1 Roll's Abr. 521; *Spencer v. Boyes*, 4 Ves. 370.

When such a covenant is made, it seems to be of no consequence, whether the covenantor be the person who conveyed the land to the covenantee, or be a mere stranger. Thus in the Prior's case, reported in the text, and in *Co. Litt.* 334 b., the Prior was a stranger to the land of the covenantee; and there is a good reason for this assigned in the above passage in *Co. Litt.*, where the law is said to be so, *to give damages to the party grieved*; in other words, in order that the person who is injured by the non-performance of the covenant, who is always the owner of the land *pro tempore*, may be also the person entitled to the remedy upon it by action. Indeed *Middlemore v. Goodale*, *Noke v. Awder*, and *Campbell v. Lewis* above cited, were all cases in which the covenantor was also the person who conveyed the land to the covenantee; and *Sir Edward Sugden*, in the *Law of Vendors and Purchasers*, expresses an opinion, that to enable the assignee of land to take advantage of covenants they must have been entered into by a prior owner thereof. This, however, is contrary to the Prior's case in the text, contrary to the case of the Coparceners, contrary [*31] also *to the anonymous case in *Moor*, 179, and to the opinion of the Real Property Commissioners, expressed in their 3rd report; and *Sir Edward Sugden*

himself declares that the consequences of applying such a doctrine to covenants entered into by a vendor, who is often only a mortgagor, or *cestuy que trust*, would be most alarming. See a learned Note in "Jarman's Bythewood," vol. 7, pages 572, 3, [vol. 9, page 354, of Mr. Sweet's edition.]

It would be wrong to omit mentioning that, since the publication of the first edition of this work, a case has occurred in the Court of Exchequer, bearing in some degree upon the above proposition. I allude to *Raymond v. Fitch*, 5 Tyrwh. 985, in which the question was, whether the executors of one who had demised land, *excepting the trees*, (the circumstance that the trees were excepted does not appear in the statement of the case, but is to be collected from the observations of the counsel and judges. See page 991 *ad finem*, and the judgment,) could sue upon a covenant not to fell or lop them, which had been broken during the testator's lifetime. It was argued on behalf of the defendant, that where a covenant runs with the land and descends to the heir, though there may have been a formal breach in the testator's lifetime, still, if the substantial damage happened after his death, the real, not the personal, representative ought to be plaintiff. See *Kingdon v. Nottle*, 1 M. & S. 355; 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418. Lord Abinger, however, delivering the judgment of the court, distinguished those cases by saying, "There is no doubt that the covenant here is *purely collateral and does not run with the land*:" and he added, "for the breach of such a covenant after the death of the covenantee, the heir or devisee of the land on which the trees grew could not sue." His Lordship does not state whether he based this opinion on the ground that the covenant not to cut down the trees did not sufficiently *touch and concern the land*, or whether, on the ground that the benefit of a covenant made by a stranger (which the lessee was *quoad* the trees) was incapable of running with the land to which it related, to the heir or devisee thereof. The point was not necessary for the decision of the case before their lordships, for the court appears to have been of opinion that the loss of the shade and casual profits of the trees during the testator's lifetime was a sufficient injury to the personal estate to vest a right of action in his executor; and it seems un-

fortunate, therefore, that the *dicta* in the case should have tended to cast any additional doubt on a doctrine so highly reasonable as that the right of action upon a covenant touching and benefiting the land, shall devolve along with the land itself to each successive owner.

But though it be not necessary that the covenantor should be in any wise connected with the land, it is absolutely essential that the covenantee should, at the time of the making of the covenant, have the land to which it relates. On this point the text is express, viz. "If the covenant were to say divine service in the chapel of *another*, there the assignee shall not have an action of covenant, *because the chapel doth not belong to the covenantee*; as it is adjudged in 2 H. 4, 6, b.;" see Co. Litt. 384, b., 385, a.; see **Webb v. Russell*, 3 T. R. 393. In such a case, however, the covenantee may sue though his assignee cannot. *Stokes v. Russell*, 3 T. R. 678.

It has been above stated, that, in order that the assignee may sue on such a covenant, he must be in of the same estate in the land which the party had with whom the covenant was originally made, for the covenant is incident to that estate. This rule might possibly be productive of very serious and disagreeable consequences; for when lands are conveyed (as has repeatedly been done for the purpose of barring dower) *to such uses as A. shall appoint, and in default of appointment to A. for life remainder to B., his executors and administrators, during the life of A., remainder to A. in fee*, and A. exercises the power of appointment in favour of a purchaser, that purchaser comes in paramount to A., and above the estate of which he was seised, which is defeated by the exercise of the power as if it never had existed. There is consequently no sameness of estate between A. and the purchaser, which latter will therefore not be entitled to the benefit of covenants entered into with A., since those covenants were incident to the estate which has now been defeated by the appointment: see *Roach v. Wadham*, 6 East, 289. To obviate this evil, it is now usual, whenever the conveyance transfers a seisin to serve uses,—as, for instance, when it is by way of feoffment, or lease and release,—to enter into the covenants with the feoffee or releasee to uses, and his heirs, the consequence

of which is believed to be, that the benefit of the covenants, being annexed to the seisin, is transferred to, and in a manner executed in, the various persons who become from time to time entitled under the uses which that seisin serves. See Sugd. Gilb. U. 186, note.

With respect to the second of the above two classes, namely, covenants entered into *by* the owners of land, great doubt exists whether these in any case run with the lands, so as to bind the assignees of the covenantor. One inconvenience which would be the result of holding them to do so is, that the assignee would frequently find himself liable to contracts of the very existence of which he was ignorant, and which perhaps would have deterred him from accepting a conveyance of the land, if he had known of them: and the reason assigned in the first Institute for allowing the *benefit* of a covenant relating to the land to run therewith, viz. to give the remedy to the party grieved, does not apply to the question respecting the *burden* thereof. This question might have arisen in *Roach v. Wadham*, 6 East, 289. There John Russ being seised of an undivided third part of a certain messuage, and the plaintiffs of the two other undivided third parts, they conveyed the whole to Coates and his heirs, to such uses as Watts should appoint, and, subject thereunto, to the use of Watts in fee, "yielding and paying, and the said William Watts, and by his direction the said T. Coates, did, and each of them did, grant out of the said messuage to the plaintiffs, their heirs and assigns, for ever, the yearly fee farm rent of 28*l.* payable quarterly." Then followed a *covenant by Watts, for himself, his heirs and assigns*, to pay the rent to the plaintiffs, their heirs and assigns. Then a similar rent of 14*l.* was reserved to Russ. Watts afterwards "granted, bargained, sold, aliened, released, ratified, and confirmed, and did also *limit, direct, and appoint*," the premises in question to Wadham, Stevens, *and Powell (a trustee), [*32] habendum to Wadham, Stevens, and Powell, and the heirs and assigns of Wadham and Stevens, as tenants in common, subject to the rent of 42*l.*, which Wadham and Stevens covenanted with Watts to pay in equal shares and proportions. Wadham died, leaving the defendant his devisee in fee and executor: the moiety which Wadham had

covenanted to pay of the 28*l.* rent became after his death three years in arrear; and this action having been brought for the recovery of those arrears, a case was ultimately stated for the opinion of the Court of King's Bench, the question in which was "whether the defendant as executor or devisee of the testator Wadham were liable at law to an action of covenant on the said covenant made by Watts." The court held that he was not liable, for that the conveyance by Watts to Wadham, Stevens, and Powell operated as an appointment under the power created by the conveyance from Russ and the plaintiff to Coates, and therefore, even supposing the covenant made by Watts with the plaintiffs to be capable of running with the land and binding Watts's assignee, still it could not affect Wadham, who was not privy in estate to Watts, but came in paramount to him.

Brewster v. Kitchell is another case often referred to on this question: it is reported in Lord Raym. 318; Comb. 424, 466; 1 Salk. 198; 12 Mod. 166; Holt, 175, 669; with the arguments of counsel, 5 Mod. 368. It was a feigned action on a wager, whether the defendant had a right to deduct 4*s.* in the pound out of a rent-charge granted to the plaintiff's ancestor out of certain lands in Bucks of which the defendant was *terre-tenant*, which tax of 4*s.* in the pound was granted in 4th & 5th W. & M. Upon a special verdict it appeared, that R. Langford, being seised in fee of the manor of Balmore, granted to Ellen Brewster a rent-charge out of the manor, to her and her heirs, and there was a covenant for further assurance, and this memorandum was indorsed on the deed, viz.: "It is the true intent and meaning of these presents, that the within-named Ellen Brewster, and her heirs, shall be paid the said rent-charge without deducting of any taxes for the said rent," &c. Afterward, R. Langford, on the 8th of July, 1652, in pursuance of the covenant in the first deed, confirmed the rent to Ellen Brewster and her heirs, and covenanted that the rent should be paid at two certain feasts, free of all taxes. The report proceeds thus:—"After several arguments, Holt, C. J., pronounced the opinion of the court, and (by him) the question is, upon this special verdict, whether the covenant indorsed upon the deed of the 20th of Nov., 1649, or the covenant in the deed of the

8th of July, 1652, be sufficient to bind the grantor and his heirs to pay the rent, free of all taxes hereafter to be charged on it by Act of Parliament? And all the judges were of opinion, that this covenant binds the grantor and his heirs to pay the rent, free of 4s. in the pound tax." Thus far, therefore, the question of the burden of the covenant running with the lands does not appear to have been taken into consideration. However, in a subsequent part of his judgment, the report proceeds to state, Lord Holt "made another question, which was not observed at the bar, nor by any of the other judges, viz.: whether the *terretenant* was liable to an action on the covenant, and he was of opinion he was not; for (by him) if the tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himself and his heirs, you may maintain covenant against the grantor and his heirs, but not against the assignee, for it is a mere personal covenant, and cannot run with the land. And, for a case in point, he cited Hardr. 57, pl. 5, *Coke v. Earl of Arundel*. Therefore, hence it does not appear that the defendant is bound by this covenant, for *non constat* whether he is *terretenant* or no, or what he is. For this reason he was of opinion, that judgment ought to be given for the defendant. But the other three judges seemed to be in a surprise, and not in truth to comprehend this objection, and therefore they persisted in their former opinion, *talking of agreements, intent of the party, binding the lands, and I know not what*. They gave judgment for the plaintiff, against the opinion of Holt, C. J., for the reasons aforesaid." The above account is extracted, verbatim, from Lord

[*33] *Raymond. The account of the disagreement between Lord Holt and the three judges, given in Salkeld, is extremely jejune, being comprised in a marginal note of about six words. But in 12th Mod. is a report of this same case of *Brewster v. Kitchell*, which, if accurate, and there seems to be no reason for distrusting it, places the matter in a far clearer and more satisfactory light. Lord Holt is there made to say, in delivering his judgment, "*If this rent was granted, so to be paid, it would be another matter, but here it is only a covenant and no words amounting to a grant*, and therefore there can be no relief in this case against the *terretenant*

but in equity; and therefore, for this point, I cannot see how the plaintiff can have his judgment, for if this covenant should charge the land it would be higher than a *warrantia chartie*, which only affects the land from judgment therein given." "But the other judges" (says the reporter) "thought this covenant might charge the land, *being in the nature of a grant, or at least a declaration going along with the grant, showing in what manner the thing granted should be taken*." So that the real difference between Lord Holt and the three judges appears to have been, not whether an action of covenant could be maintained against the defendant as assignee of the land, but whether that which Lord Holt considered a covenant was not, in reality, part of the grant; for, if it were, the plaintiff was entitled to judgment beyond all dispute, the action not being one of covenant, but a feigned issue to ascertain the net amount of the rent-charge. So that, considering the case in this light, there is Lord Holt's opinion that a covenant to pay the rent-charge would not run with the land; an opinion from which none of the other judges dissented, the point on which they really differed being, whether that which the Lord Chief Justice considered a mere covenant, was not, in point of fact, part and parcel of the grant; in which case, Lord Holt himself had admitted, that "it would be another matter." With respect to the accuracy of the report in Mod., I must repeat, that there seems little reason for distrusting it. It is given at considerable length, and cannot be said to disagree with that of Lord Raymond, who admits that he had no distinct remembrance of the grounds on which the judges based their dissent from Holt's opinion.

In *Coke v. The Earl of Arundel* (the case cited by Lord Holt from Hardress, reported also in 1 Abr. Eq. 26), the Duke of Norfolk being seised of Blackacre and Whiteacre, subject to a certain rent, granted Blackacre to A., covenanting that it should be discharged of the rent, and granted, afterwards, Whiteacre to B. A. filed a bill to charge Whiteacre with the whole rent, urging, that the covenant ran therewith, and bound B. But the court thought the covenant only binding on the Duke of Norfolk and his representatives, and dismissed the bill. (See *Lord Cornbury v. Middleton*, Cases in Chancery, 208.)

The case of *Holmes v. Buckley*, 1 Abr. Eq. 27, is another case thought to bear upon this point, and was as follows. A., and R., his wife, being seised in right of R. of two pieces of ground, granted by indenture a watercourse to J. H. and his heirs, through the said two pieces of ground, and covenanted for them, their heirs and assigns, to cleanse the same; and that all fines and recoveries to be levied or suffered of the grounds should enure to the strengthening and confirming the said watercourse. Afterwards a recovery was had, and a deed executed, *declaring the uses to be as aforesaid*. The watercourse, by mesne assignments, came to the plaintiff, and the two pieces of ground to the defendant, who built on the same, *and much heightened the ground which lay over the watercourse, and rendered it much more chargeable and inconvenient to repair; and, as it was alleged, and in part proved, the building had much obstructed the watercourse*. And so the bill was for establishing the enjoyment of the watercourse, and that the defendant, and all claiming under him, might from time to time cleanse the same, according to the covenant. It was objected, that the covenant, being a personal covenant, was not at all strengthened by the recovery; and that the plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own charges. But the court was of opinion, *that this was a covenant which ran with the land, and was made good by the recovery; and though the plaintiff had cleansed the same at his own charge, while it was easy to be done, and of little charge; yet, since the right was plain upon the deed, *and the cleansing made chargeable by the building*, it was reasonable the defendant should do it, and decreed accordingly, and gave the plaintiff his costs.

It will be observed on this case, that not only may it be urged here, as in *Brewster v. Kitchell*, that the covenant was, in fact, part of the grant, but that, even if there had been no covenant, the defendant was guilty of a wrongful act, when he obstructed and injured the plaintiff's watercourse, subject to which he took his own estate, and of the existence of which he had notice, for the deed declaring the uses of the recovery, under which deed he must have claimed, made mention of the previous grant of

the watercourse; and the court appears to have relied upon the wrongful obstruction as a ground of its decree, as is plain from the words, *"and the cleansing made chargeable by the building."* On the other hand, if the effect of the case be taken to be, that the court thought the covenant one on which an action might have been maintained at law by the plaintiff against the defendant, it seems questionable whether it do not prove too much; for, as both the parties were assignees, one of the land, and the other of the watercourse, it would, in order to support such an action of covenant, be necessary to hold, not merely that the burden of the covenant ran with the land, but that the benefit of it ran with the watercourse; for, otherwise, the plaintiff, not being the original covenantee, would have no right of action: and it would probably be found somewhat difficult to contend that a covenant could run with such an easement as a watercourse. See *Milnes v. Branch*, 5 M. & S. 417, and post. Vide *tamen E. of Portmore v. Bunn*, 1 B. & C. 694.

The case of *Barclay v. Raine*, 1 S. & Stu. 449, has been thought to bear upon this controversy, but a close examination will show that it cannot, with propriety, be cited as an authority on either side. A. being seised of Blackacre and Whiteacre, under the same title, and comprised in the same deeds, sold Blackacre to Thring, and delivered the deeds to him, Thring covenanted for their production to A., his heirs, executors, administrators and assigns. *This deed was lost, and though a copy of it existed, the copy was in a mutilated state, partly illegible*. A. afterwards sold Whiteacre to Barclay, the father of the plaintiffs: Thring then sold Blackacre to James and John Slade, who refused to give a fresh covenant for the production of title-deeds. On the sale to the Slades, part of the purchase-money was secured by mortgage; and the title-deeds, together with the mortgage deed, were lodged with Thring. The plaintiffs, who had contracted to sell Whiteacre to the defendant Raine, applied to Thring for a covenant to produce the title-deeds, and he executed a covenant by which he covenanted with the defendant, Raine, to produce the title-deeds, *while he should continue mortgagee*. The defendant objected to this as insufficient, and Thring then executed another deed, in which he acknowledged the execution

of the first covenant, and also that the deeds were, at the date of this last deed, in his possession. Under these circumstances, the question was, whether the defendant could be compelled to complete his purchase, and the Vice-Chancellor (Sir J. Leach) decided that he could not; and is reported, in 1 Sim. & Stu. 454, to have said on that occasion. "that equity never compels a purchaser to take without the title deeds, unless he have a covenant to produce them; that a mere equitable right to their production, even if it existed, would not be sufficient, and that *Thring's covenant to produce did not run with the lands.*" It is obvious, that this last observation, if made at all, could not have been intended to apply to the second covenant executed by Thring, which would be clearly insufficient, inasmuch as it was restrained to the time during which he should continue mortgagee: when he ceased to be mortgagee, the Slades would be entitled to the deeds, and it was therefore necessary, that some covenant should exist, [*35] the effect of which should last *beyond that period; and so the Master had reported. It was therefore immaterial, whether the *second* covenant would or would not run with the land, and the true question was; 1st, whether the covenant *first* executed by Thring would bind the Slades; 2ndly, if so, whether it would bind them for the benefit of Raine; and, 3rdly, supposing the covenant would bind the Slades, and would enure to Raine's benefit, *whether there was sufficient legal evidence of its contents*; for, if not, it would of course be as useless as if it never had existed. (See the judgment of the Master of the Rolls in *Bryant v. Busk*, 4 Russ. 1.) Now the first of these points would have involved the question, whether the *burden* of Thring's covenant would run with Blackacre to his vendees, the Slades? The second would have involved the question, whether the *benefit* of it would run along with Whiteacre, from A., the covenantee, to the Barclays, and from them to Raine? But it became unnecessary to decide either of these two points, because it appears clear that the *third* point was against the vendor; in other words, it appears clear, that, whatever might have been the effect of the covenant, there was no legal evidence of its contents. The deed was lost, the copy was mutilated, and partly illegible; and, if entire, would only have been se-

condary evidence of the original, if duly proved to be a true copy, and it does not appear that that could have been done; and the deed lastly executed by Thring, even had it set out the contents of the first deed, which in all probability it did not, would not have been evidence against the Slades, as it was not executed till after Thring had parted with his interest in the lands to them. The questions, therefore, whether either the benefit or burden of Thring's covenant ran with the land, did not arise; and it might have been supposed that the Vice-Chancellor, in pronouncing judgment, would have omitted all consideration of them, had it not been that the reporter puts into his mouth the following words; "*Thring's covenant to produce does not run with the land.*" However, in the 7th volume of Jarman's Bythewood, p. 375, under the report of *Barclay v. Raine*, I find the following note:—"His honor lately denied his having used the expressions here imputed to him; he did not say that Thring's *first* covenant did not run with the land (*for his Honor thought it clearly did*), but that the *second* covenant was restricted to the period of his being mortgagee." *Rolls*, 28th July, 1830. It seems, therefore, that Sir John Leach's private opinion was, that Thring's first covenant *did* run with the land; but whether he thought that the *benefit* of it ran with Whiteacre, or the *burden* with Blackacre, or that both *benefit* and *burden* ran with the land, is left completely in ambiguo. One thing, however, is quite plain, viz., that *Barclay v. Raine* is no decision on the present question; since, had his Honor thought that there was a sufficient covenant, and sufficient evidence of its contents, he must have decided in favour of the plaintiffs, and against Raine, who would then have had no excuse for not completing his purchase.

Covenants like that, to pay a rent-charge issuing out of the land, have reference to an interest possessed by the covenantee independently of the covenant, but there are other covenants unconnected with any interest in the land, such as a covenant by the owner of the land, that it shall never be built upon or never planted, or imposing any other restriction on the mode of its enjoyment, in favour of a person having no property therein. The possibility of making these covenants run with land has been questioned, not merely on the general ground

above stated, namely, that the burthen of a covenant cannot run with land except between landlord and tenant, though the benefit thereof may; but also on the ground that they infringe the rule of law against perpetuities, by tending to impede the free circulation of property. An instance of a covenant of this sort is to be found in a note to Fitzherbert's *Natura Brevium*, fo. 145, for which he cites the Year Book, 4 H. 3, 57, not in print. The note is as follows:—"A man covenants that neither he nor his heirs shall erect any mill in such a place, and an action of covenant is thereupon brought *by* the heir, and well." I presume that the words *by the heir* signify the heir of the covenantee, and probably the main question in that case was [*36] *whether the heir, who had perhaps inherited some mill which the covenant was framed to protect, or the executor of the covenantee, should bring the action. It has been remarked, by very high authority, that "in the case cited by Hale, the covenant was held to be good; but that does not go far towards removing the doubt, for that case occurred at a period long before the law of perpetuity was introduced," 3d Report of the R. P. Commissioners, 51. In addition to which it may be observed, that even had the case occurred since the rule against perpetuities, it might not have effectually resolved the doubt as to the operation of that rule, for the action was brought against the covenantor himself, of whose liability there could be no question; and as the word *assigns* does not occur in the covenant, it may be doubted whether the assignees would have been bound by it, as it can hardly be said to relate to a thing *in esse*, parcel of the covenantor's land; and if the assignees would not be bound by it, it could have no tendency to impede the circulation of the land, or to create a perpetuity.

These subjects have been very lately discussed in the case of *Keppel v. Bailey*, in the Court of Chancery, 2 Myln. & K. 517, in which the questions were elaborately argued, and every authority on either side, it is believed, cited either by counsel, or by the Lord Chancellor (Brougham) in delivering his judgment. In that case, certain persons having formed themselves into a company for the establishment of a railroad called the Trevil, Edward and Jonathan Keppel, who held the Beaufort iron-works under

a long lease, had covenanted with the proprietors of the railroad and their assigns, that they, their executors, administrators and assigns, would procure all the limestone wanted for the iron-works from the Trevil quarry, and carry it along the Trevil railroad, paying a certain toll. Edward and Jonathan Keppel assigned their lease of the iron-works to the defendants, who began to construct a railroad to other lime quarries, situated eastward of the Trevil quarry; and on a bill for an injunction to restrain them from using that or any other new road, it was, among other points, objected to the covenant that it was void, as tending to create a perpetuity, that it was void as in restraint of trade, and that it was not such a covenant as would run with the lands, so as to bind the defendants, as assignees of the iron-works. Upon the first point, the Lord Chancellor appeared to think that it could not be invalidated on the ground of perpetuity. "I do not," said he, "at all doubt that the enjoyment of property may be tied up, and an illegal perpetuity created, by annexing conditions to grants, or by executing covenants, whereby whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant, in all but a certain prescribed way, provided always that the restraint so constituted is not reserved in favour of some other party who may release it at his pleasure; and, therefore, all such conditions and covenants are void if they go beyond the period allowed by law. But if the party for whom the condition is made, or the party covenantee, has the entire power of dealing with his interest in the subject-matter, it is an obvious mistake to treat this as an instance of perpetuity, or of any tendency towards perpetuity. Indeed, the property, the subject matter of consideration here, is not the estate fettered by the condition or covenant, but the benefit reserved by the condition or secured by the covenant, and upon that there is, by the hypothesis, no restraint at all; and certainly, to take another view, though one of the parties interested, the owner of the property subject to the covenant or condition, may be fast, the other is loose, and so, quoad all, taken together, that is quoad all interested, the property is free.—Upon other grounds, such a restraint may be objectionable and void in law, as well as bad in policy, but certainly not upon the doc-

trine of perpetuity, by which it is no more struck at, than a right of a way or other easement, which the owners of one estate may enjoy over the close of another. There appears, at first, to be more weight in the objection, that covenants of this description are in restraint of trade. The covenant here is not in [*37] *general* restraint of trade, which would, *beyond all doubt, make it void, in whatever way the purpose was effected. The restraint is only partial, and then the law will support it; 'if,' to use the words of Parker, C. J., in *Mitchell v. Reynolds*, 'in the opinion of the court, whose office it is to determine upon the circumstances, it appears to be a just and honest contract.'"

Upon the great question, viz. whether the covenant were capable of running with the Beaufort iron-works, so as to bind the defendants as assignees thereof, his lordship expressed a very decided opinion in the negative:—"Assuming that the Keppels covenanted for their assigns of the Beaufort works, could they, by a covenant with persons who had no relation whatever to those works, except that of having a lime-quarry and a railway in the neighbourhood, bind all persons who should become owners of those works, either by purchase or descent, at all times, to buy their lime at the quarry, and carry their iron on the railway; or could they do no more, if the covenant should not be kept, than give the covenantees a right of action against themselves, and recourse against their heirs and executors, as far as those received assets? Consider the question first upon principle: there are certain known incidents to property and its enjoyments, among others, certain burdens wherewith it may be affected, or rights, which may be created, or enjoyed with it, by parties other than the owner, all which incidents are recognised by the law. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing men the fullest latitude in binding themselves and their representatives, that is, their assets, real and personal, to answer in damages for breach of their obligations. This tends to no detriment, and is a reasonable

liberty to bestow; but great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every message, might thus be held in a different fashion, and it would be hardly possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. 'The right of way or of common is of a public, as well as of a simple, nature, and no one who sees the premises can be ignorant of what all the vicinage knows. But if one man may bind his message and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his with obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations on the premises, besides many other restraints, as infinite in variety as the imagination can conceive; for there can be no reason whatever in support of the covenant in question, which would not extend to every covenant that can be devised. The difference is obviously very great between such a case as this and the case of covenants in a lease whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, though the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of the property that certain things should be reserved to the reversioner all the while the term continues; it is only something taken out of the demise, some exception to the temporary surrender of the enjoyment. It is only that they retain more or less partially the use of what was wholly used by them before the demise, and what will again be wholly used by them when that demise is at an end.'"

The question was also discussed at considerable length in the *Duke of Bedford v. The Trustees of the British Museum*, 2 Mylne & K. 552. That case, however, turned at last upon a point purely of equity, the court conceiving, that, however the rights of the parties might be at law, it was a case in which equity ought not to interfere. See *Collius v. Plumb*, 16 Ves. 434.

In *Randall v. Rigby*, 4 M. & W. 130, the defendant had covenanted for the payment of an annuity or rent issuing out of land. "No doubt," said Parke, B., "this covenant is collateral or in gross in one sense, *that it does not run with the land or rent.*"

[In *Bristow v. Wood*, 1 Collyer, 480, (more fully reported 14 L. J. 50,) a purchaser was discharged from his contract upon a doubt whether the land was not bound by a covenant by the vendor not to build houses in courts, or of a less value than 300*l.*, not to erect a steam-engine or manufactory, or to carry on any trade that might be a nuisance to the neighbourhood, although the purchaser at the time of the contract had no notice of the covenant. In *Whatman v. Gibson*, 9 Sim. 196, and *Mann v. Stephens*, July, 1846, the Vice-Chancellor restrained by injunction, assignees who had purchased with notice of similar covenants. It seems clear, however, that the fact of notice or no notice cannot in a court of law affect the question, whether the covenant runs with the land; and if any sound distinction exist in this respect between the case of a purchaser with and without notice, it can be worked out only in a court of equity. Such appears to have been the opinion of the Vice-Chancellor in *Whatman v. Gibson*. See also *Schreiber v. Creed*, 10 Sim. 9.]

Upon the whole, there appears to be [*38] no *authority for saying that the burden of a covenant will run with land in any case, except that of landlord and tenant; while the opinion of Lord Holt in *Brewster v. Kitchell*, that of Lord Brougham, in *Keppel v. Bailey*, and the reason and convenience of the thing, all militate the other way.

As to the subject-matter to which a covenant may be incident, so as to run with it to the assignee.—The principal case shows that covenants will not run with personal property. In *Milnes v. Branch*, 5 M. & S. 417, J. B., being seised in fee, conveyed to the defendant and J. J., their heirs and assigns, to the use that J. B., his heirs and assigns might have a rent out of the premises, and subject thereto to the use of the defendant in fee, and the defendant covenanted with J. B., his heirs and assigns, to pay J. B., his heirs and assigns, the rent, and to build within a year one or more messuages on the premises for securing the rent. J. B. within a year demised the rent to the plaintiffs for 1000

years. It was held that covenant would not lie for the plaintiffs, either for non-payment of the rent or not building the messuages; and the court, in giving judgment, expressed a clear opinion that a covenant could not run with rent. Accord. per. Parke, B., in *Randall v. Rigby*, 4 Mee. & Welsb. 135, where the defendant had covenanted to pay a rent charged upon land. "No doubt," said his Lordship, "this covenant is collateral or in gross in one sense, that it does not run with the land or rent, for that *Milnes v. Branch*, is an authority." In *Bally v. Wells*, *Wilmot's Notes*, 341, vide 3 Wils. 25, it was, however, held that a covenant might run with tithes. That was an action brought by George Bally, clerk, rector of Monkton, against James Wells, assignee of one Whitmarsh, to whom the plaintiff had demised *all the tithes of the parish of Monkton, for six years, by a lease containing the following covenant:—"And the said James Whitmarsh, for himself, his executors, administrators, and assigns, doth covenant and agree, not to let any of the farmers now occupying the estate at Monkton have any part of the tithes aforesaid, without the consent of the said George Bally in writing first had *and [*38*a*] obtained." James Whitmarsh assigned his interest in the tithes to the defendant, who let several farmers, occupiers, have part of the tithe without the consent of Mr. Bally, who thereupon brought an action of covenant, and after verdict for the plaintiff, it was moved, among other things, in arrest of judgment, that tithes are incorporeal, lying in grant, and therefore that such a covenant cannot run with them. The court, however, gave judgment for the plaintiff. [And in *The Earl of Egremont v. Keene*, 2 Jones (Exchequer, Ireland), 307, a covenant to pay rent reserved on a demise of the tolls of a market, was held to run with the tenement, and bind the assignee of the lessee. But see *Co. Litt.* 34 b, 47 a. In *Muskett v. Hill*, 5 N. C. 694, the question whether a covenant could run with an assignable right to search for and take minerals, was discussed, but not decided.] See *E. of Portmore v. Bunn*, 1 B. & C. 694.

Covenants will not run with an estate to which the covenantee is only entitled by estoppel. *Noke v. Awder*, Cro. Eliz. 436; *Whitton v. Peacock*, 2 Bing. N. C. 411. [*Quære*].

[The above proposition in terms ex-

cludes the case of a covenant in a conveyance effectual at first by estoppel only, but which has subsequently become a valid conveyance in point of interest, in consequence of the acquisition of an estate by the conveying party. In such a case, it is clear that the assignee of the covenantee, not being entitled "*only* by estoppel," may sue equally as if the conveyance had from the first transferred an estate in interest. For example, if one having no estate make an ordinary lease by indenture, and subsequently acquire the fee, the lease becomes an estate in interest; and the lessor and his assigns on the one hand, *Webb v. Austin*, 8 Scott, N. R. 419, and the lessee and his assigns on the other, *Sturgeon v. Wingfield*, 15 M. & W. 224, may maintain all such actions on the covenants, as if the lessor had had the fee simple at the time of making the lease.

Perhaps, also, the proposition might be correctly limited to cases where it must *appear* upon the pleadings of the assignee himself, that there is no estate with which the covenant can run.

The following is an attempt to state the results of the authorities upon this subject, and to distinguish what is established law from what still remains in doubt:—

1. As we have already seen, where an estate by estoppel becomes an estate in interest, by the lessor's subsequent acquisition of an estate, the parties and their assignees are in the same position as if the estate had been *ab initio* an estate in interest. *Webb v. Austin*, 8 Scott, N. R. 419; *Sturgeon v. Wingfield*, 15 M. & W. 224. So far as *Whitton v. Peacock*, 2 N. C. 411, is an authority to [*38b] the contrary, it cannot *be considered as law. See 2 Wms. Saund. 418 n. (e).

2. Where it appears upon the face of the deed containing the covenant, that the lessor has not the legal estate in the property, an assignment does not transfer the benefit or burthen of the covenant. Thus, where a lease was made by indenture, reciting that the lessor had only an equitable title, it was held that the lessor, and not his assignee, could sue upon the covenants. *Pargeter v. Harris*, 7 Q. B. 708. That is only an instance of the rule that an instrument makes no estoppel where the truth appears by the same instrument.

3. Where it appears by the statement in pleading of the assignee himself who

seeks to enforce the covenant, that the covenantee had no estate; even though it also appears that there was an estoppel which *might have been* relied upon, the assignee will fail upon his own showing. See *Noke v. Awder*, *infra*, and the comment. In such a case, the party entitled to the benefit of the estoppel contradicts instead of relying upon it. (See *Ludford v. Barber*, 1 T. R. 95, per Buller, J.)

4. Where the assignee states as part of his title some particular estate to have been in the lessor at the time of the lease, and it does not appear that the lessee is estopped by the lease from denying *that particular estate* as against the lessor, he may deny it in the action at the suit of the assignee. *Carvick v. Blagrove*, 1 B. & B. 531; 4 Moore, 303, S. C.

5. In an action by lessor against assignee of lessee, it is unnecessary for the lessor to allege his title; and, if it neither appears by the lease, as in *Earl of Portmore v. Bunn*, 1 B. & C. 694, nor by the lessor's pleadings, that he had no title, it is not competent for the assignee to raise the question whether he had an estate in interest, or only by estoppel. *Taylor v. Needham*, 2 Taunt. 278; *Cooper v. Blandy*, 1 N. C. 45; *Warburton v. Ivie*, 1 Jones (Exchequer, Ireland,) 313.

6. If a lease be made by indenture, in such a form as to create between the lessor and lessee an estoppel to deny that the lessor had a reversion, and the lessor conveys all his interest, the disputed question arises, whether the assignee can sue the lessee or his assignee for breaches of covenant in respect of which the lessor might have sued, had there been no assignment. *Parke, B.*, in *Gouldsworth v. Knights*, 11 M. & W. 337, expressed an opinion in the affirmative; and there seems to be no sound reason why the assignee of a reversion should not establish his title by way of estoppel. An estoppel does not necessarily involve a falsehood. On the contrary, facts are ascertained through the medium of estoppel without reference to the question whether really true or false; and it would be sheer fallacy to assume, that a fact *established [*38c] by estoppel, has *therefore* no real existence. For judicial purposes it ought to be dealt with as if it really existed. It is clear that the assignee of a lessor is entitled to some extent to the benefit

of estoppel, and it seems difficult to contend, that the law of estoppel, subject of course to all the limitations and exceptions which form part of that branch of the law itself, (see an instance of exception in the case of an interest passing by the lease, *Doe d. Strode v. Seaton*, 2 C. M. & R. 728; and in the case of eviction by title paramount, *Doe d. Higginbotham v. Barton*, 11 A. & E. 307,) shall not apply in favour of the assignee, equally in an action of covenant as in an action of ejectment, or of use and occupation. *Rennie v. Robinson*, 7 Moore, 539; *Gouldsworth v. Knights*, 11 M. & W. 337. The lessee has (in a case of considerable authority) been held estopped from pleading *nil habuit in tenementis* in an action of covenant at suit of the assignee of the lessor, *Palmer v. Ekins*, 2 Lord Raym. 1550, and it seems that he ought not in such a case to be allowed to plead any plea which would be satisfied by proof simply that the lessor had no title when he made the lease. The cases which have been supposed chiefly to countenance a contrary opinion are, *Noke v. Awder*, *Whitton v. Peacock*, *Carvick v. Blagrove*. An examination of those cases will show that they have no such effect.

Noke v. Awder, Cro. Eliz. 436, was not an action between landlord and tenant, nor did it in any way turn upon the statute of 32 H. 8, c. 34; but it may, for the purpose of the present inquiry, be conceded, that no sound distinction can be drawn in respect of the operation of estoppel, between cases at common law and under the statute. It was an action by the assignee (*Noke*) of the assignee (*J. S.*) of the assignee (*Abel*) of a lease for years from one *John King* to the defendant (*Awder*); and the declaration stated the making of the lease by *John King* to *Awder*, an assignment from *Awder* to *Abel* by deed containing a covenant by *Awder* with *Abel* for quiet enjoyment; that *Abel* assigned to *J. S.* and *J. S.* to the plaintiff; and it stated as breach, that, before *John King*, the lessor, had any thing in the premises, one *Robert King* was seised in fee, and died so seised, and that his heir, *Thomas King*, entered upon the plaintiff and ousted him. The plaintiff (to follow the argument of *Coke*, Attorney-General, for the defendant) was in this dilemma, that, either the lessor *John King* had upon the plaintiff's showing no estate, and then no term was creat-

ed by the lease, and so no estate passed by the assignment from the defendant to *Abel*, consequently there was no actual privity of estate between the defendant and the plaintiff, nor any estoppel, because the facts were *stated on the record and the es-^[*38d]toppel not relied upon; or, sup- posing that the declaration were read as alleging a valid lease from *John King* to the defendant; then, consistently with the declaration, *Thomas King*, who was alleged to have ousted the plaintiff, had no title, was a mere trespasser, and so there was no breach of the general covenant for quiet enjoyment. So that, *quacunqve viâ datâ*, the action could not be maintained. And the court are reported to have held, "that it was clear upon the matter shown that the action lay not, for the plaintiff ought to have shown an estate by descent in *John King* at the time of the lease and assignment made, or an estate whereby he might make a lease, and that this was afterwards determined; and so confess the estate in the lessor, otherwise this action of covenant lieth not, and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judgment against the plaintiff, but afterwards they would advise until the next term." If the judgment of the court had finally proceeded upon this reasoning, it would only have been a decision, that, as the plaintiff upon his own showing never had conveyed to him any estate in the premises, he could not sue upon the covenant as one running with the land. The estoppel was not pleaded, but the contrary; and the placitum in *Comyns's Digest*, Covenant (B. 3), "So the assignee of a lease which appears to be good only by estoppel shall not have covenant," R. Cro. El. 437, Mo. 419, correctly limits the obiter opinion of the court (which did not form the basis of their final decision) to cases where it appears that no estate passed to the covenantee. The ultimate decision in *Noke v. Awder* was founded upon the insufficiency of the breach, assuming the lease to have been valid in interest and not merely by estoppel, for the report proceeds, "Note; This was continued until Trin. 41 Eliz., and then being moved again, all the justices resolved that the assignee of a lease by estoppel shall not take advantage of any covenant; but that it shall not be intended

a lease by estoppel, but a lawful lease. But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. *Wherefore* it was adjudged for the defendant."

Noke v. Awdler cannot therefore be considered as establishing the general proposition, that the benefit of covenants in a lease which operates by estoppel does not run with the reversion; or that it is competent for the lessee or his assignee, to raise the point against the assignee of the lessor.

Whitton v. Peacock, 2 N. C. 411, was a case out of Chancery. The land was copyhold. Littlehales, and Maria, his wife, having no estate therein, demised [*38e] to Keys *for years, the rent being reserved payable to Littlehales, and the covenant being made with him only. Afterwards the lessee assigned his interest; the lessors, by surrender of the true owner and admittance thereon, acquired the legal estate; and, subsequently, by surrender and admittance, their estate so acquired became vested in the plaintiff. The question was, whether he could maintain an action of covenant against the assignee of the lessee. The case was argued as if the covenants in the lease where such as to run with the land (which *quare*, see Wootton v. Steffanoni, 12 M. & W. 129), and as if the plaintiff was assignee of the reversion by estoppel, by a conveyance which passed all the Littlehales' interest, whether by estoppel or otherwise. The practice of stating reasons for the answers to a case sent out of Chancery, had, at that time, fallen into disuse (See Lord Campbell's "Lives of the Chancellors," Vol. 7, page 137,) though it has since, happily for the profession, and beneficially for the public, been resumed; and the Court of Common Pleas, without stating any reasons, answered, that the plaintiff could not maintain an action against the assignees of Keys for breach of the covenants in the lease. The case, however, does not decide that the assignee of a reversion, created by estoppel, as between lessor and lessee, could not sue on the covenants in the lease. That question did not arise upon the facts, because, as pointed out by Parke, B., in Gouldsworth v. Knights, 11 M. & W. 344, "the reversion by estoppel on the first lease was not a copyhold transferable by surrender and admittance." It is diffi-

cult, perhaps impossible, to discover the precise ground of the decision in Whitton v. Peacock, but it may be conjectured that the point actually intended to be decided was, that the purchaser by surrender and admittance of a copyhold estate, from a vendor who had, previously to his acquiring any interest, made a lease of the land, but who had subsequently acquired therein a copyhold estate of inheritance, could not be considered as an assignee of the reversion within the statute of H. 8; a position apparently untenable. Webb v. Austin, *supra*, and the learned note to Partington v. Woodcock, 5 N. & M. 675. Parke, B., in stating (Gouldsworth v. Knights, 11 M. & W. 337) that Whitton v. Peacock was correctly decided, only referred to the decision as affecting the case of a *pure* estoppel, and evidently did not intend to uphold it upon the point not at all under consideration in Gouldsworth v. Knights, and which was so fully discussed and decided for such convincing reasons, in Webb v. Austin.

Carvick v. Blagrove, 1 B. & B. 531; 4 Moore, 303, S. C., was an action of covenant by assignee of lessor against lessee, for rent in *arrear. The count alleged, that Seth Thomas [*38f] was possessed of the demised premises, "that is to say, for the remainder of a term of twenty-two years, commencing from, &c., and that, being so possessed, he, on, &c., by indenture, demised the premises to the defendant, to hold from, &c., for a term of nine years;" that afterwards, Thomas, "being possessed of the said premises for the remainder of the said term of twenty-two years, subject to the said lease for nine years," by another indenture, "granted, bargained, sold, and assigned the said premises, and all his estate and interest therein, to the plaintiff, for the residue and remainder of the said term of twenty-two years." The defendant pleaded that the lessor (Thomas) was not, at the time of making the indenture of lease, possessed of the demised premises for the residue and remainder of the supposed term of twenty-two years *modo et formâ*. To that plea there was a *general* demurrer, and upon argument, the plea was holden good in substance by the Court of Common Pleas. The objections taken were, first, that the plea amounted to *nil habuit in tenementis*; secondly, that it raised an immaterial

issue, by traversing the precise extent of the term of twenty-two years. The second point was disposed of by the opinion of the court, that the plea put in issue only the substance of the allegation, viz, that Thomas, being possessed of *a* term, made a derivative demise to the defendant. That the substantial question, therefore, at the trial of such an issue would be, whether Thomas had a larger term out of which he could carve the lesser term? As to the first and more serious objection, the court admit the general doctrine of estoppel between lessor and lessee, and also that the estoppel had "equal effect between the lessee and one who is privy, or, in other words, derives his legal title from the lessor." But they add, that "the lessee is under no engagement, nor liable to any one but *the legal assignee*." "The allegation of the possession by Thomas for a term of twenty-two years, is made by the assignee, and not by Thomas himself; and the lessee has a right to know whether there is a privity between him and the assignee by means of a conveyance by the lessor of the true title. From the nature of the case, he cannot be prevented from putting in issue any material fact alleged by the assignee." And again, "*if the effect of the plea is to dispute the interest which a lessee took under a lease from a lessor, the plea is bad whatever shape it assumes. The present plea leaves the lease in the same state as the plaintiff has described it, and the defendant merely objects, that the title he has alleged as being assigned to him, was not the true title.*" The court, therefore, only professed to decide that, the tenant was not estopped to deny the [*38g] **existence of the particular reversion alleged to have been assigned to the plaintiff. They did not decide that if the lessee had been estopped as against the lessor to deny that particular reversion, he would not also have been estopped as against the assignee. No such question arose upon the pleadings, for the lease was not set forth, and enough did not appear upon the record to raise the question. (See per Patteson, J., Pargeter v. Harris, 7 Q. B. 708). Had the plaintiff, instead of demurring, replied by way of estoppel, showing the lease, and that thereby (if such was the fact) the tenant admitted a chattel reversion in the lessor, or if enough of the lease had appeared upon*

the record to show that fact, the same court might, consistently with their opinion expressed upon the actual state of the pleadings, have given judgment for the plaintiff. *Carvick v. Blagrove*, therefore, does not decide the point under consideration. Moreover, doubts have been expressed of its soundness. (See 2 Wms. Saunders, 207 d, 418 c, n. (d)).

In the case of a lease for years, made by a tenant for life, or in tail, who dies before the end of the term, an assignee, who has become so during the life of the landlord, may sue upon the covenants; but not one who has become so after the lease has become actually void by the death of the landlord. *Andrews v. Pearce*, 1 N. R. 158; *Williams v. Burrell*, 1 C. B. 402. These cases are referred to only to prevent misapprehension. They do not affect the present question, because in them an interest passed by the lease, and there was no estate either in interest or by estoppel, at the time of assignment.

But supposing it to be correctly concluded, that no case of authority negatives the proposition, that the assignee of a reversion established by the medium of an estoppel, aptly pleading, may sue upon the covenants in the lease, it must be conceded that the question to what extent the parties are estopped by the execution of a lease, is one of much nicety, and only to be answered in each case by reference to the terms of the instrument.

Akin to this part of the subject, is the question lately revived by the decision of the Court of Queen's Bench in *Pollock v. Stacey*, Q. B. 1st February, 1847, 16 L. J. N. S. 132, that the relation of landlord and tenant, properly so called, can be created between assignor and assignee upon a conveyance of the entire residue of a term, there being no reversion either in fact or by estoppel; a decision contrary to the opinion expressed by the Court of Exchequer in *Barrett v. Rolph*, 14 M. & W. 303.

The same question had previously caused a difference of opinion on the Irish bench, the Court of Queen's Bench in that part of the *kingdom having held that *Pluck v. Digges*, 5 [*38h] Bligh, N. S. 41, had authoritatively settled the question in the negative, *Lessee of Fawcett v. Hall, Alc. & N.* 248; the Court of Exchequer having

been of a contrary opinion. Lessee of Walsh v. Feely, 1 Jones, 413. The latter court, however, after reviewing all the cases upon the subject, have since concurred with the Queen's Bench," 2 Furlong on Landlord and Tenant," 1121, referring to Lessee of Porter v. French, 12th June, 1844, of which we have not been able to find a report; so that both those courts are now of accord with the Court of Exchequer in England.

Without professing to discuss the question here, it may be observed that it was not fully argued in either Barrett v. Rolph, or Pollock v. Stacey, and that it cannot be considered as settled by the refusal of the rule in the latter case. It will require for that purpose to begin the inquiry earlier than the Nisi Prius ruling in Poultney v. Holmes, 1 Strange, 405, acted upon by the Court of Queen's Bench. The distinction between conveyances by way of subinfeudation, and by way of assignment, of estates in fee (see Wright's Tenures, 156) does not appear to have been applied to the case of lesser estates, or to have been acted on after the statute of *quia emptores* for any purpose relating to lands of socage tenure, until it was brought back to light in Poultney v. Holmes, to meet the supposed hardship of a particular case. The authorities collected in the note to The King v. Wilson, 5 Man. & R. 157, as tending to establish the contrary, seem, even in the opinion of the very learned annotator (see page 162) to fail of that object. Assuming for the sake of argument, the position in Poultney v. Holmes to be correct; in what relation do the supposed undertenant of all the lessee's interest and the superior landlord stand? May the landlord treat the

supposed under-tenant as his tenant, by reason of his having acquired the entire residue of the term? It will hardly be contended that he cannot. See Palmer v. Edwards, 1 Doug. 187 n. If he can, then the supposed under-tenant may hold one and the same land immediately of two several lords, which cannot be, according to Littleton, § 231, and Lord Coke's Commentary, Co. Litt. 152 b. Perhaps the true distinction may be, between cases where it appears judicially that the entire interest has been conveyed, and cases where, by reason of estoppel, it does not so appear. In Baker v. Gostling, 1 N. C. 19, relied on in Pollock v. Stacey as confirming Poultney v. Holmes, there appears to have been a reversion by estoppel, and where there is such an estoppel, it is not necessary, as between the parties estopped, to advert to the question, whether in fact the instrument operates as an assignment or not. In *Cre-men v. Hawkes, 2 Jones & La- [38i] touche, 674, Lord Chancellor Sugden considered that there was no right to sue in equity upon such an instrument, containing express powers of distress and entry, which might be enforced at law, see Doe d. Freeman v. Bateman, 2 B. & Ald. 168. And the remedy for *actual* use and occupation, though under an invalid assignment, is of course not touched by the above controversy. See further Litt. §§ 214, 215, 216, 231, 232, and the Commentary; the notes to 2 Wms. Saunders, 418 c, d, e, et seq., and a note Alcock & Napier, 258, containing an opinion of Mr. Justice Burton, the reasoning in which goes near, if not the whole way, to conclude the discussion.]

It sufficiently appears from the authority of Spencer's case, and the principles there laid down, that the general rule of law under which a chose in action is incapable of assignment, meets with no exception in the instance of covenants, save when they are to be performed on or about land to which they relate. But although no covenant can pass with the assignment of an estate in land, unless when directly or by construction of law, to be performed upon or about it, yet it is by no means true, that in every such case, the capacity for running with the land, exists in the covenant. The existence of this capacity, depends not merely upon the nature of the covenant

and its relation to the land, but upon the nature of the estate in land to which it relates, and the absence or presence of tenure, and consequent privity of estate, as between covenantor and covenantee.

It is here proposed in the first place, to examine how far covenants, capable in their own nature, of running with the assignment of a present estate in land, possess or retain that capacity, where no tenure exists, and no estate passes between covenantor and covenantee, at the time of covenant made; where an estate in fee is passed but no tenure created; and where there is both an estate passed and tenure created: and then to proceed to the determination of the same point, where the assignment on which the question of the running of the covenant arises, is not of an estate in possession, but in reversion; or is a mere assignment of an incorporeal hereditament, of original and independent creation, or, severed from a reversion, to which it was originally attached.

Agreeably to the decision cited by Coke, from the 42 E. 3, 3, and sanctioned by his authority, in favour of the validity of the covenant entered into by the prior and convent, with the tenant of land in fee simple, as between the assignee of the land and the covenantors, there can be no doubt that the benefit of a covenant to do something about or relating to the land of the covenantee, made by a stranger, not in privity of contract or estate, with a subsequent assignee of the land, may pass to such assignee as an exception to the general rule, that choses in action are not assignable. It is under this doctrine of law, that the various covenants for title and farther assurance, all of which are for the benefit of the land, run with it to the assignees, even when the original grant has been in fee. In this case, there is in England no privity of estate between the covenantor and covenantee, but the former has always been held liable to an action on covenants by the assignees of the latter; *Middlemore v. Goodale*, Croke Car. 505; *Lewis v. Campbell*, 8 Taunton, 715. The same rule prevails universally in this country, and covenants for title, or otherwise for the benefit of the land, run with it into the hands of all those to whom it may subsequently come by descent or purchase; *White v. Whitney*, 3 Metcalf, 81; *Slater v. Rawson*, 6 Id. 39; *Wyman v. Ballard*, 12 Mass. 304; *Sprague v. Baker*, 7 Id. 586; *Shelton v. Codman*, 3 Cushing, 318; *Fairbanks v. Williamson*, 7 Greenleaf, 96; *Heath v. Whidden*, 17 Shepley, 383; *Martin v. Baker*, 5 Blackford, 232; *Suydam v. Jones*, 10 Wend. 180; *Allen v. Culver*, 3 Denio, 284; *Markland v. Crump*, 1 Dev. & Bat. 94. And in the recent case of *Savage v. Mason*, 3 Cushing, 318, it was held that a covenant contained in a deed of partition between tenants in common, which provided that party walls might be created on the dividing lines between their respective shares, and that each would pay for one half of the expense of every such wall before using it, was for the benefit of the land, and as such, would pass, both as to the right conferred and the obligation imposed, to all persons claiming by descent or assignment under the original parties to the deed. And where a covenant was given for quiet enjoyment against the covenantor, it was held to attach to the land, on its subsequent acquisition by the covenantee, and pass to subsequent assignees, although neither of the parties had any estate in the land at the time when the covenant was made; *Fuller v. Eastman*, 3 Metcalf, 121.

Lord Coke however confines the operation of this doctrine to those cove-

nants which relate to *the land*; and this, from the law as announced by Lord Holt, in *Brewster v. Kitchell*, and the general current of legal authority in England, would seem to mean *the land of the covenantee*. Where the covenantor charges land which *he himself holds in fee*, and there is no privity of estate between the covenantee and the subsequent assignee of the covenantor, it would seem, that although the covenant be one of those which are technically said to run with land, and which, if entered into by a lessee for life or years, would, in consequence of the privity of estate accruing on the assignment, bind his assignee in favour of the reversioner; yet as the covenantee is a stranger to the land, the burden of the covenant will not pass with the land, to one who takes it by assignment from the covenantor. In other words, although the benefit of covenants will enure to the assignees of estates in fee, where there is no privity of contract or estate, the burden will not; although the covenants be of a character, under other circumstances, to run with land, both as regards their benefit and their burden. *Plymouth v. Carver*, 16 Pick. 183.

Fully to understand the case of *Brewster v. Kitchell*, in which this doctrine came in question before the King's Bench, it must be kept in mind, that the rent there in dispute, was the early common law rent-charge granted *out of* land by the tenant, and not the constructive rent-charge *reserved* on a conveyance in fee, and that the question was, as to the amount of the rent, and not as to the liability of the land in the hands of the assignee, to a distress for that amount when settled. The case depended on the question, whether a covenant made by the tenant of the land, and grantor of the rent-charge, to pay without deduction for taxes, could be binding on an assignee of the land from such covenantor, not in privity of contract or estate with the covenantee, and, in effect, vary the amount of rent for which he was liable, by obliging him to pay the taxes, without deducting what he thus paid from the rent. There can be no doubt, on comparing together the different reports of the case, that the other judges agreed with Holt, that the covenant was not binding on the assignee of the land, as a covenant; but they were of opinion, that taking the deed as a whole, it granted all which by its face it appeared to have been the intention of the grantor to pass, and as the question was on a wager as to the amount of the rent, and not as to the form of the remedy, they decided for the plaintiff. In the English case just stated, the burden which the covenant imposed, was the payment of money; but it is evident that the same law must apply in the case of any other burden; and consequently, although the assignee in fee of land might, agreeably to the case of the prior and convent, take advantage of a covenant made by an entire stranger, with the assignor, to erect buildings on the land, yet, if the assignor had covenanted with the stranger, to erect them himself for the stranger's benefit, the burden of such covenant would not pass to the assignee, nor could the covenantee compel him to execute it.

In *Taylor v. Owen*, 2 Blackford, 301, this difference between the capacity of the benefit and the burden of covenants to run with land, where no privity of estate exists, was regarded as law on this side of the Atlantic. The tenant in fee simple of a tract of land, made a lease of parcel of the land, to be used for the sale of merchandize, to the plaintiff in the action, with a covenant that no other person should exercise the same trade on the residue

of the tract. Subsequently the lessor who had thus covenanted, sold a portion of the same tract, not including the parcel leased, to the defendant; who entered into possession of his purchase and exercised the same trade as the lessee of the first parcel, contrary to the intent of the covenant. The latter thereupon brought an action of covenant against him. It would seem from the decision of the Supreme Court of New York, in the case of *Norman v. Wells*, 13 Wendell, 136, that the covenant in this case was one which, as to its benefit, was capable of running with the land of the covenantee, as it affected the value of the estate granted to him, and consequently would pass, as a remedy in case of breach, to any assignee of such estate, as against the covenantor, or the assignee from him of the reversion. In the present instance, however, the question was as to the passage of its burden, to the assignee from the covenantor of other land, not including such reversion. The parties to the action, were thus entire strangers in estate, for of course the fact that the ownership of both parcels of land (the parcel sold in fee and the parcel leased for years,) was in the hands of the covenantor at the time of the covenant made, could not establish a privity of estate between such parcels either before or after the sale; and the case must therefore be viewed as if there had been no lease of any portion of the tract to the plaintiff, and simply as a covenant entered into by the tenant in fee of an estate with a stranger, that a certain thing should or should not be done on the land, of which the burden was sought to be imposed on the assignee of the estate. We have seen that the benefit of such a covenant will pass to the assignee in fee of the land; and in the present instance the court, in accordance with the view of the English law presented above, held that the burden would not, and consequently that no action could be supported against the defendant, to charge him with the covenant made by his vendor. Had the defendant however taken an assignment of the reversion of the premises leased to the plaintiff, together with the estate in fee simple in the rest of the land; then, as the covenant was of a nature to run with land, (*Norman v. Wells*, 17 Wendell, 136,) it would, by the statute 32 Henry 8, have passed with the reversion and have rendered him liable for the breach, committed by the exercise of the trade against which it provided. A re-assignment of the reversion would, however, have removed this liability, since the obligation it imposed would have passed to the new assignee, leaving the land, both directly and indirectly, unaffected by its burden.

The same point was decided by the Supreme Court of Massachusetts, in *Hurd v. Curtis*, 19 Pick. 459. The owners of different mills, who drew the water which they used from the same stream and dam, entered into an agreement, in which they covenanted to use water-wheels of a certain power and construction. Subsequently, one of the mills was conveyed to the defendant, and an action brought against him for a violation of this agreement. But it was held by the court that in the absence of privity of estate, the obligation of the covenants would not extend beyond the original parties, to third persons claiming under them by descent or purchase, and that the only remedy lay in a suit against the vendor, under whom the defendant came into possession of the premises. A similar view of the law was taken in *Morse v. Aldrich*, 19 Pick. 449; although it was decided that when the fee of a mill-dam was vested in one man, and the right to use it as a fish pond in another, there was a sufficient privity of estate between them, to

render a covenant by the former to draw off the water once in every year, incident to the land, and binding on those in whom it subsequently vested. It may be doubted whether this decision, can be sustained on the ground, on which it was put by the court. To constitute privity of estate, the position of the parties must, it would seem, be such as would formerly have given rise to the relations of tenure, and if so, it cannot arise from the mere grant of an easement out of an estate in fee. If, however, the ground taken in *Savage v. Mason* be law, and the character of a covenant be dependent upon the effect of the whole agreement, of which it is a part, the covenants in question in *Morse v. Aldrich*, and *Hurd v. Curtis*, may both have been for the benefit of the land, and consequently binding upon heirs and subsequent purchasers. For when the benefit and burden of an agreement are so inseparably connected, that each is necessary to the existence of the other, it would seem to follow that both must go together, and that a liability to the burden, will be a necessary incident to the right to the benefit.

In the case of *Scott v. Burton*, 2 Ashmead, 324, is a dictum, asserting that where the owner of land conveys a portion of it in fee, not only will the benefit of the covenants contained in the deed run with the land conveyed, but their burden will run with the unconveyed residue, and be binding on all parties who take it subsequently by assignment. As this opinion is contrary to the conclusion already expressed in this note, and as the decisions of the New York Court of Chancery in *Hills v. Miller*, 3 Paige, 254, and *Trustees of Watertown v. Cowen*, 4 Paige, 510, were quoted in its support, it may be well to examine those cases.

There can be no doubt that the holder of a corporeal hereditament may create out of it, by way of grant or reservation, any of the different incorporeal hereditaments with which it is, in its nature, capable of being affected. In this way the ownership of land, may be charged with rents, commons, ways, or the privilege of a use of water, light, or air. Moreover, with the exception perhaps of rents, such incorporeal hereditaments need not be created as exclusively personal rights, but may, as in the case of common appurtenant, be attached to other corporeal hereditaments, so as to vest in succession a right to their enjoyment in all the parties to whom such hereditaments may come by assignment. *North Ipswich Factory v. Batchilder*, 5 New Hampshire, 192. Nor need the instrument by which an incorporeal hereditament of this sort is created or enlarged, be of necessity a formal grant. Although in the guise of a covenant, yet if it be under seal and express the intention to grant, the effect of a grant will be given to it, and rights will arise under it by assignment, when by the assignment of a mere covenant nothing would have passed. This was in effect the decision of the court in *Brewster v. Kitchell* already cited, where though Holt pointed out, that the plaintiff took no right of action against the defendant, merely by force of the covenant, the court decided that he had a valid right of action by virtue of the grant to which that covenant amounted. Had he brought covenant, he would have failed: as he merely brought an action to establish his right to distrain, to the amount of what the covenant granted, he had judgment. When regarded in this point of view, the decisions in the New York cases cited above, are fully capable of being supported, without resorting to the anomaly of supposing that a covenant regarding one piece of land, can by any possibility pass as to its burden to the assignee in fee of

such land, even if, in consequence of its affecting the value of another piece granted to the covenantee at the time of covenant made, it can be construed, agreeably to the decision of *Norman v. Wells*, into a covenant running with the latter. Such assignee cannot be regarded as either in privity of contract or estate with the covenantee tenant of the land granted; for his assignment is not of any reversion or possibility of reverter in it, but of a distinct parcel, as unconnected with the other in estate, as if both had not belonged, at the time of covenant made, to the same person. The cases of *Hills v. Miller*, and *Trustees of Watertown v. Cowen*, were, however, not actions of covenant, but bills in equity for an injunction, and they were decided exactly on the principle of *Brewster v. Kitchell*, that, taking the whole of the writings under seal together, there appeared to have been an easement granted out of the property charged by the bill, which had come by assignment to the hands of the defendant; and as this easement had been rendered by the intention of the parties, appurtenant to lands granted at the same time, and subsequently conveyed by the grantee to the plaintiff, the latter recovered on the grant, though he could not have recovered on the covenant. The grounds on which Chancery will afford relief on such covenants, are strikingly illustrated by the case of *Barrow v. Richard*, 8 Paige, 351. Two lots were sold at different periods out of the same tract of land, and the deeds of conveyance contained mutual covenants between the vendor and the purchasers against the carrying on certain offensive trades on any part of the premises in the hands of either of the parties. Subsequently the second vendee brought his bill against the assignee of the first, for relief by injunction against a breach of the covenant. Agreeably to the decision in *Taylor v. Owen*, the benefit of the covenant had not under these circumstances passed at law to the plaintiff nor its burden to the defendant, although on the latter point the Chancellor expressed a different opinion. But he held that the default in the legal remedy would sustain the equitable jurisdiction, and that as the undertaking of the first vendee had imposed a charge in the nature of an easement on that part of the estate sold to him, and attached it to the portion retained by the vendor, the resulting advantages and restrictions would be enforced by Chancery according to the intent of the covenant for and against all subsequent assignees of either parcel of the land.

On the whole, therefore, we may infer that the burden of covenants charging land, made by the owners with entire strangers to the land so charged, will not run with the land, nor rest upon the parties taking it by assignment, even when the covenantees take, by virtue of the deed containing the covenant, an estate in other and distinct land belonging to the covenantors. Moreover the original covenantor himself will not, in such cases, be liable to the assignee of the estate granted to the covenantee, even where the grant creates a privity of estate between the parties, unless when the covenant affects the value of the grant, and thus agreeably to the decision in *Norman v. Wells*, becomes capable of running with the land. If therefore the owner of two contiguous estates grant one of them in fee, and covenant not to erect buildings on the whole or part of the other, the covenant will in general merely be binding as such between the parties. The assignee of the estate unconveyed cannot be made liable in an action of covenant, nor can the assignee of the land granted, support such an action even against the grantor, unless in so far as the covenant, although to be

performed apart from the land, may be held to run with it as affecting its value. But although the covenant when regarded as a contract is binding only between the original parties, yet in order to give effect to their intention it may be construed as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed. From thenceforth all future assignees of the estates in question will be regarded as possessing the rights and subject to the obligations which the title or liability to such an easement creates. It must be evident that the same general principles will apply, when the covenant is made by the grantee of the land conveyed, and binds him to avoid or perform certain things, with regard to the land which he takes by the conveyance. As the burden of covenants does not run with land independently of tenure, the subsequent assignee of such land if conveyed in fee, can never, where the principles of the Statute *Quia Emptores* are in force, be liable to an action on the covenant as such. This covenant may however amount, as between the original grantor and grantee, to the reservation or grant of an easement appurtenant to the other land belonging to the grantor, and arising out of the land conveyed to the grantee. Where this is the case, the general law applicable to easements of this nature as already laid down, will of course apply.

In thus passing, however, from the question as to the transmission with the land, of the burden of covenants made by tenants in fee with entire strangers, to that of covenants entered into with parties, from whom an estate in fee passes at the time of covenant made, the case becomes much more complicated. At common law, even if no services were reserved on a feoffment in fee, there was still a tenure created; for the feoffee held of the feoffor by the same services as the latter of the superior lord; *Lit. sect. 216*; *2 Inst. 275, 511*; *Coke Lit. 143, a.*; *Spinks v. Tenant, 1 Rolle's Reports, 106*. This tenure always arose on a feoffment, by implication of law, unless there was some express stipulation to the contrary; *2 Inst. 63, 275*.

It necessarily followed from this, that privity of estate growing out of tenure, existed as much between the feoffor of an estate, and those to whom he conveyed it, when the feoffment was in fee, as when it was for life. In the latter case there remained in him a reversion; in the former, what is perhaps better designated a possibility of reverter; but in both, the nature of his privity with the estate conveyed, was such as to entitle him to homage or fealty from the party to whom he had conveyed it, and to make any service charge or rent, which he reserved on the conveyance, a rent service, for which, without a clause of distress in the deed under which it arose, he might distrain of common right. *Lit. sect. 216*; *Gilbert on Rents, page 12*; *Lit. sect. 70*. It follows that there was a privity of estate between the grantor and the tenant of an estate conveyed in fee, which was not destroyed by assignment, since the former might still distrain on the land in the hands of the assignee, for all that was due on the reservation in the original conveyance. *Coke Lit. 142 a.* No doubt therefore can exist, that this privity of estate would have supported at that period in England, an action of covenant against the assignee of a tenant in fee under a feoffment, as it still does against the assignee of an estate for life created by feoffment; *M. Murphy v. Minot, 4 New Hampshire R. 454*; even where no reversion

remains in the feoffor. The law with regard to the latter class of estates is unaffected by the statute *Quia Emptores*, which extends only to estates in fee, and indicates what was the common law as to those estates, when they held the same feudal relation to the feoffor as estates for life; statute Westminster 3, cap. 3; 2 Inst. 504. Before the passage of that statute, the rights of the feoffor were never less, and were in some cases greater, towards a feoffee in fee holding under him, than towards a feoffee for life,⁽¹⁾ and we must therefore presume that he was in such privity of estate with the assignee from either, as to be able to support an action against him, on a covenant made by the assignor, to whom the first feoffment had been made. But the statute of *Quia Emptores* having as far as England is concerned, destroyed this common law privity of estate between feoffors in fee and those who were enfeoffed by them; and consequently turned by construction of law, all rents reserved on such conveyances into rents-*seek*, or rents-*charge*; (Gilbert on Rents, page 14; Lit. sect. 215, 216;) it follows, that the same law which Lord Holt laid down in *Brewster v. Kitchell*, as applicable to covenants made by the tenants of lands with third persons generally, is equally true, with regard to covenants entered into by grantees in fee of estates, with their grantors. Such is the legal effect of the case of *Keppel v. Bailey*, cited by the English editor (*supra*), where it was decided that a covenant entered into by the proprietors of certain iron works, not to use any other means of transit for the purpose of obtaining lime, than a railroad belonging to the plaintiffs, was not of a nature to pass with a subsequent assignment of the premises, nor to bind the assignees. No doubt the law would have been held the same way, had the covenant been made by a grantee unless the grant had been such as to create tenure or privity of estate, as between the grantor and the subsequent assignees. But in the recent case of *Hemingway v. Fernandes*, 3 Simons, 228, where the plaintiff had demised land to the proprietors of a neighbouring colliery, to be used for the construction of a railroad, and taken from the lessees a covenant for themselves and their assigns, that they would carry all the coal obtained from the mines then worked, or others thereafter opened, over the railway upon the premises demised, paying the lessors a certain rent per ton, it was held, that the covenant was of a nature to run with land, and that its burden would pass to a subsequent assignee of the railway and collieries, and render him liable for its fulfilment. In this case, it is obvious, that a tenure was created, and thus the case was taken out of the principal difficulty in *Keppel v. Bailey*, and brought within the range of the numerous decisions which render the assignee liable to the burden of covenants, whenever a privity of estate subsists between him and the original grantor: *Howland v. Coffin*, 9 Pick. 52; *Torrey v. Wallis*, 4 Cushing, 442.

The law in Massachusetts, seems to be in accordance with the rule which prevails in England; and it has been decided that the burden of a covenant made by the grantee, in fee of land, with the grantor, to maintain a highway passing by the land granted, will not run to the assignee of such land, or render him liable to an action of covenant; *Plymouth v. Carver*, 16 Pick. 183. It may be doubtful, whether such a covenant is capable of running with the land under any circumstances; but the court seem to have decided the question on the ground of the relation of the parties to each other, and

the absence of all privity between them. This case, of course, equally proves, that the burden of a covenant made by a tenant in fee, with a stranger from whom no estate passes at the time of covenant made, will not be binding on an assignee of the land, and may be cited to that effect, in conjunction with *Hurd v. Curtis*, and *Taylor v. Owens*.

The state of the law in England, by preventing the vendors of real property from imposing restrictions binding on the assignees, from the first vendees, as to the manner in which it should be enjoyed, would have led to inconveniences, which might have produced a change, were it not that when lands are granted there, for purposes requiring the restraint of covenants running with land, against acts injurious to the other grantees of the same property, they are, as in the case of building leases, usually conveyed for long terms of years, and thus all covenants susceptible of running with land, are made obligatory upon subsequent purchasers. In Pennsylvania, leases for long terms of years are but little understood, and few persons would be found willing to accept a conveyance of anything less than the fee. As the statute *Quia Emptores* is not, however, in force in that state, it would seem that all covenants of a character to run with land, under any circumstances whatever, will there be as binding upon the assignee of a grantee in fee, as upon the assignee of a lessee for life or years. *Sergeant v. Ingersoll*, 1 Wharton, 338. In truth, this conclusion is rendered necessary by the fact that an action of covenant may be maintained in that state, against the assignee of land, subject to a rent reserved, on the prior conveyance in fee to his assignor, to enforce the payment of the rent reserved in such conveyance; *Royer v. Ake*, 3 Penna. Reports, 461; *Herbaugh v. Zentmyer*, 2 Rawle, 159, while such is not the case in England, and could not be in Pennsylvania, if no privity of estate existed between the grantor of such an estate, and the grantee and his assigns. Of course, the same law which applies to the case of a covenant to pay rent, must hold good in that of other covenants capable of running with land, to the assignee of a lease for life or years; and consequently, agreements to erect back buildings or not to erect them, to keep open water courses, to support ways, and even to grind corn, made with the grantor of an estate in fee, at the time of the grant, will, in that state, not only bind the grantee making such agreement, but all persons taking by assignment from him, the same estate which he has received. This was first ruled in the case of *Dunbar v. Jumper*, 2 Yeates, 74, where it was held, that on a conveyance in fee, and covenant by the grantee to grind corn for the family of the grantor, an action might be brought against the assignee of the grantee.

These principles, and the conclusions to which they lead, will be found stated with great precision and force of argument, by *KENNEDY, J.*, in delivering the opinion of the court in the case of *Ingersoll v. Sergeant*, 1 Wharton, 348. The decision there made, appears to determine the following points.

1st. A rent reserved on a conveyance in fee, was a rent-service at common law, maintained as such by the privity of estate growing out of the relation of lord and tenant, arising from the conveyance, and supported by the possibility of reverter to the grantor, in case of a failure of inheritable blood on the part of the grantee.

2nd. The statute of *Quia Emptores*, by destroying the privity of estate

which arose at common law, on such conveyances, and removing the possibility of a reverter in case of an escheat, changed all rents reserved by the grantor on conveyances in fee, into rents-charge, since the party to whom they were reserved, was no longer the lord of the grantee, but a mere stranger.

3rd. The statute of *Quia Emptores* has evidently never been in force in Pennsylvania; since the charter of Penn provided, that the lands in that state which were granted to him to hold of the crown in free and common soccage, and by fealty, were, upon alienation, to be held, not immediately of the king, but of Penn himself, for such estates as he should deem expedient; the statute of *Quia Emptores*, to the contrary notwithstanding. This abrogation of the statute of *Quia Emptores*, was recognized by the act of assembly of the year 1700, which provided that, in default of heirs, lands, if held immediately of the proprietary, should go to him; if not so held, then to the immediate party of whom they were held; indicating that the old common law principle of subinfeudation existed, not merely between Penn and his immediate alienees, but between those alienees and the parties taking under them. Moreover, in the case of *Dunbar v. Jumper*, the court ruled that the burden of a covenant made by a grantee in fee, with a grantor, ran with the land, to an assignee from the grantee; and this decision, as well as those sustaining actions of covenant for rents reserved, on conveyances in fee, against subsequent assignees in fee, which would not be good in England, can only be supported on the ground of a privy of estate irreconcilable with the existence of the statute *Quia Emptores*. *Royer v. Ake*, 3 Pennsylvania Reports, 461; *Herbaugh v. Zentmyer*, 2 Rawle, 159.

4th. This statute not being in force, it follows, that rents reserved on conveyances of the whole fee, remained in Pennsylvania as at common law in England; and are of course rents-service capable of being apportioned, and entitling the holder to a distress of common right.

The effect of this decision, to which the courts had been for some time gradually approaching, is to remove all doubt that covenants, capable, under any circumstances, of running with land, will, in Pennsylvania, pass as to their burden to the assignee of land granted in fee, provided they are made between the grantor and the grantee, at the time of the grant.

A rent granted out of land where no estate passes at the time of the grant, is, however, in Pennsylvania as it was at common law, a rent-charge, and by a necessary implication from the decision in *Ingersoll v. Sergeant*, insusceptible of apportionment; so that a release of part of the land would release all. A covenant to pay such rent, or to perform any other act, would necessarily be made with a stranger in estate, from whom the covenantor takes nothing in the land, and would therefore be merely collateral to the land, and personal to the covenantor, and could not agreeably to the dicta of HOLT, in *Brewster v. Kitchell*, of KENNEDY, in *Ingersoll v. Sergeant*, the opinion of PLATT in his *Treatise on Covenants*, p. 475, and the cases of *Plymouth v. Carver*, and *Taylor v. Owens*, bind, or in any way affect a subsequent assignee of the land.

The law in Pennsylvania, with regard to covenants capable under any circumstances of running with land, and made by tenants in fee, may therefore be stated as follows: When, at the time of making such covenant, an estate, whether in fee simple or tail, for life or years, passes from the cove-

nantee to the covenantor, a privity of estate arises between the parties, which will pass to the assignee of the land, and sustain an action of covenant, if brought against him; but where no estate passes, the covenant is personal to the party making it, and collateral to the land about which it is made, and will not affect the assignee of such land. We may, consequently conclude with regard to that state, that if B., seised in fee of land which he does not derive from A., covenant with the latter to pay rent out of the land, or to erect or not to erect houses on it, the assignee of the land will not be bound by the covenant; but that if B., at the period of covenanting to such effect, receive the estate to which the covenant relates from A., and assign the same estate in quantity of interest which he has received to C., the latter will be liable to an action of covenant, founded on privity of estate; *Hirst v. Rodney*, 1 Wash. C. C. Reports, 375; *Royer v. Ake*; *Herbaugh v. Zentmyer*. But if the assignment to C. be of an estate smaller in quantity of interest, he will not be liable on the covenants of the assignor; *Holford v. Hatch*, 1 Douglas, 184; the *Earl of Derby v. Taylor*, 1 East; *Quackenboss v. Clark*, 12 Wend. 555.

The recent case of *Van Rensselaer v. Bradley*, 3 Denio, 135, seems to have proceeded upon the same view of the law with that taken in Pennsylvania, for it was decided that rent reserved on a conveyance in fee is at the present day in New York, as it was at common law before the statute of *Quia Emptores*, a rent service, and that a covenant for its payment, is consequently binding on an assignee of the whole or any part of the land.

We have now seen, that where a covenant is capable of running with land, the assignees of the land may take advantage of its benefit; and have examined in what cases, they will be liable to the burden of covenants made by their assignors; it now remains to determine how far the benefit or burden of covenants, extends to the assignees from the covenantor or covenantee, when not possessed of the land at the time of assignment, but merely of an estate in reversion. It is well known that at common law the assignees of reversions, could not take advantage of covenants made with their assignors, and that this, as far as it regarded reversions after estates for life and years, was helped by the stat. 32 Henry 8, cap. 34; *Crawford v. Chapman*, 17 Ohio, 449; *Beekford v. Parson*, 7 C. B. 920. This statute only extended to such reversions; *Coke Lit.* 215, a; *Winter's case*, *Dyer*, 307, a; *Lewes v. Ridge*, *Croke Elizabeth*, 863; not reaching even the case of the reversion subsisting in the grantor of an estate-tail; and of course did not embrace the possibility of reverter, which existed in a feoffor in fee at common law, *Lit. sect.* 216, but which had been destroyed by the statute of *Quia Emptores*.

It follows, that in England, parties claiming by assignment from covenantees who have made a conveyance in fee at the time of receiving the covenant, remain under the operation of the common law, which forbade the assignment of a chose in action, and are consequently incapable of suing the covenantor or his assigns in their own names. And as the assignee of a rent reserved on a conveyance in fee, comes within this rule, he cannot sue the tenant of the land on his covenant for the payment of the rent; *Milnes v. Branch*, 5 M. & S. 411.

The same doctrine may be presumed to prevail in this country, except in those states where a change has been made by local statutory enactments.

The law is, notwithstanding, well settled the other way in Pennsylvania, by the cases of *Streater v. Fisher*, 1 Rawle, 155, and *Miles v. St. Mary's Church*, 1 Wharton, 229, in which it was held, that the assignee of a ground-rent, might bring covenant against the tenant of the land. It is somewhat difficult to reconcile these cases with principle. Although in that state the feudal connection between the grantor of an estate in fee, and the grantee would seem to exist, yet the assignee of such grantor took at common law no right of action against the grantee; and we have seen that the statute of Henry 8 only applies to reversions after estates for life and years; *Devises of Van Rensselaer v. Executors of Platner*, 2 Johnson's Cases, 24; *Lewes v. Ridge*; *Winter's case*, supra, 96; and it would therefore appear, that whether the statute of *Quia Emptores* be in force or not, the assignee of a ground-rent should not be entitled to maintain an action of covenant in his own name. As the rent itself, being an incorporeal hereditament, necessarily passes to him by the assignment, he may of course distrain; or an action of covenant may be brought in the name of the person to whom the covenant to pay it was first made. Debt on the obligation created by the covenant, he, of course, has not in the absence of the covenant itself, and debt on the *reddendum* only existed at common law, in the case of rents reserved on leases for years; and the statute of Anne, which merely extended the latter form of action to leases for life, seems not to be in force in Pennsylvania. Report of the Judges as to English statutes in force in Pennsylvania, 3 Binney 593; *Abbot of Bury's case*, *Dyer*, 33, 60, per *BALDWIN*, C. J.; *Brindloss v. Philips*, *Croke Elizabeth*, 895; *Bishop of Winchester v. Wright*, 2 Lord Raymond, 1056; *Varley v. Leigh*, 2 Exchequer, 446.

It would appear, therefore, that on the strict principles of law, the assignee of a ground-rent cannot bring any action in his own name, to recover the rent when in arrear, but must resort to his distress. Much doubt was formerly entertained in England, whether the assignee of rent reserved on the grant of an estate for years, could support any action to recover the rent where the reversion did not pass by the assignment. *Austin & Smith's case*, 1 Leonard, 315; *Robbins v. Warwick*, 1 Keble, *sed contra*, *Ard v. Watkins*, *Croke Eliz.* 637, 651; *Allen v. Bryan*, 5 B. & C. 512. The authority of *Littleton* and *Coke* is decisive, that the assignee of a rent reserved on the conveyance of an estate in fee, was without remedy of any sort, where the services, and consequently the possibility of reverter, were expressly excepted out of the grant, unless he obtained seisin of the rent from the tenant, and thus acquired the power of resorting to an action real. *Lit. sec.* 235; *Coke Lit.* 139, b. Where the services are not excepted, but the whole interest of the grantor in the rent and its incidents is passed, as is always the case in all assignments of fee farm and ground-rents at the present day, the assignee acquires the power of resorting to a distress; but, as it would seem, no action personal of debt or covenant to recover the rent when in arrear. And *SERGEANT*, J. would seem to have been of this opinion, in giving the decision of the court in *Kenege v. Elliot*, 9 Watts, 262. It must, however, be observed that the opinion has been entertained, that the assignee of a reversion after an estate for years, took a right of action at common law on the implied covenant of the lessee, arising out of the *reddendum*, to pay the rent, or fulfil the reservation contained in it in any other

manner; *Vyvyan v. Arthur*, 1 Barn. & Cres.; *Harper v. Bird*, 2 Levinz, 208; and it might, therefore, be thought, that the assignee of a rent reserved on a conveyance in fee would, in the absence of the statute of *Quia Emptores*, have in Pennsylvania a right of action on the implied covenant of the *reddendum* reserving the rent. As, however, an action of debt cannot be brought, it is difficult to believe that there can be a right to bring an action of covenant, as that would more effectually have contravened the feudal policy than debt. *Gilbert on the Action of Debt*, 5; *Harper v. Bird*, T. Jones, 102. It is, however, on this ground of the passage, with reversions, of the right to bring an action on the implied covenant in the *reddendum*, and not under the statute 32 Henry 8, which is wholly inapplicable, that the cases of *Streaper v. Fisher*, and of *Miles v. St. Mary's Church*, deciding that the assignee of a ground-rent can sue in covenant, are alone capable of being supported, if considered as resting exclusively on common or statute law. But the courts of Pennsylvania professedly administer equitable principles through the medium of common law forms, and as the assignee of a ground-rent, when destitute of legal remedy, may no doubt support a bill in equity for its recovery, there would seem to be no sufficient reason why he should not attain the same object in that state, by an action of covenant. *Livingston v. Livingston*, 4 Johns. Ch. 287.

In the case of *Scott v. Lunt's Administrator*, 7 Peters, 605, the Supreme Court of the United States held, in accordance with the Pennsylvania decisions, that the assignee of a rent reserved on a conveyance in fee, might bring an action of covenant against the covenantor or his personal representative. STORY, J., in delivering the opinion of the court, appears to have arrived at the conclusion, that the annexation of a condition of defeasance to a grant in fee, raised some sort of estate or interest in the grantor, even before condition broken, and moreover, that this interest brought an assignee from him within the 32 Henry 8, relating to assignees of reversions. In support of this doctrine he cited the case of *Havergill v. Hare*, Croke Jac. 511; S. C., 2 Bulstrode, 350. On this point it is only necessary to observe, that in *Havergill v. Hare*, a fine was levied, by which the legal estate in the land was conveyed to the use that the tenant of the rent and his assigns might enter for rent arrear; and thus the point of law there discussed was, merely whether the assignment of a springing contingent use, when coupled with an estate which it was meant to secure, was good, if made before the use became vested in interest. Moreover, there was in that case no condition, and still less any reversion in the tenant of the rent, since it was a rent-charge granted out of land, which was not conveyed by the grant. Of course no condition attached to or affecting the land, could be raised by the deed granting the rent. The two cases of *Havergill v. Hare* and *Scott v. Lunt's Administrator*, are consequently not in *pari materia*; for the former was of a rent granted out of land, the land itself remaining unconveyed; so that no CONDITION in defeasance of the estate in the land was possible; Lit. sec. 349; and it was held by all the justices, that none existed; while in the latter there was a rent reserved on a conveyance of the land, with a valid common law condition of re-entry. One decision is therefore no authority for the other; and it is evident, that in the case in Peters, the grantor could have had no estate or interest in the land, under the condition, even after breach, if before entry, and that his rights under it were incapa-

ble of assignment; while even if he had possessed the interest attributed to him in the decision of the court, it would not have come within the statute 32 Henry 8.

Whatever may be the law on this subject, as held in Pennsylvania and the courts of the United States, it has been decided in New York, in a case of great hardship to the unsuccessful party, that the assignees of a fee farm or ground-rent, are not within the statute 32 Henry 8, and cannot recover in an action of covenant against the executor of the deceased tenant in fee on an express covenant made by the testator. *Devises of Van Rensselaer v. Executors of Platner*, 2 Johnson's Cases, 24. It was not directly decided that the action could not be maintained against the tenant in fee then in seisin of the estate; but it must be inferred from the facts of the case and the language of the court, since the plaintiffs, who were devisees of the rent, being held not within the statute as to assignees of reversions, the case was said to be at common law, and stronger against them than if they had been assignees of a reversion after an estate for life or years, and brought an action of covenant against the tenant of the estate before the statute, when such an action would certainly have been bad. In the previous case of *The Ex'ors of Van Rensselaer v. The Ex'ors of Platner*, in the same volume of reports, it had been held, that the defendants were liable on the covenant; so that if the right to enforce it had passed to the plaintiffs with the ground-rent under the devise, they must have had judgment. And the court in deciding that the devisees could not sustain their action against the executors of the covenantor, necessarily decided that they could not have sued the covenantor himself, had he been living, or his assignee, now that he was dead; for executors are always liable on an express covenant of the testator for the payment of money. This case is, therefore, opposed to that of *Scott v. Lunt's ad'm.*, and appears to proceed upon the only sound view of the law.

Although it does not appear, that there are any decisions on this particular point in the other states, yet it would seem, on general principles, and from the cases already quoted, that in all those states of the Union where the common law forms the basis of the system of jurisprudence, and where there are no express and peculiar statutory enactments to the contrary, the assignees of rents in fee, issuing out of estates held in fee, cannot bring an action of debt on the *reddendum*, against the tenants of the lands charged with such rents. The cases of *Milnes v. Branch*, 5 Maule & Selwyn, and *Van Rensselaer v. Platner*, show that the covenants made with the original holders of such rents, cannot run with the rents themselves, or be transferred to the assignees under any form of assignment; and it would consequently seem that the latter, as a general proposition, can bring no action of covenant in their own names for rent arrear. And they cannot be in a better position, as it respects an action of debt, than the parties from whom they take by assignment.

The obstacles which this doctrine presents to the recovery of rents reserved in conveyances in fee, have been removed in New York since the case of *Van Rensselaer v. Platner* was decided, by the Revised Statutes, which put such rents on the same footing with those reserved in leases for life or years, and invest the assignees, with the right to use all the remedies which could have been employed by their assignors; 1 Revised Statutes, Part 2, Ch. 1, Sects. 23, 25; *Van Rensselaer v. Bradley*, 3 Denio, 135. On the other

hand, in Ohio, where the statute 32 Henry 8, 634, has not been adopted, covenants can only run with a present estate in land, and cannot be enforced by the assignee of a reversion even where reserved on the grant of an estate for life or years. *Crawford v. Chapman*, 17 Ohio, 449.

Agreeably to the principles of the common law as already stated, to pass to a third party the right of action on a covenant, there must, in all cases, have been a conveyance of some definite estate. The covenant by itself, whatever might be its nature, was necessarily incapable of assignment by deed or parole; but if it were attached to an estate in land, any assignee of the land unavoidably took with it the covenant.

It follows as a consequence, from this, that while between the original grantor and grantee of an estate, a covenant could never be called into being without deed; yet if it were capable of running with land, any subsequent assignment of the estate, even by parol, carried with it to the assignee, a right of suit on the covenant. A deed, although necessary to create the covenant, was yet unnecessary to transmit it; and where livery of seisin was made, inoperative. *Lincoln College case*, 3 Coke, 63; *Noke v. Awder*, *Croke Eliz.*, 373, 457.

It was an inevitable deduction from these principles, that as the covenant did not pass by the deed from the original grantee of land to the assignee from him, but only with the land when conveyed, whether by deed or not; or in other words, as the covenant did not and could not pass by any form of conveyance, but merely, as an incident to the land which such conveyance passed, so when the original grantee took no estate under the grant in the deed containing the covenants, no subsequent assignment by him could transfer them to the assignee. Being incapable of a direct transfer, they could not pass by force of the assignment itself, nor could they run with the land, which the grantee had not to convey.

When, therefore, it appeared on the face of the declaration, that the lessee of land, under whom the plaintiff in an action brought on the covenants in the lease, against the lessor, claimed by assignment, took no estate by the demise, the court held that the action could not be maintained. *Noke v. Awder*, *Croke Eliz.* 373, 436. The ground of their opinion was, that the covenants could not have run with the land under the assignment to the plaintiff, as there was no estate in the land on which it could operate, and it was incapable of passing them by its direct effect as an assignment.

This doctrine that covenants cannot pass under the operation of an assignment, unless the assignment transfers some estate in land with which they may run, was again applied in the case of *Andrews v. Pearce*, 4 Bos. & Pul. 162. The tenant in tail of lands made a lease for ninety-nine years, with a covenant for quiet enjoyment. Subsequently to his death, by which the term was avoided, the lessee, who continued in possession, assigned his estate to the plaintiff, who was ousted by the party entitled under the entail, and brought an action on the covenant against the executor of the lessor.

The plea of the defendant having averred, what indeed appeared from the declaration, that the title of the lessor determined before the assignment the plaintiff demurred; and argued in support of the demurrer, that the defendant was estopped by the indenture of lease, from showing that his testator's title did not extend, to making a good lease for the whole term demised. The court, however, without taking notice of this objection, decided, that as

it appeared from the pleadings that no estate in the land passed by the assignment, the naked covenant could not be assigned by itself, and, therefore, that the plaintiff was not entitled to recover.

In the case of *Nesbit v. Montgomery*, 1 Taylor, 84, will be found a judgment supporting and illustrating this doctrine with great force and precision of argument and language. An action of covenant was brought by the assignee in fee of an estate, who had received a conveyance from the original grantee then in possession of the estate assigned, against the first grantor, on a covenant for quiet enjoyment in his original deed of grant. The declaration set out the existence of a title paramount to that of the grantor, and an eviction of the assignee under it, and as it thus appeared that the grantee had no estate in the land at the time of the assignment, having taken nothing under the original grant save a bare possession, the court held that the covenant could not pass to the assignee. It was said it could only be passed, as incident to the transfer of an estate in the land.

The same law will be found recognized or applied in the cases of *Beardsley v. Knight*, 4 Vermont, 471; *Nesbit v. Brown*, 1 Devereux's Equity Rep. 30; *Randolph v. Kinney*, 3 Randolph, 396; *Allen v. Wooley*, 1 Blackford, 149; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Green v. James*, 6 M. & W. 665. *The Mayor of Carlisle v. Blamire*, 8 East, 487; *Pargeter v. Harris*, 7 Q. B. 708.

The consequences of this doctrine are very important at the present day. No inconvenience could arise from it under the old common law except in the case of terms for years, when we have seen its effect in defeating a recovery in *Noke v. Awder*. But it did not apply to conveyances of freeholds, for as they were conveyed by livery of seisin, an actual estate was transferred by right or wrong to the first feoffee in all cases, and might pass from him to any subsequent assignee. Thus when a feoffment was made, although the feoffor might have previously had nothing in the land, the feoffee took an estate of freehold which was susceptible of being transferred to a second feoffee, and carrying with it all warranties and covenants made by the original feoffor.

But in conveyances taking effect under the statute of uses, as must all those which are intended to pass an estate of freehold and are unaccompanied by livery, nothing passes to the vendee save only the estate actually and legally possessed by the vendor. Of course, therefore, in the very case in which the title to an estate totally fails, and in which the purchaser who has taken it on the security of the covenants for title, entered into by a previous vendor, most requires the assistance of the principle which gives to an assignee, the right to sue on the indemnity, given to his assignor, he is left under the operation of the doctrine of *Noke v. Awder*, as applied to our modern system of conveyancing, wholly without remedy.

It would seem moreover, that in a suit thus brought by the assignee of land on the covenants of the original vendor, he cannot take advantage of the doctrine of estoppel, to prevent the defendant from setting up as a defence, that no estate passed by his deed to the assignor. For as the failure of the title must be set forth in the declaration, and a mere statement of eviction without an averment that it was under title paramount, is insufficient; *Patton v. McFarlane*, 3 Penna. 419; *Kelly v. The Church*, 2 Hill, 105; the plaintiff cannot rely upon the estoppel, to support the title in opposition

to his own averment: *Slater v. Rawson*, 1 Metcalf, 450. Moreover, as a mere stranger cannot avail himself of an estoppel, the plaintiff who, by his own showing, has never been in of any estate from the defendant, cannot conclude the latter, from showing the truth of the matter to the court, by his plea, if it be not fully set out already in the declaration of the plaintiff; *Nesbit v. Montgomery*, 1 Taylor, 84; *Andrews v. Pearce*, 1 Bos. & Pul. 158. It has been however, determined, that when the assignee is prevented from taking advantage of a covenant by the want of any estate in the land on the part of his assignor, with which the covenants can run, equity will relieve him against the original vendor by whom the covenant has been made, and through whose default the deed containing it failed to convey the land. *Nesbit v. Brown*, 1 Devereux's Equity Reports, 30. But an opposite opinion has been held in Virginia, where the court expressed the opinion, that the right of a complainant to sue in equity on covenants not originally made with himself, is to be determined by deciding whether they have run with an estate in land, so as to give him the power of bringing an action at law. *Randolph v. Kinney* 3 Randolph, 396.

Notwithstanding what has been stated above, there appears to be no reason why an assignee, who has taken an estate by assignment from a vendee, holding under a deed containing covenants for title, should not maintain an action on the covenants, when any interest whatever in the land, has passed to him by the assignment, although inferior in quantity, to the estate, which the deed to the first vendee, purported to convey, and terminated by an eviction under a title paramount, accruing subsequently to the assignment. Thus in the case of *Andrews v. Pearce*, already cited, if the death of the tenant in tail who granted the original lease for years, to the assignor of the plaintiff in the action, had not occurred until subsequently to the assignment, the latter might no doubt have recovered for the breach of the covenant by his subsequent eviction. An actual chattel interest in the land would have passed, and would have carried the covenant with it, notwithstanding its termination by a subsequent event. The law was so held in the case of *Williams v. Burrill*, 1 C. B. 401, 433, in which it was decided, that where the estate of the assignee does not become void until after the assignment, he is entitled to maintain an action on a covenant running with the land, against the executor of the grantor.

It cannot however be considered as settled what amount of interest in the land, must pass to carry with it a covenant, nor whether a covenant for the security of a greater estate, could run to the assignee of an estate at will if nothing more passed under the deed containing the covenant. But is well settled in England by the cases quoted above, that when nothing but a bare possession passes by the conveyances from the covenantor to the covenantee, and from the latter to a subsequent assignee, the covenant cannot pass, either by the direct or indirect operation of the assignment.

The general doctrine that where no interest passes from the grantor, the covenants contained in the grant cannot run to a subsequent assignee from the grantee, was applied by the Supreme Court of Massachusetts in the cases of *Bartholomew v. Candee*, 14 Pick. 167, and *Slater v. Rawson*, 1 Metcalf, 450, and appears to prevail generally throughout the United States, (supra.) It is, however, materially qualified in that state by a doctrine which had its origin there, but has since spread into other parts of the country. It has

long been held in Massachusetts, that the actual possession of land under a claim of title whether well or ill founded, proves or constitutes seisin in the sense of the common law. This point was decided as far back as the case of *Marston v. Hobbs*, 2 Mass. 439, and has been held the same way on a number of subsequent occasions, both there and elsewhere. *Beaver v. Jackson*, 4 Mass. 408; *Twambley v. Henley*, id. 441; *Prescott v. Trueman*, id. 627; *Chapel v. Bell*, 17 id. 213; *Wart v. Maxwell*, 5 Pick. 217; *Slater v. Rawson*, 1 Metcalf, 450; *Kirkendall v. Mitchell*, 8 McLean, 145; *Collier v. Gamble*, 10 Missouri, 472; *Brookby v. Hathaway*, 20 Maine, 255; *Weland v. Twitchell*, 1 New Hampshire, 178. This course of decision gives to a wrongful possession under a claim of right, the character of an estate, which, although voidable by the entry or action of the rightful owner, is, notwithstanding, actual, and will, unless avoided, ripen under the statute of limitations unto an indefeasible fee. It results from this doctrine, that a conveyance by a grantor in possession under a claim of title, passes an estate to the grantee, which will carry the covenants contained in the conveyance, to any subsequent assignee. *Slater v. Rawson*, 6 Metcalf, 439. The same ground was substantially taken by the Supreme Court of New York, in *Beddoes ex'ors v. Wadsworth*, 21 Wend. 120, in which it was held, that when possession accompanies the deed, the covenants which it contains will pass to a subsequent assignee from the grantee, although the grantor has no title at the time when it is executed. And in the recent case of *Fowler v. Poling*, 2 Barbour, 300, the doctrine that actual possession under a claim of right, is equivalent to seisin, and constitutes an estate in the land with which covenants may run, was adopted to its fullest extent, and said to furnish the true explanation of the decisions made in *Beddoes v. Wadsworth*, and the other cases, in which assignees have been allowed to recover on the footing of a naked possession. It may also be inferred from the language used in *Barker's adm'ors v. McCoy*, 3 Ohio, 218; *Foot v. Burnet*, 10 id. 317; and *Devore v. Sunderland*, 17 id. 60, that the Supreme Court of Ohio hold the same doctrine, and regard adverse possession as an actual estate, until defeated by the entry or action of the true owner, and, therefore, sufficient to invest the assignee, with all covenants incident to the land in the hands of the assignor. The doctrine thus held, is unquestionably inconsistent with the more recent English authorities, but can hardly be said to be repugnant to principle. The earlier law recognised the possibility of the existence of an actual seisin, apart from and hostile to the true title, and held that the party by whom it had been acquired, might enter as tenant into the chain of feudal relations, and finally become invested through the operation of various causes, as for instance the descent of a warranty on the rightful heir, the owner of an indefeasible estate in fee simple. The true owner was disseised, and the freehold was actually vested in the disseisee, as soon as the ouster of the former was complete, and the possession of the latter actual and exclusive, although liable to be defeated at any moment by entry or action. The common law definition of a disseisin, was said by Lord Mansfield, in *Taylor v. Horde*, to have been lost in the passage of time, or more properly speaking, to be inapplicable to the relations of property and society, subsisting at the present day. And there can be no doubt, that the English courts now treat mere possession, unaccompanied by title, although actual and adverse, as wholly destitute of the characteristics and qualities

of an estate. But however this may be, it is certain that from the earliest periods, adverse possession has been at once the means and proof of title, and that the statute of James has rendered its continuance for twenty years, equivalent for all practical purposes to an estate in fee. There is, therefore, no inconsistency in holding, that since possession enduring for a sufficient length of time will confer or constitute a good title, it must be regarded as an actual estate from the moment of its commencement. It is universally admitted, that the rights given by such a possession, may be transferred from one set of hands to another, by any legal means of conveyance, and that the wrongful possession of different owners may in this way be aggregated into a title, which is perfectly good either for the purpose of defence or recovery, and which is not marketable only because its validity is a question of evidence rather than of law. *Overfield v. Christie*, 7 S. & R. 177; *Sheetz v. Fitzwater*, 5 Barr, 126. What is yet more material, is, that it has the quality of inheritance, and will descend from an ancestor to an heir by operation of law, and without the act of the parties. And it is certainly inconsistent to hold, that an interest in lands is susceptible of passing by descent, devise or grant, that it may be made the foundation of an entry in ejectment, and that if it continues, it will become an indefeasible title, and yet deny it the character of an estate in the land in other particulars. The doctrine of *Slater v. Rawson*, is therefore consistent with general principles, and should undoubtedly be preferred to the English doctrine, which interposes a technical difficulty in the way of the administration of justice little known to the earlier common law, and chiefly attributable to the change in the system of conveyancing, consequent to the statute of uses. It must, however, be recollected that under no view of the law, can an action be maintained by an assignee from a grantee, when the grantor was not in actual or constructive seisin at the time of the grant, that is where he has neither an absolute and adverse possession, nor such a title as to create a constructive possession. For in the absence both of right and possession, all the elements which constitute an estate are necessarily wanting, and the covenants contained in the grant must remain in the grantee, from the absence of every thing which can carry them farther. *Slater v. Rawson*, 1 Metcalf, 450; *Devore v. Sunderland*, 17 Ohio, 60.

The difference in the view taken on this subject in England and in this country, is well illustrated by the cases of *The Mayor of Carlisle v. Blamire*, 8 East, 487, and *Pargeter v. Harris*, 7 Q. B. 708, in which it was decided that an equity of redemption, is not such an estate in the land as can carry the benefit of a covenant for quiet enjoyment, or for the payment of rent to an assignee, and by that of *White v. Whitney*, 3 Metcalf, 83, where it was held that covenants capable of running with land, will pass with the assignment of an equity of redemption, even when the assignor has no legal estate or other estate at the time when they are made, and that when a mortgage is made to one man and a subsequent sale to another, both the mortgagee and vendee are entitled to enforce all covenants, incident to the land and anterior to the mortgage.

There is, however, more difficulty in reconciling this decision with technical principle, than that made in *Slater v. Rawson*, because as the possession of the mortgagor is that of the mortgagee, there is no room for the crea-

tion of a new and adverse interest in the former, capable of passing covenants running with the land to an assignee from him, without reference to the outstanding title vested in the latter. It is, however, strongly supported by considerations of reason and convenience, if not of abstract law, and is in harmony with the course of decision throughout this country, which, even when it does not deny the right of the mortgagee to the immediate possession of the freehold, invests the mortgagor with the most, if not all, the incidents of legal as well as equitable ownership. (See note to *Moss v. Gallimore*, *infra*.) It is, however, admitted, that the benefit and burden of covenants running with the land, will pass to the mortgagee, as incident to the legal estate conveyed by the mortgage. *McMurphy v. Minot*, 4 New Hampshire, 454; *Carvis v. McClary*, 5 id. 529, although this might perhaps be denied in some of the states of the Union, unless he were actually in possession.

There are limits even at common law to the proposition advanced by the English editor (*supra* page 118) that a covenant will not run with an estate claimed only by estoppel. In all cases where the estoppel of a conveyance of land, in which the grantor had nothing, takes effect upon an estate subsequently acquired, and actually transfers it to the grantee, (see note to *Duchess of Kingston's case*, vol. 2d.) the covenants contained in the original grant, will attach themselves to the estate thus arising, and will pass to any subsequent assignee of the estate itself, or of the reversionary interest out of which it is carved; *Webb v. Austin*, 7 M. & G. 700. *Sturgeon v. Wingfield*, 13 M. & W. 224.

The case of *Beardsley v. Knight*, 4 Vermont, 471, presents some points of law bearing on the subject, which merit examination. The court there decided, that a full legal title to the land must pass by the assignment, in order to carry with it a covenant, and that an instrument in writing with a scroll affixed, made by the pen, within which was written the word seal, could not convey such a title. They further held that the equitable estate which undoubtedly passed, although accompanied by seventeen years' quiet possession, would not authorise a suit, on covenants running with the land, made by the defendant at the time of his original conveyance by deed, to the party under whom the plaintiff claimed as assignee. As it is so far from being true, that a deed was always necessary at common law to pass the title to land, that it was never necessary when the estate was actually in possession of the grantor, and as the conveyance in the present case was a valid bargain and sale, both under the statute of uses and that of frauds, neither of which require a deed to raise a use and transfer the legal title, it is difficult to understand that the land did not pass absolutely to the plaintiff, whether the instrument were sealed or not, unless there be some statute in force in Vermont, analogous to the 27 Henry 8, c. 16, and requiring a bargain and sale to be under seal. There can be no doubt, that there passed an equitable title, accompanied by possession, and the court must be considered as deciding that such a title, even when so accompanied, will not carry a covenant with it, though of a character to run with land, and created by the deed originally conveying the property. The court would seem to have thought, that when a party wished to take advantage of covenants created by deed, as running with land under a subsequent conveyance to himself, he must show that such conveyance was by deed. This opinion seems altogether unfounded; for covenants, although requiring a deed to call them into being in

the first instance, ran with the subsequent conveyance of land at common law, when made by a parol assignment of a chattel interest, or a feoffment of the freehold without deed; *Lincoln College Case*, 3 Coke, 63; *Noke v. Awder*, Croke Eliz. 373. A parol agreement cannot, however, run with land, even where made in the course of a verbal or written lease, and hence an action brought to enforce it, must be between the original parties, and not by or against an assignee of the land itself, or the reversion. *Doe v. Phillips*, 11 Q. B. 131; *Beckford v. Parson*, 5 C. B. 920.

It was held in *Wheelock v. Thayer*, 16 Pick. 69, that the grant of a right to draw a certain amount of water from a dam, did not pass an estate capable of carrying a covenant of warranty to the assignee of the grantee. A covenant will not run, it was said, save with lands or tenements. And in *Mitchell v. Warner*, 5 Connecticut, 497, the court there went to the length of deciding, that a covenant of warranty in a deed of land did not embrace water resting on the land; and that it was not broken by the existence of a right in a third party to enter upon the land warranted and draw off the water, nor by an actual entry and diversion of the water, in pursuance of the right. The distinctions taken in this case seem ill founded; for water resting on land is part of the land itself, and whatever interferes with the possession of the subject-matter of a grant, may operate as an eviction. The former decision may also be questioned, so far as it proceeds on the general principle, that covenants will not run with inheritances incorporeal; for it was held by the Common Pleas in *Bally v. Wells*, 3 Wilson, 26, after an elaborate examination of the question, that covenants are as capable of running with incorporeal hereditaments at common law, as with land; and that their capacity for being transferred by the assignment of either species of estate, is dependent upon the same rules.

An argument, might, perhaps, be drawn from this determination, in favour of the idea, that a rent in fee, called into being by a grant or reservation, will carry with it to an assignee, the right to sue on a covenant for its payment. A covenant made for the benefit of an inheritance in land, will undoubtedly pass with a conveyance of the inheritance, under all circumstances; and in *Bally v. Wells*, the court were of opinion, that inheritances, corporeal and incorporeal, are, in general, on the same footing; but whatever the law may be on the subject of rents, unconnected in their creation with reversions, it would seem, that if originally coupled either with them, or with the possibility of reverter subsisting at common law in the grantor, after a feoffment in fee, and subsequently separated by assignment, the assignee will take no right of suit on covenants to pay them. Lit. sect. 235; Coke Litt. 159. Of course, when the lessor of an estate for years assigns the rent, keeping the reversion in his hands the assignee cannot bring covenant for the non-payment. *Allen v. Wooley*, 1 Blackford, 149. It is evident, in fact, that as the assignment, both of rent and reversion, did not carry with it an express covenant at common law, though for the payment of the rent, and the benefit of the reversion, the assignment of the rent, after severance from the reversion, cannot have any greater effect.

In delivering the opinion of the court, in a recent case of *Willard v. Tillman*, 2 Hill, 276, it was held by *Bronson, J.*, that a covenant for the payment of rent, would run with a bare assignment of the rent, severed from the reversion, and give the assignee a general right of recovery, although

judgment was given against him, upon another point. This decision, which his honor expressed to be against his own understanding of the general doctrine of the law, was supposed by him to be rendered necessary, by the authority of the cases of *Ard v. Watkins*, Croke Eliz. 637, 651, and *Allen v. Bryan*, 5 B. & C. 512, and by the previous decision of the Supreme Court of New York, in *Demarest v. Willard*, 8 Cowen, 206. It would seem, however, that none of these decisions are an authority for the proposition, that where rent is incident to a reversion, a covenant for the payment of the rent will pass, if it be severed from the reversion, and assigned apart. *Ard v. Watkins*, and *Allen v. Bryan*, were actions of debt, and were decided in favour of the assignee, as to the first, because the defendant who owed the rent, and was liable to an action of debt for its recovery, had assented, by attornment, to paying it to the assignee; and, as to the second, because the statute 4 Anne, c. 16, s. 9, had rendered attornment unnecessary. An assignment of the reversion had always, in the case of leases for years, carried the right to sue in debt, with it to the assignee, and by these decisions it was merely extended to the assignee of the rent, when aided by an attornment; but the right to sue in covenant, under the same circumstances, did not pass at common law, even to the assignee of both rent and reversion; and it is needless to repeat, that the statute 32 Henry 8, only comes in aid when there is an assignment of a reversion. And when properly construed, *Demarest v. Willard*, instead of proving that the assignee of a rent, without the reversion, can sue in covenant for arrears accruing, during the continuance of the assignment, simply proves, that an assignor who has kept the reversion, but parted with the rent, cannot; not because the covenant has passed to the assignee, but because the subject-matter to which it relates is no longer in the assignor. Not being entitled to the money due on the rent, he can sustain no damage from its non-payment, and, consequently can acquire no right of action, by the breach of the covenant to pay it.

The statute 32 Henry 8th, only applies to covenants between the lessors of land and their lessees, and does not extend to those made between the holder of a reversion, and a stranger not possessed of the particular estate on which the reversion is dependent. It would, therefore, appear that a grantee of land cannot take advantage of any covenant made with the grantor with third persons, where the estate was under lease at the time when the covenant was made, although of a nature to run with land actually held in possession. The New York revised statutes follow the statute of Henry 8, and only provide for covenants between landlord and tenant. It was notwithstanding decided in *Allen v. Culver*, 3 Denio, 284, that the assignee of a reversion might enforce a covenant between the assignor and the defendant, by which the latter had made himself answerable as surety, for the payment of the rent by the lessee, although the covenant was contained in a separate instrument and not in the lease itself. The soundness of this decision, for which no reason was assigned by the court, may be doubted. But it cannot be denied, that when a covenant is of a nature to run with land, the right of a subsequent purchaser from the covenantee to enforce it, ought not to be defeated by the mere circumstance that the estate was under lease at the time when it was made, and that unless the defendant in *Allen v. Culver* was a surety, the objection to the recovery of the plaintiff was one purely technical.

In order practically to apply the doctrine regulating the passage of covenants, as incident to the assignment of estates, it is necessary to examine what right of action on a covenant running with land, remains in a covenantor, who has made an assignment of the land to which the covenant is attached.

The general principle is, that where there has been an assignment before breach, the assignee alone can bring suit, unless the assignor show at least a continuing possibility of injury to himself; *Bickford v. Page*, 2 Mass. 460; *Niles v. Sawtel*, 7 Id. 444; *Claunch v. Allen*, 12 Alabama, 159. This rule was made the basis of decision in *Kane v. Sanger*, 14 Johnson, 89. In that case different parcels of the land to which the warranty of the defendant related, had been assigned by the plaintiff to different persons, and he now brought suit to recover for the subsequent eviction of the assignees, without having suffered any actual loss himself. The court took the distinction, that his right of action extended only so far, as his assignment had been accompanied with a warranty over; and held, that where such was the case, as he was entitled to support the action, he might be compelled to make good the damages arising from the breach. The opinion was also expressed, that the assignees were precluded, by the acceptance of the warranty from the plaintiffs, from proceeding on that originally given by the defendant. This last point was probably so held, to avoid the objection, that the decision would expose the latter to two distinct actions for the same breach. But in the subsequent case of *Withey v. Mumford*, 6 Cowen, 437, the court overruled the latter part of the proposition, and held that whether there was or was not a second warranty in the deed of assignment of land by the grantee, the right of action for a subsequent breach, would necessarily vest in the assignee and entitle him to bring suit. The same point was decided by the Supreme Court of Pennsylvania, in the case of *Le Ray de Chaumout v. Forsyth*, 2 Penna. 514, where it was again determined, that an assignee might maintain an action on a warranty in the original grant, notwithstanding the introduction of another to himself in the deed of assignment. But in giving the opinion in *Withey v. Mumford*, the court had gone further, and questioned the right of a party who has parted with all his interest in land, to recover damages, on the ground of a prospective liability, on the covenants contained in his conveyance to the grantee, and cited the case of *Booth v. Starr*, 1 Conn. 244, in which it had been determined, that the assignor could not bring suit for the breach of the warranty to him, until he had actually satisfied the demands growing out of his warranty over. The latter case was followed in *Chase v. Weston*, 12 New Hampshire, 413, where the assignor's right of suit was held absolutely dependent, on his having been compelled to make satisfaction in damages to the assignee. But in *Keith v. Day*, 1 Vermont, 660, 671, the question was treated as still open on this point; and the court contented themselves with determining that the assignor could not recover, where the assignment contained no warranty over, as under such circumstances, he could not be rendered liable for the subsequent eviction. The law was held the same way in *Markland v. Crump*, 1 Dev. & Bat. 94.

The principle that the mere existence of a covenant in the covenantor, will not give him a right of suit where he has assigned the interest to which it relates, and thus precluded all possibility of injury from any subsequent

breach, was recognised in the case of *Demarest v. Willard*, 8 Cowen, 206. In that case, the lessor of an estate for years, having assigned the rent, but without the reversion, brought, after a re-assignment to himself, an action of covenant, for the arrears which accrued during the continuance of the assignment: and the court held, that although the covenant continued in him, and no right of action passed on it to the assignee of the rent, yet, as he had no interest to be affected at the time of the breach, he could not recover, notwithstanding the re-assignment to him of all the assignee's interest. In this instance, the covenant necessarily remained in the covenantor, as no estate in the land passed with which it could run, and the right of the assignee to have brought debt for the rent, was a strong argument to show that no suit could be sustained by the assignor. But where the breach has occurred before assignment, the right of suit on the covenants of warranty and for title, has been treated in this country as dependent on considerations unconnected with the question of damages. In *Townsend v. Morris*, 6 Cowen, 123, it was determined that even when running with land, and intended for the benefit of the inheritance, they were covenants personal, sounding in damages, on which the executors of the covenantor were liable, and that being personal remedies, they did not descend as to part after breach, to the heir of one of two joint covenantees, tenants in common under the deed in which the warranty was contained, but survived to the other covenantee and tenant in common, by whom the action was well brought, for the whole damages sustained by an eviction from the whole of the land. *Beddoe's Executor v. Wadsworth*, 21 Wendell, 121, again asserted, that such a covenant, though annexed to the realty before breach, and running with the land to assignees, and descending to heirs, became, on breach, a mere personal right, and, as such, survived to the executor of the assignee who was evicted in his lifetime, and did not descend to his heir. These decisions are fully supported by those in most of the other States of the Union. *Clark v. Swift*, 3 Metcalf, 390; *Thayer v. Clemence*, 22 Pick. 490; *Bartholomew v. Candee*, 14 id. 167; *Bickford v. Page*, 2 Mass. 455; *Prescott v. Truman*, 4 id. 627; *Wyman v. Ballard*, 12 id. 304; *South's Heirs v. Hoy's Heirs*, 3 Monroe, 88, 94; *Townsend v. Morris*, 6 Cowen, 123; *Hamilton v. Wilson*, 4 Johns. 72; *Bennett v. Irwin*, 3 id. 363; *Mitchell v. Warner*, 5 Conn. 497; *Heath v. Whidden*, 24 Maine, 383; *Chapman v. Holmes*, 5 Halsted, 20; *Garrison v. Standford*, 7 id. 261.

From these cases it appears that the general current of American authority has tended, with but little exception, towards the position, that on total breach, a covenant, though annexed to the realty, becomes a merely personal right, which remains with the covenantee or his executors, and does not descend with the land to heirs, nor run with it on any future assignment to third parties. Where the right of action falls, there it lies.

It results from this doctrine, as generally applied in this country, that where the nature of the covenant is such, as in the instance of a covenant for seisin or against incumbrances, that it must be broken instantaneously, if at all, it is deprived of all efficiency for the protection of the title, in the hands of an assignee, even where the loss resulting from the breach has fallen solely upon him. Thus the right of action on covenants, originally intended for the benefit of the inheritance in all subsequent hands, has been denied, by this course of decision, to the purchaser of the land, although the party

really injured,—Chapman v. Holmes, Hamilton v. Wilson, Clark v. Swift, Mitchell v. Warner,—and held to remain in the original grantee, who has perhaps, in reality, not been a loser; Bickford v. Page, Garrison v. Sandford. But under these circumstances, the recovery of the latter has been limited to nominal damages, unless where he can rest his claim to indemnity upon having extinguished the paramount title or incumbrance, weighing upon the estate in the hands of the assignee; Prescott v. Truman, 4 Mass. 627, Wyman v. Ballard, 12 Id. 304; Rawle on Covenants, 129, 289; when it will be increased to the full amount of the sacrifice actually incurred for that purpose, unless greater than the measure of damages of the covenant.

At common law, warranty was exclusively a covenant real. The right of suit, even after breach, descended to the heirs; and as the recovery sought was solely of lands, the remedy was in all cases prosecuted against them, and could not be employed by or against the personal representatives of the parties.

Thus in the case of Pencombe v. Rudge, as reported in Yelverton, 129, it was held, that where a feoffment for life had been made, expressed in the accompanying deed by the words *dedi* and *demisi*, no action of covenant personal could have been maintained to recover damages for an eviction of the freehold, but that as the feoffees had merely been dispossessed, by a third party claiming under a prior lease for years from the feoffor, and still remained seised of the reversion in the premises, they were entitled to sue on the covenant for quiet enjoyment, implied by law from the use of the verb *demisi*. This case was subsequently taken on error to the Exchequer Chamber, where the judgment of the King's Bench below was affirmed; Hobart, 3. But from the report there given, it appears that the deed of feoffment contained a clause of express warranty, and that the Exchequer Chamber rested their judgment on the ground, that where the injury was of a nature for which no real action would lie, as in the case of the dispossession by a tenant for years, the warranty would not fail altogether, but would be so construed as to enure for the support of an action of covenant personal.*

In Chapman v. Holmes, already cited, breaches of three distinct covenants, of warranty,—against incumbrances,—and for seisin, were assigned in the declaration; and while the defendant alleged that the two latter had been broken before assignment, and had never passed to the plaintiff, he also insisted that as the action was personal and sounded in damages, it could not be sustained on the former. This position was fully supported by authorities cited from the old books of the law, and it was asserted in the course of the argument, that no English precedent could be found in which these had been disregarded, and a warranty treated on any other than the common law footing, or made the foundation of another proceeding than a voucher or warrantia chartæ. It was however held by the court, that in American, if not in English law, this part of the old system of common assurances, although once so important and peculiar in its legal relations, had become a mere covenant personal, and that the right of suit and recovery upon it was to be regulated, by the ordinary rules governing actions upon contracts under seal. A similar decision was made in Tabb v. Binford, 4 Leigh, 132. The point thus expressly determined, was tacitly assumed as the basis of decision

* See the learned note of Mr. Justice Williams, on this case, in his edition of Hobart.

in most of the cases just cited, in which the nature and operation of a warranty were presented for judicial consideration.

The ground taken in argument in *Chapman v. Holmes*, with regard to the effect given in England to a warranty, is fully supported by the authorities, if confined to those instances, in which the warranty is attached to an estate not less than for life, and the injury complained of is one affecting the freehold. But when attached to a mere chattel interest, such as a term for years, there is no room for the operation of a warranty as a covenant real, and it has been made a question not so much whether it should be allowed to fail altogether, as what effect should be given it. In the recent case of *Williams v. Burrell*, 1 C. B. 401, this point was presented under the following circumstances. A tenant for life acting under a leasing power, granted a lease for ninety-nine years, by an indenture containing a clause, that the lessor would, during the term, warrant and defend the premises demised against all the world. The appointment proved to be void, the assignee of the lessee was evicted by the remainder-man, and his executor having brought an action of covenant on the clause of warranty, the objection was taken that at the most it was only a covenant in law, and therefore could not continue in existence longer than the estate to which it was attached, nor enure to charge the executor for a breach accruing after the death of the testator.

But it was held by TINDAL, C. J., that as the clause in dispute did not come within the strict legal construction which would have applied to its words as being terms of art, had the estate granted been one of freehold instead of a mere chattel interest, the only question was as to the meaning of the words as understood by the parties, and that these in their ordinary and natural sense, amounted to an express covenant for the quiet enjoyment of the lessee during the continuance of the lease, on which his assignees might bring suit, and the executor of the lessor be made liable. And he held also, that as the only question in any instrument is as to its meaning, such meaning whether appearing expressly or collected by implication, would in an agreement under seal have the force of an express covenant, and bind not only the parties themselves, but their personal representatives, and that the defendants would therefore be liable, even if the direct purport of the clause were a warranty, and the effect of a covenant could only be given to it by implication. Covenants implied by law in the sense contended for by the counsel for the defence, as standing in opposition to those arising out of the agreement of the parties, were said to be those only which the law calls into being in certain instances, as incidents to the creation of estates, and which therefore cannot continue in existence longer than the estates to which they are accessaries. The distinctions taken throughout the whole of this case, fully prove that a warranty still remains on its common law footing in England, where the circumstances are such as to admit of its technical operation.

But the right of the heir to sue for indemnity, even where the descent occurred after a breach by eviction, was not confined at law to the case of a *warrantia chartæ* or voucher to warranty, but also extended to that of all other covenants real; *Fitzherbert*, N. B. 145. *Viner's Abridg. Covenant*, H. The tenant of land, who neglected to keep such a covenant for its conveyance was treated as a *deforciant*; *Blackstone*, vol. 3, 174; and as the

remedy sought by the writ was in the nature of that now obtained by a bill for specific performance, and consisted in a recovery of the land itself, it vested in the heir as the party really injured by the breach; and not in the executor. In this form the action of covenant has gone out of use, its demand is now in all cases merely for damages, and unless attached to an estate in land, cannot avail to give a right of action to any other than the original covenantee, or his personal representatives. The object of the earlier law, in giving the writ of covenant real, which was to afford a remedy to the party actually injured by the breach, was, however, attained in *Watton v. Cooke, Dyer*, 337, notwithstanding the change from real to personal actions, by holding that the heir might sue on a covenant, entered into between his ancestor and other joint tenants of land, to divide it equally among all. Here it is evident, that the covenant must have descended on the heir, if at all, by operation of law, as part of the real assets, and not by running with the land in which he took no estate. At the time when this case was decided, the law was obviously in a state of transition, for although the heir was held entitled to sue on a naked covenant descending to him by its own weight, and not carried by an estate in the land, yet his recovery was in damages, and not, as it would have been at common law, of the land. And the decision was obviously based on the principle which is applied by chancery in many cases at the present day, that the party who would have been benefited by the performance, is entitled to compensation for the breach. But this reasoning did not satisfy the logical exigencies of the common law, which regarded the nature of the right in the hands of the ancestor, as conclusive of the title of those claiming under him after his death. Accordingly, it soon became settled law, that as the action of covenant real had gone into disuse, and all covenants were reduced, on breach, to mere pecuniary demands, which, if recovered by the covenantee in his life, went to augment his personal estate, they must necessarily obey the same rule after his death, and vest in the executor, and not in the heir. It necessarily followed, that even where the breach was of a covenant for the conveyance of land, which would have formed part of the inheritance, if conveyed, the right of suit devolved upon the personal representatives of the covenantee, and the only redress of the heir was in equity. *Watson v. Blaine*, 12 *Sergeant & Rawle*, 131. As this rule of law takes effect, even in the case of covenants which are essentially real, it necessarily applies to those which are merely personal, although incident to the land. When, therefore, a covenant running with land, is converted into a personal demand by a breach occurring in the lifetime of the ancestor, the consequent right of action will vest, on his death, in the executor, and not in the heir. This doctrine which has been shown to prevail universally in this country, (*supra*,) was applied, in England, as far back as the case of *Lucy v. Levington*, 2 *Levinz*, 26, where the right of action for the breach of a covenant for quiet enjoyment, by the eviction of the covenantee in his life, was held to survive to his personal representatives after his death. The rule is the same, when the question turns on the right of an assignee of the land, to recover for a breach of covenant prior to the assignment, and where an estate in reversion was extended in the lands of the grantee, in consequence of the failure of the grantor to fulfil a covenant for the discharge of incumbrances, the right of suit was held to vest absolutely in him, and not to pass with a subsequent

assignment of the reversion. But the reasoning on which these decisions were founded, only applies when the covenant has been finally and completely converted into a personal demand in the hands of the covenantee, before the descent or assignment of the lands, for where it has not, its character still remains unchanged, and it will pass with the land to the hands of subsequent holders. Thus when a covenant of seisin was broken nominally as soon as made, by the want of estate on the part of the vendor, but the vendee sustained no actual injury during his life, the right to recover for a subsequent eviction was held to be in the heir, and not in the executor; *Kingdon v. Nottle*, 1 M. & S. 355; 4 id. 53. It was decided in like manner in *King v. Jones*, 5 Taunton, 418; 4 M. & S. 188, that the heir is entitled to recover for an eviction after the death of the ancestor, although occasioned by a failure to comply with a covenant for further assurance in his lifetime. In both instances, the eviction which was the real ground of the cause of action, did not occur until after the death of the ancestor, and the descent on the heir, and the point actually decided was, that the right of suit on a covenant running with land, vests in the holder of the land at the time when the injury happens for which suit is brought, and not when the covenant is nominally and technically broken. But the language of the court went much further and implied, that the right of suit on such covenants should be held to reside in the party on whom the loss ultimately falls, without regard to the time when the injury itself happens, and that no action can be sustained by the executor on a covenant for title, unless some special damage is shown to the personal estate of the testator. In support of this view, Lord Ellenborough cited the case of *Chamberlain v. Wilson*, 2 M. & S. 408, where it had been held, that an executor cannot sue on a promise of marriage made to his testator. But the real obstacle to the recovery of the executor in *King v. Jones* and *Kingdon v. Nottle* seems to have consisted not in the absence of injury to the personalty, but in the fact, that the injury to the realty did not actually occur until after the death of the testator, and consequently never vested in him as a personal right. If no suit could be brought by an executor without showing an injury to the assets in his hands; *Watson v. Blaine*, 12 Sergeant & Rawle, 181; it would be necessary either to deny all redress on a covenant for the conveyance of land broken in the lifetime of the ancestor, or else to hold that the naked right to damages descends on the heir, which would be a departure from all legal analogies. And any attempt based on the reasoning of Lord Ellenborough, to deprive the executor of the right to recover for an eviction in the lifetime of the testator, can only result in a complete failure of remedy, either on his part or that of the heir. For as an eviction under title paramount, must necessarily put an end to the title and possession of the covenantee, no estate can remain in him capable of carrying the covenant either to an heir or assignee. Hence, if the right of action fails in him and his personal representatives, it must fail altogether, for none can be brought by any other person. All, therefore, that these cases can be fairly considered as deciding is, that covenants of seisin and for further assurance, are continuing in their operation, and that although nominally broken by a refusal to execute a necessary assurance, or by the existence of a defect in the title of the grantor, the covenant still retains its capacity of running with the land until the breach is completed by an actual or constructive eviction. That this is the

true interpretation of the decisions in *King v. Jones* and *Kingdon v. Nottle*, appears from the more recent decisions in *Raymond v. Fitch*, 2 C. M. & R. 588, and *Ricketts v. Weaver*, 12 M. & W. 715, in which it was held, that the executor, and not the heir, is the person to sue for the breach of a covenant to repair, or against felling timber, although it is evident that the resulting injury must fall chiefly, or exclusively, on the inheritance. And when thus understood, *King v. Jones* and *Kingdon v. Nottle* cease to be inconsistent with the earlier cases of *Lucy v. Levington* and *Lewes v. Ridge*, where the eviction occurred in the lifetime of the ancestor, and the right of suit which was complete in his hands, necessarily remained in himself or his executor, instead of passing to the heir or assignee.

Although the rule with regard to the effect of a breach on the capacity of covenants to run with land, seems to be the same on both sides of the Atlantic, its application is unquestionably different. The English courts hold that the breach must be final and actual, and that the covenant does not acquire the character of a chose in action, until the right of suit upon it is complete; while it is held with us, that a nominal breach is sufficient to arrest the covenant in the hands of the covenantee, and prevent it from passing with a subsequent transfer of the land; *Greenby v. Wilcocks*, 2 Johnson 1; *Collier v. Gamble*, 10 Missouri, 467; *Harker v. Storer*, 8 Maine, 228; *Ross v. Turner*, 2 English, 122; *Mitchell v. Warner*, 5 Conn. 497; *Davis v. Lyman*, 6 Id. 243; *Rawle on Covenants for Title*, 289. The difference thus existing is the more remarkable, from the fact that our courts concur with the English, on the point that only nominal damages can be recovered on the covenant against incumbrances, until actual injury or eviction; *Prescott v. Trueman*, 4 Mass. 627; *Wyman v. Ballard*, 12 Id. 504; *Sprague v. Baker*, 17 Id. 588; *Tuft v. Adams*, 8 Pick. 547; *Harlow v. Thomas*, 15 Id. 66; *Delavergue v. Norris*, 7 Johnson, 358; *Beam v. Mayo*, 5 Maine, 94; *Richardson v. Dorr*, 5 Vermont, 9; *Collier v. Gamble*, 10 Missouri, 467. And it might have been thought, that as the obstacle to the passage of a covenant which has been broken, is technical, and depends upon the conversion of the covenant into a chose in action, it would not arise when this conversion is merely nominal, and that when the right to actual damages arises, after the land has passed out of the hands of the covenantee by descent or assignment, the remedy on it would vest in the heir or purchaser. The latter opinion was adopted in the first instance in Massachusetts, where it was decided that although a covenantee might recover nominal damages, for the breach of a covenant against incumbrances, which had occurred at the moment of the execution of the deed, the substantial right of suit vested in the assignee, who had been the party actually evicted; *Wyman v. Ballard*, 12 Mass. 304; *Sprague v. Baker*, 17 Id. 588. The law was held the same way in *McCrary's ex'or v. Brisbane*, 1 Nott & McCord, 104. But the later decisions in Massachusetts, have abandoned this ground, and adopted the more arbitrary and technical rule, which prevails in New York and most of the other States of the Union, that the passage of the covenant is arrested equally, whether the breach be real or nominal; *Thayer v. Clemence*, 22 Pick. 494; *Clark v. Swift*, 3 Metcalf, 390.

The English doctrine on this subject, was notwithstanding followed by the Supreme Court of Indiana in *Martin v. Baker*, 5 Blackford, 232; where it was held, that the capacity of covenants to run with land, does not cease

until they are actually and not merely nominally broken, and that the heir is entitled to sue for an injury occurring after the death of the ancestor, in consequence of a technical breach in his lifetime. And the court seem to have been disposed to go further, and hold that the right of suit vests in the party who is the loser by the injury, irrespectively of the time at which it has happened. On the other hand, the Supreme Court of Ohio concur with the general course of decision in this country, on the point that the right of suit vests finally, as soon as the covenant is broken, but hold that the purpose of covenants for title is satisfied, so long as the possession taken under the deed remains undisturbed, and that no breach occurs until actual injury or eviction. It necessarily follows that whatever may be the state of the title at the time of the grant, the covenant is not broken until the grantor or his assignee is evicted, or obliged to make some sacrifice, in order to avoid an eviction, and that the right of suit vests in the party who holds the land at that period; *Baekus's ad'or v. McCoy*, 3 Ohio, 218; *Foot v. Burnet*, 10 Id. 317. But it has also been decided, that where the grantor has neither title nor possession, and is consequently unable to transfer either the actual enjoyment of the land, or the title to enjoy it, to the grantee, the covenant for seisin is broken as soon as made, and becomes a mere right of action, insusceptible of passing to a subsequent assignee; *Devore v. Sunderland*, 17 Ohio, 60.

There can be no doubt of the soundness of this decision, whatever may be thought of the reasoning on which it is founded, for as under these circumstances, no estate or possession vests in the grantee to carry the covenant to a subsequent assignee, he cannot recover under any view of the law, either on the covenant for seisin, or on any of the other covenants for title, (*supra*.)

It has been said in some cases, that when the grantor is not seised indefeasibly at the time of the conveyance, the covenant for seisin is instantaneously and totally broken, and the grantee is entitled to recover the full amount of the consideration paid for the deed, without waiting for an actual eviction; *Richardson v. Dorr*, 5 Vermont, 9; *McCarty v. Liggett*, 3 Hill, 134; *Bingham v. Weiderwax*, 1 Comstock, 509. If this be the law, it must necessarily follow that the decision in *Kingdon v. Nottle* is erroneous, and that as the covenant is converted into a mere personal demand, it cannot pass with a subsequent descent or assignment, under the rule generally held in this country, and applied in England in *Raymond v. Fitch*. But it has been held on other occasions, that when the title conveyed, although bad at the time, becomes valid subsequently, the recovery of the grantee will fail altogether, or be reduced to nominal damages; *Garfield v. Williams*, 2 Vermont; *Wilson v. Forbes*, 2 Devereux, 30; *Conway v. Silliman*, 4 Id. 46; *Baxter v. Bradbury*, 7 Maine, 260; *Spring v. Chase*, 9 Id. 505. It would therefore appear, that in the case of this covenant, as in that of the other covenants for title, the right of action should be held to depend on the actual, and not on the nominal breach, and should consequently vest in the holder of the land at the time when the action happens; *Rawle on Covenants for Title*, 281—307.

The conclusion of the Supreme Court of Ohio, with regard to the covenants for seisin, and against incumbrances, seems to be substantially just, although some steps in the reasoning by which it was attained, may be doubted. Two different constructions may be put on these covenants, each

consistent with itself, though not with the other. Under the one they are viewed as absolute, and present engagements that the grantor has a good and unencumbered title, and are consequently broken at once, if his title be bad or encumbered, although no loss has been sustained by the covenantee. But they are regarded under the other as substantially covenants of indemnity, and as undertaking, not that the title of the covenantor is absolutely good, but that the grantee shall be saved harmless, if it prove defective. The hardship of making the vendor answerable, in cases where the vendee has not been injured, has induced the courts to recede from the former construction, as it regards the covenant against encumbrances, and to hold that the vendee cannot found a right to actual damages, on the mere existence of an incumbrance, and will be confined to a nominal recovery, unless he has sustained some real injury; *Prescott v. Truman*, 4 Mass. 627; *Wyman v. Ballard*, 12 Id. 304; *Sprague v. Baker*, 17 Id. 588; *Tuft v. Adams*, 8 Pick. 457; *Lifingwell v. Elliott*, Ib. 457; *Harlow v. Thomas*, 15 Ib. 66; *Delavergue v. Norris*, 7 Johnson, 358; *Bean v. Mayo*, 5 Maine, 94; *Richardson v. Dorr*, 5 Vermont, 9; *Stannard v. Eldridge*, 16 Id. 254; *Collier v. Gamble*, 1 Missouri, 467; *Pomeroy v. Burnet*, 8 Blackford, 142; *Whisler v. Hicks*, 5 Id. 100. The reasoning on which these decisions proceed, would seem equally applicable to the covenant for seisin, when the grantee goes into possession under the deed. And as it can serve no good purpose to give a right of suit for mere nominal damages, it is obviously better to adopt the construction followed in Ohio, and hold that both these covenants are technically, as well as actually, covenants of indemnity, which removes all doubt as to the right of the heir or assignee, to sue for an eviction occurring after the descent or assignment.

It is proper to observe, that the covenant for seisin is construed in many of the States of this country, as nothing more than an undertaking that the grantor has actual or constructive possession of the land, and is satisfied whenever possession accompanies the deed, although wholly unprotected by title, and defeated immediately afterwards by the entry of the true owner; *Fowler v. Poling*, 2 Barbour's S. C., 300; *Rawle on Covenants for Title*, 37. This necessarily involves the conclusion, that as the covenant cannot be broken, unless the grantee fail to obtain either title or possession, the breach, if any, must be final and total in the first instance, and the right of action cannot pass to a subsequent assignee; *Marston v. Hubbs*, 2 Mass. 433; *Bartholomew v. Candee*, 14 Pick. 167; *Ross v. Turner*, 2 English, 22; *Hacker v. Stone*, 8 Maine, 228. This doctrine has however been rejected in many of the States, and seems equally inconsistent with authority and reason, for although a defeasible possession may be so far an actual estate, as to carry the covenants contained in the deed to an assignee, this is no reason for holding that it satisfies their requisitions, unless it is rightful and sustained by title; *Richardson v. Dorr*, 5 Vermont, 9; *Lockwood v. Sturdevant*, 6 Conn. 305; *Devore v. Sunderland*, 17 Ohio, 10.

It is well settled, that the transfer of the obligation of an express covenant running with land, to an assignee, does not discharge the original covenantor, even when the covenant is for the payment of rent, and the assignee is accepted as tenant by the covenantee; *Dewey v. Dupuy*, 2 W. & S. 556. When, however, the covenant is implied by the words, yielding and paying, in the reddendum, the assignor will be discharged, if the rent be accepted

from the assignee, although not by the mere fact of assignment, without such acceptance; *Kimpton v. Walker*, 9 Vermont, 191; *Wilkins's case*, 3 Coke, 22. Its obligation will bind every subsequent assignee of the land, and may be enforced by subsequent assignees of the reversion, subject to the qualification, that the burden of covenants does not attach to land in the absence of privity of estate, (*supra*.) But when the covenant relates to matters collateral to the land, its operation will be confined strictly to the original parties to the contract, and will not extend to third persons claiming under them by assignment. Thus a covenant, in a lease of a manufactory, that certain tools and chalk-stones used for manufacturing purposes, shall be considered as a part of the premises demised, and be delivered up at the end of the term, will not bind an assignee of the land, and cannot, as it would seem, be enforced against the lessee by an assignee of the reversion; *Allen v. Culver*, 3 Denio, 284. In deciding this case, the court cited and relied on *Spencer's case*, to the point that if a lessee covenant to redeliver stock or money demised with the land at the end of the term, the assignee will not be bound by the covenant.

In *Suydam v. Jones*, 10 Wendell, 180, an interesting decision was made, giving the character of negotiability, to the transfer of covenants running with land, and deciding, that they are not liable in the hands of an assignee of the land, to equities, created between the grantor and grantee at the time the covenant was made by the grantor. Covenants, in general, of course, cannot be transferred by the mere act of the parties, so as to give the assignee a right to sue at common law, in his own name; and in Pennsylvania, where such a right of suit has been given to the assignee of specialties for the payment of money, the latter in availing himself of it, is liable to all equities between his assignor, and the party originally covenanting, even although they may have arisen after assignment, if before notice. But from decisions in New York, it appears, that where the covenant runs with an assignment of land, and passes by implication of law, no equity between the original covenantee and covenantor, will avail the latter as a defence to an action brought by the assignee, unless, perhaps, when there is actual notice of its existence at the time of the assignment and passage of the covenant. *Greenvault v. Davis*, 4 Hill, 64.

These decisions appear to give covenants of this sort the force of obligations under seal, and the capacity for negotiation of promissory notes. Even a formal technical release of the covenant by the covenantee after assignment, and breach, would not, it was said on the authority of *Middlemore v. Goodale*, Croke Car. 503, destroy the covenant.

It has already been stated that all covenants which relate to the land, and are for its benefit, run with it, and may be enforced by each successive assignee, into whose hands it may come by conveyance or assignment. Thus a covenant in a lease, to repair the premises demised may be enforced by an assignee of the lessee, against the lessor at common law, and under the statute 32 Henry 8, against an assignee of the reversion. *Allen v. Culver*, 3 Denio, 284. In like manner whenever a covenant relates to land, although charging it with a burden, as where it is to erect additional chimneys on the premises; *Harris v. Coulbourn*, 3 Harrington, 338; to surrender them in good order at the end of the term; *Allen v. Culver*; or for the punctual payment of the rent; *Van Rensselaer v. Bradley*, 3 Denio, 135, it may be

enforced as between all successive parties who stand in privity of estate with regard to the land. (Supra.)

In *Norman v. Wells*, 17 Wendell, 136, the question as to what species of covenants are capable of running with land, was fully considered by the Supreme Court of New York. The defendant had covenanted that he would not erect any mill for sawing mahogany, on a stream running through part of his land, in the deed by which he granted another portion of land as a mill seat, for a term of years to the lessee, from whom the plaintiff had taken by assignment. The court decided, that although the covenant was to do something off the land, yet as it affected the value of the land demised in the deed containing the covenant, it was not so far collateral to such land as not to run with it.

The English case of *Vyvyan v. Arthur*, 1 Barn. & Cres. 410, is the converse of *Norman v. Wells*, and therefore calculated to support the principle there laid down. A covenant to grind all the grain grown on the demised premises, at the mill of the lessor, was held to be in the nature of rent, and beneficial to the reversion, so long as the owner of the reversion continued to own the mill. It was therefore held that the assignee of both, might maintain an action on the covenant, although to be performed off the land.

It may be observed, that the covenant in *Norman v. Wells* contained the word assigns, and that in the preceding case of *Thompson v. Rose*, 8 Cowen, 266, the first resolution in *Spencer's case* was strictly applied by the court, and the word assigns, not being in a covenant entered into by a lessor, to pay the lessee for buildings to be erected by him on the land, the benefit of the covenant was adjudged not to pass to the assignee from the lessee.

At the same time, however, that the court held in this case, that the covenant did not run with the land to the assignee, so as to give him an action in his own name, they determined that an equitable interest in the covenant did pass; and consequently that a release given by the original lessee to the lessor, after notice of an assignment of the term, would not prevent a recovery against him in an action, brought by such lessee in his own name, but for the benefit of the assignee.

In some of the American cases, covenants which do, and those which do not run with land are treated as being essentially different in their nature, the former being designated as covenants real, and the latter as covenants personal. *Morse v. Aldrich*, 19 Pick. 449. Such a distinction might be more just, were it not that the capacity of a covenant to run with land, depends not only on the nature of the covenant itself, but on the cotemporaneous relations subsisting between the covenantor and the covenantee, so that a covenant which under one set of circumstances will run with an estate in land, or in a reversion, will be confined under another, to the parties between whom it is made. But apart from this it would seem, that at the present day, all covenants whether susceptible or insusceptible of passing as incident to the passage of the realty, are essentially personal. The true criterion of the legal nature of a covenant, is the nature of the remedy given by the law when it is broken; and it is settled both in the United States and in England, that the right of action for the total breach of a covenant running with land is purely personal, sounding in damages and surviving to executors, whereas in the case of covenants real it descended

to the heir. *Supra*. The distinction between covenants which run with land, and those which do not, is therefore, one of incident, rather than of essence, and consists not so much in the nature of the rights which they confer, and the obligations which they impose, as in their power of being made available, for or against successive holders of the estate to which they relate.

The distinction above stated, has been applied in many of the American cases to the covenants for title; and it has been asserted that while some of these covenants, as for instance those for quiet enjoyment, and further assurance, are covenants real and run with the land, others, as the covenants for seisin and against incumbrances, are covenants personal, and therefore insusceptible of passing beyond the covenantee. This distinction seems inadmissible, as implying an essential difference between these and the other covenants for title, which does not exist. All the covenants for title inserted in conveyances, relate to the estate conveyed and are for its benefit. As such they come within the definition of covenants running with land, and are as much covenants real as any covenants can be, on which the remedy sounds in damages, and is purely personal. And although no suit can accrue to an assignee of the land, on the covenant of seisin, in many of the States of the Union, this is because the covenant is held to be finally and totally broken (if broken at all) as soon as made, and thus converted into a mere right of action, which necessarily puts a stop to the running of every covenant, and not because the covenant is peculiarly and essentially personal in its nature. This is the more evident, because in England, and in those parts of this country, where the covenant for seisin is held not to be completely and finally broken until eviction, it runs with the inheritance which it is designed to protect. It is therefore plain, that the real difference in the view taken by the courts is as to the time of the breach, and not as to the nature of the covenant, and that if they agreed on the former point, there would be no room for dispute on the latter.

The case of *Norman v. Wells* may be regarded as carrying the power of covenants to run with land, to the extremest limit allowed by law. Care, however, must be taken on the one hand, not to suppose that a court of equity will not sometimes go further, and, on the other, not to draw decrees on bills of equity into precedents for actions at law. Thus in *Holmes v. Buckley*, *Equity Cases Abridged*, 26, an assignee in fee was compelled by equity, to fulfil the covenants made by his assignor, to keep open and repair a water course, granted by the latter out of the land. In *Van Horn v. Crain*, 1 Paige, 455, certain of the tenants in common of a tract of land, had leased the whole for life, with a covenant to convey the reversion, and also a certain other tract, on the payment of a fixed sum. They afterwards became possessed of the entirety, and of the other tract, which they had not at the time of lease made, and a specific performance was decreed, in a suit by an assignee of part of the lease, against a subsequent assignee of the other tract and the reversion. Now most certainly the covenant to convey the other tract, was not one which could have run with the land to the assignee of the lessee, and still less could its burden have passed to the assignee of the reversion. But there is as little doubt, that on the acquisition of the second tract by the covenantors, their previous covenant to convey it, created an equitable interest in the covenantee, which entitled him to a

deed for the conveyance of the legal estate, as against purchasers with notice; *Miller v. Abney*, 1 Ch. Ca. 38.

At law, when a covenant is capable of running with land, its burden will, of course, pass to the assignee of the legal estate, although merely a trustee, but equity in this, as in other cases, considers him as a mere instrument, and holds the cestui que trust as the party really answerable. On this principle, the courts of Pennsylvania, which enforce equitable rights and liabilities through the medium of legal forms, hold that where a conveyance is made in trust, both the cestui que trust and trustee are liable on the covenants running with the land. This doctrine was applied in the case of *Berry v. McMullen*, 17 Sergeant & Rawle, 84, although the party charged as assignee, was a stranger to the deed of assignment, as far as was shown by its face, and his equitable interest was merely a question of fact for the jury.

Under the provisions of the statute *de bigamis*, 4 Edward 1, c. 6, which seem to have been merely declaratory of the common law, the word give in a deed implies a warranty, which in the absence of tenure terminates with the life of the grantor, but extends to his heirs when a tenure is created; 2 Inst. 274, 275; Coke, Lit. 384, a; 384, b. There have been several decisions in this country in which this rule of law has been treated as still in force. *Frost v. Raymond*, 2 Caines, 188; *Kent v. Welsh*, 7 Johnson, 259; *Gratz v. Ewalt*, 2 Binney, 95; *Crouch v. Fowle*, 9 New Hampshire, 219. And it would therefore appear, that where a conveyance is not within the operation of the statute of *Quia Emptores*, or where that statute is not in force, the use of the word give will import a warranty at the present day, as it did at common law, (*supra*). The point is however of little practical importance, for the word give is seldom used in modern deeds, and the cases above cited together with many others which might be referred to, all decide that, independently of recent statutory enactments which exist in several of the states, the words grant, bargain, and sell, commonly resorted to in conveyances in this country, imply no warranty or covenant for title whatever.

In taking leave of the subject, it may be found advantageous briefly to enumerate the various rules of law which regulate the capacity of covenants to run with land.

The general legal principle, which lies at the foundation of the whole doctrine we have been examining, is, that choses in action are not assignable. A covenant under seal is of course as much within the operation of this principle as any other species of contract.

As an exception to this principle, the common law permits the transfer of covenants, not by the direct operation of an assignment, but as incident to land when passed by assignment; provided they are, in their nature, capable of running with land.

This capacity for running with land, only exists when the covenant is about or affecting the land. But it may be held to be a covenant affecting the land, although not directly to be performed upon it, provided it tend to increase or diminish its value in the hands of the holder.

But although the covenant, agreeably to the last rule, be one capable of running with land, yet independently of tenure and of privity of estate, or at all events, of such a relation between the parties as would, agreeably to the feudal law, have created tenure and privity of estate, it will only

run with the land when and as for the benefit of the land. For, the purpose of imposing a charge or burden upon the land, it shall never run.

It follows that covenants made about or relating to land which does not pass at the time of covenant made, by some conveyance between the parties, although capable in their nature of running with land, cannot enure as covenants to impose any burden, charge or obligation on a third person taking such estate by a subsequent assignment. And that even when the land is conveyed in fee at the time of making the covenant, it cannot, where the principles of the statute of *Quia Emptores* are in force, run with the land on a subsequent conveyance, as to its charge or burden. Under that statute a conveyance in fee, creates no tenure or privity of estate, and consequently only the benefit of covenants can be attached to the estate.

But where this statute, or the doctrines arising under it, are not in force, as in Pennsylvania, conveyances in fee create a privity of estate, and all covenants capable of running with land, therefore, pass both as to their benefit and burden, to every subsequent assignee of the land conveyed.

And as the statute in question only applies to conveyances of the whole fee, the common law doctrine still applies to all conveyances of smaller estates, and consequently the benefit and burden of covenants will every where pass to all subsequent assignees of such estates.

As a covenant is not by itself capable of assignment at common law, and only passes as an incident to the land conveyed by an assignment, it follows that where the assignor has no estate in the land to which the covenants relate at the time of the assignment, no right of action on them will pass to the assignee. This doctrine of course applies to covenants for title and warranties. And under these circumstances the action must be brought by the executor and not by the heir, even when the injury falls exclusively on the latter.

The estate in land requisite at common law to carry with it an express covenant, was an estate in actual possession. Hence such covenants could not run to the assignee of reversions. By force of the statute 32 Henry 8, the privity of contract in such covenants, has been transferred to the assignees of reversions after estates for life or years, provided the covenant be in its nature capable of running with land at common law. Reversions after conveyances in fee did not exist in England at the time of the statute; and reversions after estates tail are not within the limits of its operation. It follows that the assignees of parties who have made conveyances in fee or in tail remain as at common law, and have neither the benefit nor the burden of the covenants made with their assignors.

It has been observed, that at common law, the burden of covenants never ran with land, save where there was a privity of estate between the covenantor and the covenantee; or in other words, where there was a conveyance from one to the other, while their benefit might in all cases run without such privity or conveyance. Although this distinction may at first sight appear arbitrary, yet on a closer examination, it will be found to be the best of which the subject admits. When a party who has no estate in the premises, enters into a covenant, having for its object the benefit of land in the hands of another, it must be a matter of indifference to him in whose favour he is obliged to fulfil the obligation which he has assumed. He cannot, therefore, complain that the benefit of the covenant should pass to a subsequent assignee

of the land, and carry with it a consequent right of suit. The right of action is in that case transferred, and not the obligation under the covenant. On the other hand, if the assignment were allowed to operate on a covenantor, and place the assignee of the land under him, in the same position which he himself held, then the burden of the covenant would, without any reason, be imposed upon a party who might never before have heard of its existence, and who might well complain of being exposed to the obligation of a contract, independently both of consent and consideration. Such is the case where the covenantor takes nothing in the land at the time of covenant made; but where there is an accompanying conveyance to him, it is altogether changed. The performance of the covenant may be presumed to be in part consideration for the conveyance, without which it would not have been made; and therefore the assignee is fairly liable to an obligation, which partakes in some degree of the nature of a *reddendum* for his tenure. Such at least seems to have been the rule of law prior to the statute of *quia emptores*. When, however, that statute destroyed the relations of tenure, on conveyances in fee, the rights of grantors of land underwent a very material alteration. It became the policy of the law to discourage all connexions between the grantor of land and the grantee, which could not in any way impair or restrain the estate granted to the latter. And it was consequently held, that the covenants of the grantee were merely personal, and did not bind the land in the hands of a subsequent assignee. But as the reasons for this policy have ceased, it would seem entirely reasonable to determine the question, whether the burden of a covenant shall run with land by the old test, of whether it has been accompanied by a conveyance. If it has, it would seem only fair that the assignee should continue to perform that which must be regarded as having been part of the price of his land, and without which it would not have been transmitted from the covenantor, through his assignor, to himself. The land which he holds is the consideration which he has received for the contract. Where, however, the land sought to be charged with the covenant was not derived from the covenantor, the consideration of the covenant is necessarily foreign to the land, and the title held by the covenantor, and transmitted by him to any subsequent assignee, is entirely independent of the stipulations of the covenant. And as these and all the other relations, which are indicated by the old phrase of privity of estate, are absent, there is, in the necessary absence of privity of contract, no reason why the assignee should be bound by the covenant.

In restraining the power of imposing a burden upon land, by means of a covenant, to those cases in which an estate is transferred from the person by whom it is imposed, and in permitting it where such transfer occurs, although of a fee, the common law follows the same policy in the case of covenants as in the case of conditions, which can never be attached to an estate, save where it passes at the time of condition reserved, and from the person by whom it is called into being. Where such a conveyance is made, no future party has a right to complain of any burden attendant upon it, whether of covenant or condition; since, independently of the conveyance, neither estate nor burden could have reached him. Any objection, which under these circumstances can apply to the fetters imposed by covenants on subsequent assignees, must apply with greater force to conditions, which take a wider range, and need not even be performed on the

land. The limits, therefore, which the policy of the law has set to the operation of conditions, cannot be regarded as too extensive for that of covenants.

H.

[*39]

*SEMAYNE'S CASE.

MICH. 2 JAC. 1.—IN THE KING'S BENCH.

[REPORTED, 5 COKE, 91.]

Sheriff when entitled to break doors—Application of Maxim "Every Man's House is his Castle."

IN an action on the case by Peter Semayne, plaintiff,^(a) and Richard Gresham, defendant, the case was such; the defendant and one Gerge Berisford were joint-tenants of a house in Blackfriars in London, for years, George Berisford acknowledged a recognizance in the nature of a statute-staple† to the plaintiff, and being possessed of divers goods in the said house died, by which the defendant was possessed of the house by survivorship in which the goods continued and remained; the plaintiff sued process of extent on the statute to the sheriffs of London; the sheriffs returned the consors dead, on which the plaintiff had another writ to extend all the lands which he had at the time of the statute acknowledged, or at any time after, and all his goods which he had at the day of his death; which writ the plaintiff delivered to the sheriffs of London, and told them that divers goods, which were the said George Berisford's, at the time of his death were in the said house: and thereupon the sheriffs, by virtue of the said writ, charged a jury to make inquiry according to the said writ, and the sheriffs and jury *accesserunt ad domum prædictam ostio domus prædictæ aperto existen' et bonis prædictis in prædicta domo tunc existen'*, and they offered to enter the said house, to extend the goods according to the said writ: and the defendant *præmissorum non ignarus*, intending to disturb the execution, *ostio prædictæ domus tunc aperto existen', claudebat contra viscom' et jurator', prædict'*; whereby [*40] they could not come, and extend the said goods, nor the sheriff seize them, by which he lost the *benefit and profit of his writ, &c. And in this case these points were resolved;—

(a) Co. Ent. 12, pl. 11. Mo. 668. Yelv. 28, 29. Cr. El. 908, 209. 2 Roll. Rep. 294. See the report of this case in Sir F. Moore, 668, where it appears that there was a division of opinion among the Judges; and the same appears in Croke, 908, and that one of the dissentient judges withdrew his opinion.

Whether a bailiff, &c. may break a house to do execution or not. See 6 Mod. 105, &c. Ibid. [See Hob. 263, where the parties were punished for executing the process of law in a riotous manner.]

† See an account of this sort of recognizance, and the mode of proceeding thereon, 2 Wms. Saund. 70, in notis.

1. *That the house of every one is to him as his(b) castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills(c) one per infortun', without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's(d) house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree 3 E. 3; Coron. 303 and 305; and 26 Ass. pl. 23. So it is held in 21 H. 7, 39; every one may assemble his friends and neighbours(e) to defend his house against violence: but he cannot assemble them to go with him to the market(f) or elsewhere, for his safeguard against violence: and the reason of all this is, because domus sua cuique est tutissimum refugium.*

2. *It was resolved, when any house is recovered by any real action, or by eject' firmæ, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff, for the words of the writ are, habere facias seisinam, or possessionem, &c., and after judgment it is not the house, in right, and judgment of law, of the tenant or defendant.*

3. *In all cases when the King(g) is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the king's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors; and that appears well by the statute of Westminster, 1 c. 17, (which is but an affirmance of the common law) as hereafter appears, for the law, without a default in the owner, abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which if he had notice, it is to be presumed that he would obey it; and that appears by the book in 18 E. 2(h), Execut. 252, where it is said that the king's officer who comes to do execution, &c., may open [*41] the doors which *are shut, and break them if he cannot have the keys; which proves that he ought first to demand them. 7 E. 3,(i) 16. J. beats R. so as he is in danger of death, J. flies and thereupon hue and cry is made, J. retreats into the house of T., they who pursue him, if the house be kept and defended with force (which proves that first request ought to be made), may lawfully break the house of T., for it is at the king's suit. 27 Ass. p. 66. The king's bailiff may distrain for issues(k) in a sanctuary. 27 (28) Ass. p. 35. By force of a capias on an indict-*

(b) 3 Inst. 162. Cr. El. 753. 2 Co. 32, a. 7 Co. 6, a. 8 Co. 126, a. 11 Co. 82, a. 1 Bulst. 146. Stanf. Cor. 14, b.

(c) Co. Lit. 391, a. Hale's pl. Cor. 32. Stanf. Cor. 15, c. 16, d.

(d) 3 Inst. 56. Stanf. Cor. 14, a. Cor. 192. 3 E. 3. Cor. 205, 330. Br. Cor. 100. 1 Roll. Rep. 182. 22 H. 8, c. 5.

(e) 11 Co. 82, b. Br. Riots, &c. 1. 21 H. 7, 39, a. Fitz. Tresp. 246. 2 Inst. 161, 162.

(f) 11 Co. 82, b. 1 Roll. Rep. 182.

(g) Benl. 112. 1 Bulst. 146. Cr. El. 908, 909. Moor 606, 668. Yelv. 28, 29. Cr. Car. 537, 538. 3 Inst. 161. Dy. 36, pl. 40. 12 Co. 131. 4 Inst. 177. Goldsb. 79. 2 Jones, 233, 234. 4 Leon. 41. 13 E. 4, 9, a.

(h) Yelv. 29. 5 Co. 92, b. Cr. El. 909. Moor, 668.

(i) 4 Inst. 177. (k) Br. Distress, 35. Br. Trespass, 151.

ment of trespass the sheriff may^(l) break his house to arrest him; but in such case, if he breaks the house when he may enter without breaking it, (that is, on request made, or if he may open the door without breaking,) he is a trespasser. 41 Ass. 15. On issue joined on a traverse of an office in Chancery, Venire facias, was awarded returnable in the King's Bench, without mentioning *non(m) omittas propt' aliquam libertat'*: yet forasmuch as the king is party, the writ of itself is *non omittas propt' aliquam libertat'*. 9 E. 4, 9; that for felony⁽ⁿ⁾ or suspicion of felony, the king's officer may break the house to apprehend the felon, and that for two reasons: 1. for the commonwealth, for it is for the commonwealth to apprehend felons. 2. In every felony the king has interest, and where the king has interest, the writ is, *non omittas propter aliquam libertatem*; and so the liberty or privilege of an house doth not hold against the king.

4. In all cases when the door is^(o) open the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter the house^(p) and distrain for his rent or service. 38 Hen. 6, 26, a. 8 E. 2 Distr. 21, & 33 E. 3, Avow. 256; the lord may distrain in the house, although lands are also held in which he may distrain. Vide 29^(q) Ass. 49. But the great question in this case was, if by force of a *Capias* or *Fieri facias* at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house to do execution if the door be not opened. And it was objected, that the sheriff might well do it for divers causes.^(r) 1. Because it is by process of law; and it was said, that it would be granted on the other side, that a house is not a liberty; for if a *Fieri facias* or a *Capias* be awarded to the sheriff at the suit of a common person, and he [^{*42}] makes a *mandate to the bailiff of a liberty who has return of writs, who *nullum dedit respons*, in that case another writ shall issue with *non omittas propter aliquam libertatem*; yet it will be said on the other side that he shall not break the defendant's house, as he shall do of another liberty; for whereas in the county of Suffolk there are two liberties, one of St. Edmund Bury and the other of St. Ethelred of Ely, suppose a *Capias* comes at the suit of A. to the sheriff of Suffolk to arrest the body of B., the sheriff makes a mandate to the bailiff of the liberty of St. Ethelred, who makes no answer, in that case the plaintiff shall have a writ of *non omittas*, and by force thereof he may arrest the defendant within the liberty of Bury, although no default was in him. 2. Admitting it be a liberty, the defendant himself shall never take advantage of a liberty: as if the bailiff of a liberty be defendant in an action, and process or *Capias* or *Fieri facias* come to the sheriff against him, the sheriff shall execute the process against him; for a liberty is always for the benefit of a stranger to the action. 3. For necessity the sheriff shall break the defendant's house after such denial as is aforesaid, for at the common law a man should not have any execution for debt, but only of a defendant's goods.

(l) Fitz. Trespass, 232. Br. Trespass, 248.

(m) Br. Prerogative le Roy, 109. Br. Francise, 18. Br. Process, 102. Fitz. Prerogative, 21.

(n) 13 E. 4, 9, a. Fitz. Bar. 100. 4 Inst. 177. 1 Bulstr. 146. 2 Bulstr. 61.

(o) 1 Brown, 50. Cr. Jac. 481. (p) Br. Trespass, 226. Br. Issue, 26.

(q) Br. Disseisor, 52. Fitz. Assize, 286. (r) Lucas, 290. Cro. Jac. 555.

Suppose then the defendant would keep all his goods in his house, the defendant himself, by his own act, would prevent not only the plaintiff of his just and true debt, but there would also be a great imputation to the law, that there should be so great a defect in it, that in such case the plaintiff by such shift without any default in him should be barred of his execution. And the book of 18 E. 2.(s) Execut. 252, was cited to prove it, where it is said, that it is not lawful for any one to disturb the king's officer who comes to execute the king's process; for if a man might stand out in such a manner, a man would never have execution, but there it appears (as has been said) that there ought to be request made before the sheriff breaks the house. 4. It was said, that the sheriffs were officers of great authority, in whom the law reposed great trust and confidence, and are to be of sufficiency to answer for all wrongs which should be done; and they had *custodiam comitatum*, and therefore it should not be presumed that they would abuse the house of any one, by colour of doing their office in execution of the king's writs, *against the duty of their office, and their oath also. *But it was resolved, that it is not lawful for the sheriff (on request made and* [*43] *denial) at the suit of a(t) common person, to break the defendant's house, sc. to execute any process at the suit of any subject; for thence would follow great inconvenience, that men as well as in the night(u) as in the day should have their houses (which are their castles) broke, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man, at any time, might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. And although the sheriff be an officer of great authority and trust, yet it appears, by experience, that the king's writs are served by bailiffs, persons of little or no value: and it is not to be presumed that all the substance a man has is in his house, nor that a man would lose his liberty, which is so inestimable, if he has sufficient to satisfy his debt. And all the said books, which prove that when the process concerns the king, the sheriff may break the house, imply that at the suit of the party the house may not be broken: otherwise the addition (at the suit of the king) would be frivolous. And with this resolution agrees the book in(v) 13 E. 4, 9, and the express difference there taken between the case of felony, which (as has been said) concerns the commonwealth, and the suit of any subject, which is for the particular interest of the party, as there it is said. In(w) 18 E. 4, 4, a, by Littleton and all his companions it is resolved, that the sheriff cannot break the defendant's house by force of a *Fieri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. And it was said, that the said book of(x) 18 E. 2, was but a short note, and not any case judically*

(s) Yelv. 29. 5 Co. 91, b. Moor, 663. Cr. El. 409. O. Benl. 121. See 18 E. 4, 4, contra.

(t) 1 Jones, 429, 430. 1 Brownl. 50. 1 Bulstr. 146. Cr. Jac. 556. O. Benl. 121. 4 Inst. 177. Palm. 53. Dyer, 36, pl. 41. Moor, 663. Cr. Car. 537, 538. Cr. El. 908, 902. Yelv. 29. Hob. 62, 263, 264. 4 Leon. 41. 11 Co. 82. March. 34. 18 E. 4, 4, a. Br. Execu. 100. Br. Trespass, 390.

(u) 9 Co. 66, a. Cr. Jac. 80, 486. Jenk. Cent, 291. Hale's pl. Cor. 45. Owen, 63.

(v) 13 E. 4, 9, a. 5 Co. 92, a. Fitz. Bar. 110. 4 Inst. 177.

(w) Cro. Eliz. 909. Yelv. 29. Br. Execution, 100. Br. Tresp. 309.

(x) 18 E. 2. Execut. 252. Yelv. 29. Moor, 663. Cr. El. 909. 5 Co. 91, b. 92, b. Benl. 121.

adjudged and it doth not appear at whose suit the case is intended, but it is an observation or collection (as it seems) of the reporter. And if it be intended of a Quo(y) minus, or other action in which the king is party, or is to have benefit, the book is good law.

5. *It was resolved, that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any(z) person who flies to his house, or the goods of any other which are brought and conveyed into [*44] his house, to prevent a lawful *execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases after denial on request made, the sheriff may break the house; and that is proved by the statute of West. 1, c.(a) 17, by which it is declared, that the sheriff may break an house or castle to make replevin, when the goods of another which he has distrained are by him, i. c. conveyed to his house or castle, to prevent the owner to have a replevin of his goods; which act is but an affirmance of the common law in such points. But it appears there, that, before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him: for the words of the statute are, "after that the cattle shall be solemnly demanded by the sheriffs," &c.*

6. *It was resolved, admitting that the sheriff after denial made might have broke the house, as the plaintiff's counsel pretend he might, then it follows that he has not done his(b) duty, for it doth not appear, that he made any request to open the door of the house. Also the defendant, as this case is, has done that which he might well do by the law, scil. to shut the door of his own house.*

Lastly, the general allegation, (c) *premissorum non ignarus*, was not sufficient in this case, where the notice of the premises is so material; but in this case it ought to have been certainly, and directly, alleged; for, without notice of the process of law, and of the coming of the sheriff with the jury to execute it, the shutting of the door of his own house was lawful. And judgment was given against the plaintiff.

Although the sheriff, as appears from this case, may justify (after request made) the breaking open the doors of a third person's house in order to execute the process of the law upon the defendant, or his property, removed thither in order to avoid an execution, still he does so at his peril; for if it turn out that the defendant was not in the house, or had no property there, he is a trespasser. *Johnson v. Leigh*, 1 Marsh, 565, 6 Taunt.; { *Morrish v. Murrey*, 13 M. & W. 52, 57; } *Ratcliffe v. Burton*, 3 B. &

P. 229, explained in *Hutchinson v. Birch*, 4 Taunt. 627; Com. Dig. Execution, C. 5. See *White v. Wilshire*, Palm. 52; 2 Rolle, 138; *Biscop v. White*, Cro. Eliz. 759; and judgment in *Cooke v. Birt*, 5 Taunt. 769. { See, also, *Burton et al. v. Wilkinson et al.*, 18 Vermont, 186, 189. } But his right to enter the defendant's own house does not depend on any such contingency, for that is the most natural place for the defendant or his goods to be. { *Kneas v. Fitler and others*, 2 S. & R. 263. } And on the same principle,

(y) Plowd. 208, a. 2 Show. 87.

(z) Cr. Car. 544.

(a) 2 Inst. 192, 193, 194.

(b) Stile, 447.

(c) Hard. 2. 1 Mod. Rep. 286. See *Hollingsworth v. Broderick*, 7 A. & E. 40.

where there is a judgment against an administrator *de bonis testatoris*, and she marries, the sheriff may enter her husband's house to search for the goods of the testator. *Cooke v. Birt*, 5 [*45] Taunt. *771; and, although the sheriff must not break open the outer door of the defendant's house in order to execute the process (see *Kerbey v. Denbey*, 1 M. & W. 336), yet, having obtained admission to the house, he may justify the afterwards breaking open inner doors in order to execute the process, as he may cupboards, trunks, &c. *Lee v. Gansel*, Cowp. 1; {*Williams v. Spencer*, 5 Johnson, 352; *The State v. Thackam & Mason*, 1 Bay, 358; } *R. v. Bird*, 2 Show. 87; *Hutchinson v. Birch*, 4 Taunt. 619; see *Ratcliffe v. Burton*, 3 B. & P. 223. And the maxim, that "a man's house is his castle," only extends to his dwelling-house; therefore, a barn or out-house, not connected with the dwelling-house, may be broken open. *Penton v. Browne*, 1 Sid. 181, 186; {but a request for admittance must first be made; *Burton et al v. Wilkinson et al*. 18 Vermont, 186, 189. } And if the defendant, after being arrested, escape, the sheriff may break open either his own house, or that of a stranger, for the purpose of retaking him. *Anon.* 6 Mod. 105, Lofft. 390; vide *Lloyd v. Sandilands*, 8 Taunt. 250. [So, where a bailiff who has entered the house to distrain, or execute process, is forcibly ejected, he may break open the door in order to re-enter, *Eagleton v. Gutteridge*, 11 M. & W. 465; *Pugh v. Griffiths*, 7 A. & E. 838, *Aga Kurboolie Mahomed v. The Queen*, 4 Moore (Privy Council), 239.] {The principle is the same, where there has been an arrest of the person, and a levy upon goods: the rule, in its true form, being, that, for the purpose of serving civil process in the first instance, whether against the person or goods of the defendant, the officer cannot justify the breaking of the outer door of the defendant's dwelling-house, but where the execution of the process has been properly commenced, the officer may afterwards break the outer door, if necessary, for the purpose of continuing and completing the execution; *Glover v. Whittenhall*, 6 Hill, 597; *Saunders v. Millward et al*, 4 Harrington, 246. } It is above stated that the sheriff cannot justify breaking open the outer door of a stranger's house, unless it prove that the defendant or his goods are actually there; if they be not there he will be a tres-

passer. This doctrine has been carried still farther: for it has been thought that he cannot, even though he may have grounds for suspicion, justifying entering the dwelling-house of a third person, although he break no door, unless it prove in the event that the defendant or his goods were actually therein. In *Cooke v. Birt*, 5 Taunt. 765, Dallas, J., says, "The sheriff may enter the house of a stranger if the door be open; but it is at his peril whether the goods be found there or not; if they be not, he is a trespasser." The expressions of Gibbs, C. J., are to the same effect. In *Johnson v. Leigh*, 6 Taunt. 245, in trespass for breaking and entering the plaintiff's house, and breaking the inner doors, locks, &c., the defendant, as sheriff, justified entering under a *testatum capias*, against T. Johnson, the outer door being open, and there being reasonable and sufficient cause to suspect and believe, and the defendant suspecting and believing, that T. Johnson was in the house. On demurrer, Gibbs, C. J., said, "In *Hutchinson v. Birch*, 4 Taunt. 619, the goods were in the house, here the defendant only avers a suspicion that T. Johnson was in the house; I protest that the court have not decided this point, or dropt, in the case of *Hutchinson v. Birch*, anything which favours the opinion, that it may not go abroad to the world that we have so decided." Leave was given to amend the plea. However it is apprehended that circumstances might exist, under which the sheriff would be justified in entering the house of a stranger on suspicion, though the defendant were not actually there. Supposing, for instance, that the defendant were on a visit with the stranger, the dwelling-house of the stranger would seem to be, *pro tempore*, the defendant's dwelling-house, so as to entitle the sheriff to enter it; upon the principle on which *Cooke v. Birt* was decided, namely, that of its being the place where it would be natural to expect the defendant, or his goods to be. I have seen a plea framed on that idea, and indeed the point is virtually so ruled by *Shere v. Brooks*, 2 H. Bl. 120, where it was held, that, when the defendant resided in the house of a stranger, the bail above might justify entering it in order to seek for him, the outer door being then open; for, said Lord Loughborough, "I see no difference between a house of which he is solely possessed, and a house in which he resides with the

consent of another." It seems to follow from this, that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal. There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger, upon bare suspicion, *viz.* if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house, for the purpose of favouring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff, who entered under the false supposition thus induced, as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter. See *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530; and an *anonymous* case in Chitty's Gen. Prac. of Law, 1st. Edit. vol. 3, p. 354, n. x. {But in *Morrish v. Murrey*, 13 M. & W. 52, a plea alleging that the defendant in an execution had resided in the plaintiff's house for six months next preceding the trespass, and that the sheriff had good ground to suspect and believe, and did actually suspect and believe, that the person was then in the house, was decided to be insufficient in an action against the sheriff for entering the plaintiff's house; and the rule was laid down, without qualification by Alderson, B., that "a party who enters the house of a stranger to search for and arrest a defendant, can be justified only by the event."}

[*46] The distinction taken in this case *between process at the suit of the king and that of an individual, is recognised in *Burdett v. Abbott*, 14 East, 157; *Launock v. Brown*, 2 B. & A. 592; 2 Hale, P. C. 117; *Foster on Homicide*, p. 320.

It is laid down in the text, that, before the sheriff breaks the outer door of a stranger's house, in those cases in which he has right to do so, he ought to demand admission; and this is also necessary when he breaks open the defendant's own doors in order to execute the process of the crown, *Launock v. Brown*, 2 B. & A. 592; even in case of felony, 2 Hale, P. C. 117; *Foster on Homicide*, p. 320; or, in order to retake the defendant after an

escape; see *Genner v. Sparks*, 1 Salk. 79; 6 Mod. 173; *White v. Wilshire*, 2 Rolle's Rep. 138. [See *Palm*, 52, where the bailiffs were imprisoned, and the door broken to rescue them. On a similar principle in *De Gondouin v. Lewis*, 10 A. & E. 120, the court thought that before seizing contraband goods from the person the officers ought to demand them.] But though it was considered in *Ratchiffe v. Burton*, 3 B. & P. 223, that admission should be demanded before breaking an *inner* door, the contrary was decided in *Hutchinson v. Birch*, 4 Taunt. 619. {In *Kneas v. Fitler and others*, 2 Sergeant & Rawle, 263, 265, the opinion of FOSTER, there, in every case, civil or criminal, where outer doors are broken open, there must be a previous notification and demand, is approved of by YEATES, J.; and the *dicta* in *Glover v. Whittenhall*, 6 Hill, 597, 599, recognize the necessity of a reasonable demand before the outer door is forced for the purpose of recapturing goods that have been levied upon. But in *Allen v. Martin and others*, 10 Wendell, 300, where it was decided, that if one arrested escape into his own house, the officer, to retake him, may break the outer door, it was held, that the party's conduct in having violently opposed and thrust out the officer, dispensed with the necessity of a previous notification and demand, as being, in such a case, "a senseless ceremony."} [In *Pugh v. Griffiths*, *7 A. & E. 833, the sheriff's [*46a] officer, under a *fiery facias*, had lawfully entered a house and seized goods there, and the outer door being locked upon him, he was held justified in breaking it open to carry away the goods, there being no one whom he could request to open it. In *Aga Kurboolie Mahomed v. The Queen*, 4 Moore (Privy Council) 239, a sheriff's officer in the execution of a bailable writ lawfully entered a house, but before he could arrest was forcibly expelled; he obtained assistance, and without demand of re-entry, broke open the outer door, re-entered, and made the arrest. The Judicial Committee of the Privy Council held the officer and his assistants justified. To use the pointed language of the judgment, which was delivered by Lord Campbell, "The outer door being open, they were entitled to enter the house under civil process, and they being lawfully in the house to arrest him, he was guilty of a trespass by expelling them. The act of locking

the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act.”]

The law upon this subject is so well, and, at the same time, briefly summed up by Sir Michael Foster, in his *Discourse of Homicide*, pp. 319, 20, that I cannot forbear inserting his account of it in his own words; it is as follows:—

“The officer cannot justify breaking open an outward door or window in order to execute process in a civil suit; if he do he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door is opened to him from within, and he entereth, he may break open inward doors if he findeth that necessary in order to execute his process.

“The rule, that *‘every man’s house is his castle.’* when applied to arrests in legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what, in the scale of sound reason and good policy, they will warrant. But this rule is not one of those that will admit of any extension; it must, therefore, as I have before hinted, be confined to the breach of windows and outward doors, intended for the security of the house against persons from without endeavouring to break in.

“It must likewise be confined to a breach of the house in order to arrest the occupier, or any of his family, who have their domicile, their ordinary residence, there; for, if a stranger, whose *ordinary residence is elsewhere*, upon a pursuit taketh refuge in the house of another, this is not *his castle*, he cannot claim the benefit of sanctuary in it.

“The rule is likewise confined to cases of arrests, *in the first instance*; for, if a man, being legally arrested (and laying hold of the prisoner and pronouncing the words of arrest is an actual [*46*b*] arrest), *escapes from the officer and takes shelter, *though in his own house*, the officer may, upon fresh suit, break open doors, in order to retake him; having first given due notice of his business and demanded admission, and been refused.

“And let it be remembered that not only in this, but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

“The rule already mentioned must

also be confined to the case of arrest upon process in civil suits; for, where a felony hath been committed, or a dangerous wound given, or even where a minister of justice comes armed with process founded on a breach of the peace, the party’s own house is no sanctuary for him; doors may, in any of these cases, be forced; the notification, demand, and refusal before-mentioned having been previously made. In these cases, the jealousy with which the law watches over the public tranquillity (a laudable jealousy it is,) the principles of political justice, I mean the justice which is due to the community, *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience, and oblige us to regard the dwellings of malefactors, when shut against the demands of public justice, as no better than the dens of thieves and murderers, and to treat them accordingly. But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony has been actually committed, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion.”

[It is laid down in the principal case that the sheriff breaking an outer door to do execution “is a trespasser by the breaking, and yet the execution which he then doth in the house is good.” The authority referred to for this proposition is the year book of 18 E. 4, Pasch. 4 *a*. In that case, after fieri facias issued, the defendant locked up all his goods in his house, whereupon the sheriff broke open the outer door of the house, entered, and seized the goods; and the question, which appears to have been raised on a motion, though the form of the proceeding is not distinctly stated, was, whether the sheriff had done any wrong or not. “Littleton and all his companions held, that the party may have a writ of trespass against the sheriff for the breaking of the house, notwithstanding this fieri facias, for the fieri facias shall not excuse him of the breaking of the house, but of the taking of the goods only.” It is laid down accordingly, in Bacon’s *Abridgment*, Execution (N), “that if the sheriff in executing a writ break open a door, where he has no authority for *so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff.” This, so far

as relates to an execution against goods, is consistent with the doctrine acted upon by the Court of Queen's Bench in *De Gondouin v. Lewis*, 10 A. & E. 120, where the defendant, a custom-house officer, without demand, or any circumstance to justify the use of force, violently took contraband goods from the manual possession of the plaintiff. An action of trespass was brought for that seizure, not complaining of the assault. The Court of Queen's Bench held, that the fact of the goods being forfeited was an answer to that action, notwithstanding that, if the plaintiff had sued in trespass for an assault, there would have been no justification. And the reason of the thing, as well as the authority of Coke and of Littleton, seems to be with the decisions, for the execution creditor not taking part in the execution has been guilty of no wrong, and the maxim *nullus commodum capere potest de injuriâ suâ propriâ* (see Co. Litt. 148 b), is therefore not violated by holding so much of the acts of the sheriff as was for the benefit of the execution creditor valid, and the rest illegal. However, in *Yates v. Delamayne*, Trin. T., 17 Geo. 3, Bacon's Abridgment, Execution (N), an execution against the goods is stated to have been set aside on the ground that an outer door had been illegally broken open for the purpose of making the seizure. That case, though hard it may be considered, if interfering with a strict legal right of the execution creditor, is perhaps not irreconcilable with the doctrine under discussion; because, it is quite consistent with the validity of the execution in point of law, that the court, to prevent an abuse of its process and the danger of collusion between the execution creditor and the sheriff should, in the exercise of its *summary* jurisdiction, undo the proceedings, according to the principle acted on in *Barrett v. Price*, 9 Bing. 566, and other cases. It is the practice in like manner, to discharge persons taken under process against the person, by means of an illegal entry into a dwelling house; *Hodgson v. Towning*, W. W. & D. 53; 5 Dowl. 410, S. C. And there is authority for saying, that an arrest of the *person* by means of an illegal breaking of the outer door, is altogether void, and that the sheriff is liable, in case of such arrest, not merely for the breaking and entering of the house, but also for the assault and imprisonment; for, in *Kerbey*

v. Denbey, 1 M. & W. 336; Tyrw. & Gr. 688, S. C., to a declaration for breaking and entering a house and assaulting and imprisoning the plaintiff, the defendant amongst other pleas, pleaded, *except* as to the breaking and entering the house, a justification under a *capias ad satisfaciendum* stating the arrest *to have been in a dwelling [*46d] house, and the outer door to have been open. The Court of Exchequer held, that the fact of the outer door being open was a material averment, and that fact being disproved, that the judge was right in directing a verdict for the plaintiff on the plea of justification, (which it has been seen, was pleaded to the assault and imprisonment only) with damages for all the trespasses. This decision, if consistent with the doctrine in the principal case, points to a distinction between the cases of process against the goods and against the person, and one which may be thought to spring from the intention of the rule in *Semayne's case*, viz., to preserve the security and repose of the person, an intention directly, immediately, and entirely violated by the arrest of the body, whereas the seizure of the goods which are bound by the writ, and in which the execution creditor has an interest, only defeasible after the delivery of the writ to the sheriff by a sale in market overt, (see *Samuel v. Duke*, 3 M. & W. 622), may be considered as but an indirect and remote disturbance of the repose of the debtor. It may be doubted, however, whether in *Kerbey v. Denbey* the court of Exchequer meant to proceed upon such a distinction; and in *Brooke's Abridgment*, Trespass, 390, 18 E. 4 P. 4 a. is stated thus, "Trespass, the sheriff cannot break house or chest to do execution by fieri facias, per curiam; but he may take the goods or the body for (pur) execution," (an abridgment which extends the original in two particulars, the first obviously erroneous), and the passage above referred to in Bacon's Abridgment is to the same effect. See too as to a distress, *Viner's Abridgment*, tit. Replevin, A. a. 8, 9. These observations must therefore be considered as merely suggestive upon a point which seems likely to be the subject of further discussion.

It may here be added, that in a case like *Yates v. Delamayne*, *supra*, inasmuch as the seizure by the sheriff under a fieri facias, of goods to the value of

the judgment debt, is said to operate by way of satisfaction, (*Wilbraham v. Snow*, 2 Wms. Saund. 47, *a*, note (1), and per cur. *Holmes v. Newlands*, 5 Q. B. 370), a question may arise as to the defence of the execution creditor to an *audita querela*, after the goods have been ordered to be restored to the execution debtor. Probably, the bringing of an *audita querela* would be considered as a breach of good faith, after a successful application to restore the goods. If not, the alternative would be, to hold the sheriff liable to the execution creditor as upon a lawful seizure; and, indeed, in such a case

it would perhaps be difficult to suggest what valid defence the sheriff could make. It would, however, be a [*46e] wild sort of *justice to make him pay the debt and costs by way of additional punishment of his illegal entry, for which he would, at all events, be liable to answer in damages to the debtor. At least, it would seem that the jurisdiction exercised in *Yates v. Delamayne*, (except in cases where the execution creditor has employed a special bailiff, or been privy to the illegal entry,) ought to be administered with great caution.]

The principles of *Semayne's case*, were adopted in the *State v. Armfield & Wright*, 2 Hawks, 246; and it was there decided, that, where one of the family, upon the approach of the officer, had run into the house, and attempted to close the door, and before the door was entirely closed, the officer had forced it open and entered, the officer was not justified, but was liable to an indictment. In *Curtis v. Hubbard*, 1 Hill's N. Y. 337, it is decided, that to make the sheriff a trespasser, it is enough that the outer door be shut; merely opening is a breaking in law; lifting a latch is as much a breaking, in law, as the forcing of a door bolted with iron; whatever would be a breaking of the outer door in burglary, is a breaking by the sheriff; sliding down a window fastened by pulleys, would in both cases, be a breaking: it is decided also, that a guest, or mere visitor at the house, is justified in resisting the sheriff, and rescuing goods which he has seized: and this case was affirmed in the Court of Errors. 4 id. 437. See *Dent v. Hancock*, 5 Gill, 120, 126.

It is said, in the Year Books, the principal case, and elsewhere, that though the entry of the officer is illegal, yet the execution of the writ is good. The point is examined at some length by SHAW, C. J., in *Ilseley v. Nichols et al.*, 12 Pickering, 270, and it is shown that this notion is erroneous, and that the execution is void: and this case is adopted and acted upon, in *The People v. Hubbard*, 24 Wendell, 369, and by the Court of Errors, in *Curtis v. Hubbard*, 4 Hill's N. Y. 437: and again, in *State v. Hooker*, 17 Vermont, 659, 672, it is decided, that if the sheriff break open the party's outer door, and proceed to arrest him, the latter may forcibly resist him, and will not be indictable for an assault and battery; and both the sheriff and his assistants will be trespassers; *Hooker v. Smith et al.*, 19 id. 152, 154. But the merit of correcting this venerable error, is due to Theron Metcalf, Esquire, to whose able and excellent note to *Semayne's case*, as reported by Yelverton, the reader is referred,—Metcalf's Yelverton, 29.

H. B. W.

[*47]

*CALYE'S CASE.

PASCH. 26 ELIZ.—IN THE KING'S BENCH.

[REPORTED 8 COKE, 32.]

Liability of Innkeepers.

It was resolved, *per totam curiam*, that if a(a) man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it; for the words of the writ, which lieth against the hostler are, *Cum secundum legem et consuetud' regni nostri Angliæ(b) hospitatores qui hospitia com' tenent ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existentia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu servientium suorum hospitibus hujusmodi damnum non eveniat ullo modo, quidam malefactores quendam equum ipsius A. precii 40s. infra hospitium ejusdem B. &c. inventum, pro defectu ipsius B. ceperunt, &c. Vide Registr. fol. 105, inter Brevia de Transgr' and F. N. B. 94, a. b., by which original writ (which is in such case the ground of the common law) all the cases concerning hostlers may be decided. For, 1. It ought to be a(c) common inn; for if a man be lodged with another (who is not an innholder) upon request, if he be robbed in his house by the servants of him who lodged him, or any other, he shall not answer for it; for the words are *hospitatores qui com' hospitia tenent, &c.* And so are the books in(d) 22 Hen. 6, 21, b,(e) 38;(f) 2 Hen. 4, 7, b;(g) 11 Hen. 4, 45, a, b;(h) 42 Ass. pl. 17;(i) 42 E. 3, 11, a; 10 El.;(k) Dyer, 266; 5 Mar. Dyer, 158.(l) And the writ need not mention that the defendant keeps *commune hospitium*, for [*48] the words of the writ in the *Register are, *infra hospitium ejusdem B.*, but it is to be so intended in the writ; for the recital of the writ is, *hospitatores qui communia hospitia tenent, &c.*, and the one part ought to agree with the other, and the latter words depend on the other, and the*

(a) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(b) Plowd. 9 b, the Register is false printed, scilicet, *Distractione pro subtractione*. F. N. B. 94, a & b, Book of Entries, tit. Hostler, f. 366 & 377. 1 And. 29. 3 Keb. 73. Dyer, 266, b.

(c) 1 Roll. 2, d, 1. Dr. & Stud. 137, b, Hob. 245.

(d) Fitz. Hosteler, 2. Br. Action sur le Case, 58.

(e) 22 Hen. 6, 38 b. Fitz. Hosteler, 1. Br. Action sur le Case, 59.

(f) Fitz. Hosteler, 4. Br. Action sur le Case, 28. Br. Action sur le Statute, 39.

(g) Br. Action sur le Case, 41. Br. General Brief, 16. Fitz. Hostler, 5.

(h) Br. Action sur le Case, 86. Palm. 523. 1 Roll. 3.

(i) Fitz. Hosteler, 6. Br. Action sur le Case, 15. Statham Action sur le Case, 6.

(k) Dyer, 266, pl. 9, Postea, 33, a. 3 Keb. 73.

(l) Dyer, 158, pl. 52. 1 And. 29, 30. 3 Keb. 73. 1 Roll. 3, 4.

plaintiff ought to *declare* that he keeps *commune hospitium*: and so the said books in(m) 22 Hen. 6, 21; (n) 11 Hen. 4, 5, a, b; 40 Eliz. Dyer,(o) 266, &c. are well reconciled.

2. The words are, *ad hospitandos homines per partes ubi hujusmodi hospitia existunt transeuntes, et in eisdem hospitantes*; by which it appears that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is, *diversorium*, because he who lodges there is *quasi divertens se a via*; and so *diversorium*. And therefore, if a(p) neighbour, who is no traveller, as a friend, at the request of the innholder lodges there, and his goods be stolen, &c. he shall not have an action; for the writ is *ad hospitandos homines, &c. transeuntes in eisdem hospitantes, &c.*

3. The words are, *eorum bona et catalla infra hospitia illa existentia, &c.* So that the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*. And because the horse, which at the request of the owner is put to pasture, is not *infra hospitium*, for this reason the innholder is not bound by law to answer for him, if he be stolen out of the pasture; for the thing with which the hostler shall be charged ought to be *infra hospitium*; and therewith agree the books in(q) 11 Hen. 4, 45, a, b; 22 Hen. 6, 21, b; 42 E. 3, 11, a, b; 42 Ass. pl. 17, where Knivet, C. J., saith, that the innholder is bound to answer for himself, and for his family, of the chambers and stables, for they are *infra hospitium*: and with this resolution in this point agreed the opinion of the Justices of Assize (viz. the two Chief Justices, Wray and Anderson) in the county of Suffolk in Lent vacation, 26 Eliz. that if an(r) innholder lodges a man and his horse, and the owner requires the horse to be put to pasture, and there he is stolen, the innholder shall not answer for him.(s) But it was held by them, that if the owner doth not require it, but the innholder of his own head puts his guest's horse to grass, he shall answer for him if he be stolen, &c. And it is to be observed, that this word [*49] *hostler* is derived* *ab hostile*; and *hospitator*, which is used in writs [for an innholder, is derived *ab hospitio*, and *hospes est quasi hospitium petens*.

4. The words are, *ita quod pro defectu hospitator' seu servientum suorum, &c. hospitibus hujusmodi damn' non eveniat, &c.*, by which it appears that the innholder shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels within his common inn; for the innkeeper is bound in law to keep them safe without any stealing or purloining; and it is no excuse for the innkeeper to say, that he delivered the(t) guest the key of the chamber in which he is lodged, and that he left the chamber-door open; but he ought to keep the goods and chattels of his guest there in safety; and therewith agrees, 22 Hen. 6, 21 b; 11 Hen. 4, 45, a, b; 42 Edw. 3, 11, a. And although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away, or stolen, the

(m) Antea, 32, a. Fitz. Hostler, 2. Br. Action sur le Case, 58.

(n) 1 Roll. 4. Br. Action sur le Case, 41. Br. Gen. Brief, 16. Fitz. Hostler, 5.

(o) Dyer, 266, pl. 9. 3 Keb. 73.

(p) 1 Roll. 3. E. 4. 2 Brown, 254.

(q) 1 Roll. 4.

(r) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(s) 1 Roll. 3, 4. 4 Leon. 96. 2 Brownl. 255.

(t) Moor, 78, pl. 207. 158, pl. 299. 2 Brownl. 255.

innkeeper shall be charged, and therewith agrees, 42 Edw. 3, 11, a. And although they who stole or carried away the goods be unknown, yet the innkeeper shall be charged. 22 Hen. 6, 38. 8 R. 2, Hostler 7. Vide 22 Hen. 6, 21. But if the guest's servant, or he who(u) comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant; and the words of the writ are, *pro defectu hospitator' seu servientium suorum*. Vide 22 Hen. 6, 21, b. But if the innkeeper appoints one to lodge with him, he shall answer for him, as it there appears. The innkeeper(v) requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not(w) be charged, for the fault is in the guest, as it is held, 10 Eliz. Dyer, 266.

5. The words are, *hospitibus damnum non eveniat*: these words are general, and yet forasmuch as they depend on the precedent words they will produce two effects, viz. 1. They illustrate the first words. 2. They are restrained by them: for the first words are, *corum bona et catal' infra hospitium illa existentia absque subtractione custodire, &c.*, which words* [*50] (*bona et catalla*) by the said words, *ita quod, &c. hospitibus damnum non eveniat*, although they do not of their proper nature extend to(x) charters and evidences concerning freehold or inheritance, or(y) obligations, or other deeds or specialties, being things in action, yet in this case it is expounded by the latter words to extend to them; for by them great damages happen to the guest: and therefore, if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona et catalla* generally; and the declaration shall be special. 2. These words, *bona et catalla*, restrain the latter words to extend only to moveables: and therefore, by the latter words, if the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his moveables, which he brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person; and yet in such case of battery, *hospiti damnum evenit*, but that is restrained by the former words, as hath been said. And these words aforesaid, *absque subtractione seu omissione*, extend to all moveable goods, although of them felony cannot be committed; for the words are not *absque felonica captione, &c.*, but *absque subtractione*, which may extend to any moveables, although of them(z) felony cannot be committed, as of charters, evidences, obligations, deeds, specialties, &c.

[If a horse is at livery, and eats more than he is worth, an action lies against the owner; but the horse cannot be used or sold, Moor, 876, 877; but by the custom of London and Exeter the horse may be sold; but see Popham, 127, Robinson v. Waller.]

(u) Cro. El. 285.

(v) Moor, 158.

(w) Vide Salk. 19.

(x) 2 Roll. 58. 22 E. 4, 12, a, b.

(y) Dy. 5, pl. 2.

2 Roll. 58. Yelv. 68.

(z) 3 Inst. 109. 10 E. 4, 14, a. Fitz. Endict. 19. Br. Coron. 155.

THIS is the leading case upon the subject of the liabilities of inn-keepers in respect of their guests' property: in a subsequent case, goods belonging to a factor were lost, out of a private room in the inn, chosen by the factor for the purpose of exhibiting them to his customers for sale, the use of which was granted to him by the inn-keeper, who, at the same time, told him that there was a key, and that he might lock the door, which the guest however neglected to do, although on two occasions, while he was occupied in showing part of the goods to a customer, a stranger had put his head into the room. The judge, Richards, C. B., told the jury, that *prima facie* the inn-keeper was answerable for the goods of his guest in his inn, but that the guest might, by his [*51] own conduct, discharge him from *responsibility, and left it to them to say whether he had done so here: the jury found that he had: and, on a motion for a new trial, the court approved of the direction of the learned judge, and thought the verdict was correct. "The law," said Lord Ellenborough, "obliges the inn-keeper to keep the goods of persons coming to his inn, *causa hospitandi*, safely, so that, in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo* But there may no doubt be circumstances, as where the guest, by his own misconduct, induces the loss, which form an exception to the general liability, as not coming within the words, *pro defectu hospitatoris*. Now, let us consider, 1st, whether the plaintiff came to the inn *causa hospitandi*; and, 2dly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping-room, but I think we may presume he had, but he desires a private room up some steps in order to show his goods. Now, an inn-keeper is not bound by law to find show-rooms for his guests, but only convenient lodging-rooms and lodging. As to what is laid down in Calye's Case, respecting the delivery of the key to the guest, it plainly relates only to the chamber-door in which he is lodged; and I agree that if an inn-keeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as inn-keeper . . . The cases," continues his lordship, "show that the rule is not so inveterate against the inn-

keeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion whom he brings with him, for so it is laid down in Calye's Case. Now, what is the conduct of the plaintiff in this case? The inn-keeper not being bound to find him more than lodging, and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and introducing a number of persons, over whom the inn-keeper can have no check or control, and thus for a purpose wholly alien from the ordinary purpose of an inn, which is *ad hospitandos homines*. Therefore, the care of these goods hardly falls within the limits of the defendant's duty as inn-keeper. Besides, after the circumstances relating to the stranger took place, which might well have awakened the plaintiff's suspicion, it became his duty, *in whatever room he might be*, to use, at least, ordinary diligence: and particularly so, as he was occupying the chamber for a special purpose: *for though, in general, a traveller who resorts to an inn may rest on the protection which the law casts around him, yet, if circumstances of suspicion arise, he must exercise ordinary care*. It seems to me that the room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to exercise ordinary care in the safe keeping of his goods, and it is owing to his neglect, and not to the fault of the inn-keeper, that the accident happened: and this was a question proper to leave to the jury." *Burgess v. Clements*, 4 M. & S. 306, accord. *Farnworth v. Packwood*, 1 Stark. 249. [So, where the defendant's ostler placed the plaintiff's horse in a stable with another horse that kicked him, and the defendant to rebut the presumption of negligence gave evidence to show that the horse had been properly taken care of; the judge, Cresswell, J., told the jury that the defendant was liable, if he or his servants had been guilty of direct injury or of negligence, otherwise not; the jury found for the defendant; and the court, (though they held that evidence of any damage or loss of the goods of a guest, *prima facie*, raises a presumption of neg-

ligence in the inn-keeper,) considered the direction proper. *Dawson v. Chamney*, 5 Q. B. 164.] But in another case, where a traveller went to an inn with several packages, one of which was, by his desire, taken into the commercial room, into which he was shown, and the others into his bed-room, which, according to the usual practice of that inn, was the place to which goods were taken, unless orders were given to the contrary, and the package taken into the commercial room was stolen, the inn-keeper was held responsible, and *Holroyd, J.*, distinguished the case from *Burgess v. Clements*, by saying, that there the plaintiff asked to have a room which he used for the purposes of trade, *not merely as a guest in the inn.* *Richmond v. Smith*, 8 B. & C. 9. So in *Kent v. Shuckard*, 2 B. & Ad. 803, the plaintiff and his wife, with Miss S., arrived at the defendant's inn, and took a sitting room and two bed-rooms so situated that, the door of the sitting-room being open, a person could see the entrances into both bed-rooms. On the following day the plaintiff's wife went into the bed-room, and laid on the bed a reticule, which contained money, and [52] *leaving the door between that and the bed-room open. About five minutes afterwards she sent Miss S. for the reticule, which was not to be found. The inn-keeper was held responsible for it, and it was held that there was no distinction between money and goods as to the liability of inn-keepers. So when the plaintiff drove his gig to the defendant's inn on Bewdley fair-day, and asked whether there was room for the horse, the ostler of the defendant took the horse out of the gig and put him into a stable, and the plaintiff carried his coat and whip from the gig into the house, and took some refreshment there, the ostler placed the gig outside of the inn-yard, in a part of the open street in which the defendant was in the habit of placing the carriages of his guests on fair-days. The gig was stolen thence: and the court held the inn-keeper responsible, for it did not appear that the defendant put the gig in the street at

the request or instance of the plaintiff: the place was, therefore, a part of the inn, for the defendant by his conduct treated it as such. If he wished to protect himself, he should have told the plaintiff that he had no room in his yard, and that he would put the gig in the street, but could not be answerable for it. *Jones v. Tyler*, 11 Ad. & Ell. 522.

It is not necessary, in order that a man may be a *guest*, so as to fix the inn-keeper with this sort of liability, that he should have come for more than a temporary refreshment, *Bennett v. Mellor*, 5 T. R. 273; and in *York v. Grindstone*, 1 Sal. 388, 2 Lord Raym. 860, three judges held, against Lord Holt's opinion, that if a traveller leave his horse at an inn, and lodge elsewhere, he is, for the purpose of this rule, to be deemed a guest; "because," said they, "it must be fed, by which the inn-keeper hath gain; otherwise if he had left a dead thing." But it is clear that if the inn-keeper receive goods as a bailee, and not in the character of an inn-keeper, they do not fall within it. *Hyde v. Mersey and Trent Navigation Company*, 5 T. R. 389; *Jelly v. Clarke*, Cro. Jac. 188; *Bac. Abr. Inns*, C. 5. *Williams v. Gesse*, 3 Bingh. N. C. 849. {See *Smith v. Dearlove*, 6 C. B. 132.} The length of time for which the guest has resided, seems not to affect his right as such, provided he live there in the transitory condition of a guest. But if he came on a special contract to board and lodge there, the law does not consider him a guest, but a boarder, *Bac. Abr. Inns*, C. 5; *Parkhurst v. Foster*, Sal. 388.

The definition of an inn is, "*a house where the traveller is furnished with every thing he has occasion for while on his way.*" *Thompson v. Lacy*, 3 B. & A. 283. See *Bac. Abr. Inns*, B.; but a mere coffee-house is not an inn, at least not within the meaning of a fire policy. *Doe v. Laming*, 4 Camp. 77.

[As to duties of inn-keepers in receiving guests, &c., see *Fell v. Knight*, 8 M. & W. 269; *R. v. Ivens*, 7 C. & P. 213; *Hawthorn v. Hammond*, 1 Car. & Kir. 404.]

For references to the American decisions on the subject of the liability of Inn-keepers, see the note to *COGGS v. BERNARD*, *infra*.

*CROGATE'S CASE.

[*53]

MICH.—6 JACOBI 1.

[REPORTED 8 COKE, 66.]

Replication De Injuriâ when allowable.

EDWARD CROGATE brought an action of trespass against Robert Marys, for driving his cattle in Town-Barningham in Norfolk, &c.(a) The defendant pleaded, that a house and two acres in Bassingham in the said county, were parcel of the manor of Thurgarton in the same county, and demised and demisable, &c. by copy, &c. in fee-simple, &c. according to the custom of the manor, of which manor William late Bishop of Norwich was seised in fee in the right of his bishoprick, and prescribed to have common of pasture for him and his customary tenants of the said house and two acres of land *in magnâ peciâ pasturæ vocat'* Bassingham common, *pro omnibus averiis, &c. omni tempore anni*, and the said Bishop at such a court, &c. granted the said house and two acres by copy to one William Marys, to him and his heirs, &c. And the plaintiff put his said cattle in the said great piece of pasture, wherefore the defendant, as servant to the said William, and by his commandment, *molliter* drove the said cattle out of the said place, where the said William had common *in præd' villam* Town-Barningham, adjoining to the said common of Bassingham, &c. The plaintiff replied, *de injuriâ suâ propriâ absque tali causâ*: upon which the defendant demurred in law. And it was objected on the plaintiff's part, that the said replication was good because the defendant doth not claim any interest, but justified by force of a commandment; to which *de injuriâ suâ propriâ absque tali causâ*, may be fitly applied; and this plea, *De injuriâ suâ propriâ*, shall refer only to the commandment, and to no other part of the plea, and they cited* [*54] the books in 10 H. 3. 3. a. b. 9. a. 16 H. 7, 3. a. b. &c. 3 H. 6. 35 [*54] a. 19 H. 6. 7. a. b. &c. But it was adjudged, that the replication was insufficient. And in this case divers points were resolved. 1. That *absque tali causâ*, doth refer to the(b) whole plea, and not only to the commandment, for all maketh but one cause, and any of them, without the other, is no plea by itself. And therefore in (c) false imprisonment, if the defendant justifies by a *capias* to the sheriff, and a warrant to him, there, *de injuriâ suâ propriâ* generally is no good replication, for then the matter of record will be parcel of the cause (for all makes but one cause), and matter of (d)

(a) Doct. pl. 114. See 2 Salk. 628. 1 Ld. Raym. 700. 12 Mod. 580. Comyns 582, 583. pl. 254. 2 Lutw. 1347, 1350. 7 Viner, 503. 2 Saund. 295. 3 Lev. 65. Hard. 6. and see 6 E. 4. 6. a.

(b) Cr. Jac. 599. 2 Leon. 81. 2 Saund. 235. Doct. pl. 114. 3 Bulstr. 285. Cr. Car. 138.

(c) Doct. pl. 114. 2 Leon. 81. 2 E. 4. 6. b. (d) 4 Co. 71. b. 9 Co. 25. a. Co. Lit. 260. a.

record ought not to be put in issue to the common people but in such case he may reply, *de injuriâ suâ propriâ*, and traverse the warrant, which is matter in fact. (d) But upon such justification by force of any proceeding in the Admiral Court, hundred or county, &c., or any other which is not a court of record, there *de injuriâ suâ propriâ* generally is good, for all is matter of fact, and all makes but one cause. And by these differences you will agree your books in 2 H. 7. 3 b. 5 H. 7. 6. a. b. 16 H. 7. 3. a. 21 H. 7. 22. a. (33). 19 H. 6. 7. a. b. 41 E. 3. 29. b. 17 E. 3. 44. 18 E. 3. 10. b. 2 E. 4. 6. b. 12 E. 4. 10. b. 14 H. 6. 16. 21 H. 6. 5. a. b. 13 R. 2. Issue 163.

2. It was resolved, that when the defendant in his own right, or as a servant to another, claims any(e) interest in the land, or any common, or rent going out of the land; or any(f) way or passage upon the land, &c., there *de injuriâ suâ propriâ* generally is no plea. (g) But if the defendant justifies as servant, there *de injuriâ suâ propriâ* in some of the said cases, with a traverse of the commandment, that being made material, is good; and so you will agree all your books, *scil.* 14 H. 4. 32. 33 H. 6. 5. 44 E. 3. 18. 2 H. 5. 1. 10 H. 6. 3. 9. 39 H. 6. 32. 9 E. 4. 22. 16 E. 4. 4. 21 E. 4. 6. 28 E. 3. 98. 28 H. 6. 9. 21 E. 3. 41. 22 Ass. 42. 44 E. 3. 13. 45 E. 3. 7. 24 E. 3. 72. 22 Ass. 85. 33 H. 6. 29. 42 E. 3. 2. For the general plea *de injuriâ suâ propriâ*, &c. is properly when the defendant's plea doth consist merely upon matter of(h) excuse, and of no matter of interest whatsoever; *et dicitur de injuriâ suâ propriâ*, &c., because the injury properly in this sense is to the person, or to(i) the reputation, as [*55] battery or imprisonment* to the person; or scandal to the reputation; there, if the defendant excuse himself upon his own assault, or upon hue and cry levied, there, properly(j) *de injuriâ suâ propriâ* generally is a good plea, for there the defendant's plea consists only upon matter of excuse. 3. It was resolved, that(k) when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. The same law of an(l) authority, given by the law; as to view waste. &c. *Vide* 12 E. 4. 10. 9 Ed. 4. 31 20 Ed. 4. 4. 42 Edw. 3. 2. 16 H. 7. 3.

Lastly it was resolved, that in the case at bar, the issue would be full of multiplicity of matter, where an issue ought to be full and single: for parcel of the manor, demisable by copy, grant by copy, prescription of common, &c. and commandment, would be all parcel of the issue. And so, by the rule of the whole court, judgment was given against the plaintiff.

"FROM the time of Crogate's case down to the present day, the resolutions of the court made in that case have as to the greater part been considered law."

Per Tindal, C. J., *Bardons v. Selby*, 3 Tyrwh. 435. See *White v. Stubbs*, 2 Wms. Saund. 293, b. and the notes; *Cockerel v. Armstrong*, B. N. P., 93,

(d) Doct. pl. 114.

(e) Doct. Pl. 114. Cr. Eliz. 539, 540. Cr. Jac. 225. Yelv. 157. 1 Brownl. 215.

(f) Cr. Jac. 599.

(g) Doct. pl. 114. g.

(h) Doct. pl. 115.

(i) Doct. pl. 115. Cr. Eliz. 607.

(j) Doct. pl. 115.

(k) Doct. pl. 115. Cro. Car. 164.

(l) Doct. pl. 115.

Willes, 99; Jones v. Kitchin, 1 B. & P. 76; Langford v. Waghorn, 7 Price, 670; Cooper v. Monke, Willes, 52; Bell v. Wardell, Willes, 202; Hooker v. Nye, 4 Tyrwh. 777. See also the notes to Craft v. Boite, 1 Wms. Saund. 244, c.; Com. Dig. Pleader, F. 18; 3 M. 29. It is unnecessary to do more here than refer to the above cases, because they are fully canvassed and explained, and the nature and applicability of this replication settled, in the cases of Selby v. Bardons, 3 Barnewall & Adolphus, 1; affirmed in error, 3 Tyrwh. 431; Pigot v. Kemp, 3 Tyrwh. 128, and Hooker v. Nye, 4 Tyrwh. 777. In Selby v. Bardons, the declaration was in replevin for goods and chattels. *Avowry*, that the plaintiff was an inhabitant of that part of St. Andrew's, Holborn, which is above the bars, and occupiers of a tenement in the parish of St. George the Martyr; that a rate was duly made and published for those districts, in which the plaintiff was rated at 7l., of which the defendant, who was collector, gave him notice, and demanded payment, which being refused, he summoned him before two justices, where he appeared, but showing no cause for his refusal, the justices made there warrant to defendant to distrain, under which he and the other defendant, as his bailiff, took the goods and chattles in the declaration mentioned as a distress. *Plea in Bar, de injuriâ suâ propriâ absque tali causa*, and to this a demurrer. There were other pleas in bar to the same effect, and demurred to. Upon argument the plea was held good. Patteson, J., remarked, that, if bad, it must be so either because the avowry claimed some interest, or because the defendant justified under authority in law within third resolution in Crogate's case, or for multiplicity.

"In the first place," said his lordship, "as to any claim of interest, it is plain that the avowries claim no interest whatever in land, the sort of interest to which* [56] the second resolution is *in words* confined. But supposing any interest in goods were within the spirit of that resolution, still I apprehend that it must be an interest existing antecedent to the seizure complained of, and not one which arises merely out of that seizure, otherwise this plea never could be good in replevin, when a return of goods is claimed, and of course an interest in them is asserted. . . . As, therefore, the avowries in this case show no interest in lands or in

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the goods seized except that which arises from claiming a return; and as I find no authority for saying that such claim of return is an interest within the second resolution in Crogate's case; it seems to me that the avowries show matter of excuse only, and that as to this ground of objection, the general pleas in bar of *de injuria* are good.

"In the next place—Are the general pleas bad, on account of any authority in law shown by the avowries?

"It is certainly stated in the third resolution in Crogate's case, that the replication *de injuria* is bad where the plea justifies under an authority in law: but this, if taken in the full extent of the term used, is quite inconsistent with part of the first resolution which states, that where the plea justifies under the proceedings of a court not of record, the general replication may be used, or where it justifies under a *capias* and warrant of sheriff, all may be traversed except the *capias*, which cannot, because it is matter of record, and cannot be tried by a jury. Now the proceedings of a court not of record, and the warrant of a sheriff and seizure under it, are surely as complete authorities in law as any authority disclosed by the present avowries; [see Bowler v. Nicholson, 12 A. & E. 354, where Patteson, J., intimated, that the authority in law must be mediately or immediately derived from the plaintiff, as, for instance, resulting from the relation of landlord and tenant or the like]. With respect to the proceedings of a court not of record a *quære* is made, in Lane v. Robinson, whether a replication *de injuria* would be good; but the point did not arise in the case, and the year books referred to in Crogate's case warrant the conclusion that it would. In Bro. Ab. tit. *De son tort Demesne*, there are instances of this replication to a plea justifying by authority of law. There is also the case referred to in the argument at the bar of Chancey v. Win and others, 12 Mod. 102, in which it is laid down by Lord Holt that *de injuria* is a good replication in many cases, where the plea justifies under an authority in law. I do not therefore think that the present pleas are objectionable on that ground.

"In the last place—Are the pleas bad on account of the issue tendered by them being multifarious?

"If this were *res integra*, I should have no hesitation in holding that they

were bad; and it cannot, I think, be denied that the present issues are as full of multiplicity as that in Crogate's case, and to which the fourth resolution there applied. But I am unable to find any instance in which this general replication has been held bad on that ground.

The cases of Robinson v. Raley, 1 Burr. 316, and O'Brian v. Saxson, 2 B. & C. 908, are authorities to show that it cannot be objected to on that account, provided the several facts so put in issue, constitute one cause of defence, which, as it seems to me, they always will, where the plea is properly pleaded, however numerous they may be, since, if they constitute more than one cause, the plea will be double. The present avowries state many facts, undoubtedly, but they are all necessary to the defence, and, combined together, they show but one cause of defence, namely, that the plaintiff's goods were rightfully taken under a distress for poor rates; and if the general replication be held bad in this case, I am at a loss to see in what case such a replication can be held good where it puts more than one fact in issue. I am compelled, therefore, however reluctantly, to come to the conclusion that the pleas in bar are good." See also the judgment of L. C. J. Tindal in the court above, 3 Tyrwh. 431. 1 C. & M. 500, S. C.

In Pigott v. Kemp, 3 Tyrwh. 128, 1 C. & M. 157, S. C., in trespass for assault and battery, the plea alleged that J. E. and S. B. were possessed of a dwelling-house and close, and being so possessed, the plaintiff was wrongfully there making a noise, &c., and that the defendants, as the servants of J. E. and S. B., and by their command, requested him to depart, which he refused, whereupon the [57] defendants, as such servants, *gently laid their hands upon him, &c., and because he was armed with pistols, and assaulted them, they, as such servants, necessarily a little laid hold of him and hurt him. *Quæ sunt eadem*, &c. Replication, *de injuria sua propria absque tali causa*. Upon demurrer, it was contended with great learning by Mr. Byles, on the part of the defendant, that the authorities showed that command derived from another could not be traversed in this form of replication. However, the court expressed so strong an opinion that the rule which forbids the traverse of an authority in this form, related only to authorities derived mediately or immediately from the

plaintiff himself, that the learned counsel elected to amend.

Upon the whole, the exceptions subject to which the general replication is admissible, may be reduced to the following four:—

1. When matter of record is parcel of the issue; and that for the obvious reason, that if it were permitted, it would lead to a wrong mode of trial.

2. When the defendant derives any authority mediately or immediately from the plaintiff. [For instance, in trespass *quare clausum fregit*, a plea justifying by reason of a clause in the defendant's lease, authorizing the landlord or incoming tenant to enter for certain purposes, is not properly met by the replication *de injuria*. *Milner v. Jordan*, 8 Q. B. 615. This exception also includes the case of an authority given by the law, but derivable from the plaintiff's act. Thus in trespass, to a plea justifying by reason of a fraudulent removal of goods to avoid a distress for rent, *de injuria*, is not a good replication. *Bowler v. Nicholson*, 12 A. & E. 341. But a right to drive plaintiff's cattle pursuant to a custom, though rendered necessary to be exercised by the plaintiff's having wrongfully surcharged a common, is not an authority derived mediately or immediately from the plaintiff within the rule. *Mortimer v. Moore*, 8 Q. B. 294.]

3. When the defendant, in his own right, or as servant to another, claims any *interest*: for *de injuria*, says Lord Coke, is properly when the defendant's plea doth consist merely upon matter of excuse, and of no matter of *interest* whatever. "By this," says Mr. Justice Parke, in *Selby v. Bardons*, "I understand him to mean, an interest in the realty, (see *Vivian v. Jenkins*, 3 A. & E. 741,) or an interest in, or title to, chattels, averred in the plea, and existing prior to, and independently of, the act complained of, which interest or title would be in issue on the general replication; and I take the principle of the rule to be, that such alleged interest or title shall be specially traversed, and not involved in a general issue." [According to *Edmunds v. Piniger*, 7 Q. B. 558, this rule does not extend to every case where any interest whatever in land, even a *seisin in fee* is alleged in any one, and is necessary to be proved. That was an action of trespass *quare clausum fregit*. The defendant justified as constable, in the execution of a warrant granted by magistrates

to restore possession to a landlord under the Small Tenements' Act, 1 & 2 Vict. c. 74. The plea averred a seisin in fee in the landlord, the tenancy and its expiration, an application to magistrates under the Act, the warrant and its execution. It did not aver any authority *from the landlord*. Replication *de injuria*. The court held, that even assuming the seisin in fee of the landlord to be a material averment, and put in issue by the replication *de injuria*, the replication was yet correct, no interest in land being averred in *the defendant*, or those under whom he justified.]

4. Where the plea is not *in excuse* of the injury contained in the declaration; as, for instance, if it were a plea of release, or of accord and satisfaction, or in denial. See *Crisp v. Griffiths*, commented on in the latter part of this note, *Whittaker v. Mason*, and the principal case. [See *Mortimer v. Moore*, 8 Q. B. 294. In trespass for seizing cattle, a plea of a custom to drive the cattle on a certain common to a pound, for the purpose of seizing estrays, and ascertaining surcharges, was considered in excuse, and the replication *de injuria*, correct. Also in *Price v. Woodhouse*, 16 M. & W. 1, *de injuria* to a plea justifying under a heriot custom was held good.]

Hitherto, our observations on this traverse have been confined to its applicability in actions of tort. But the rules of court made in Hilary Term, 1834, under the power given to the judges by st. 3 & 4 W. 4, c. 42, have very much increased the importance of *de injuria*, by rendering it often desirable to apply it to actions of contract. Before the above-mentioned rules, there were seldom any special pleas in actions upon contract, on account of the comprehensive nature of the general issues non assumpsit and nil debet. As soon, however, as the extent of general issues were confined, and special pleas began to be of every day occurrence in assumpsit, it became desirable, that the plaintiff, who has but one replication, should be enabled to put in issue several of the numerous allegations which the special pleas were found to contain; otherwise he would have laboured under the hardship of being frequently compelled to admit the greater part of an entirely false story. It became therefore, important to ascertain whether *de injuria* could not be replied in cases of this description, and the question of its applicability frequently came

before the courts. Thus, in *Crisp v. Griffiths*, 3 Dowl. 752, 5 Tyrwh. 619, 2 C. M. & R. 159, S. C., to debt on a promissory note for 12*l*. by the payee against the maker, the defendant pleaded that, after the making of the note, the plaintiff drew a bill for 25*l*. on the defendant, who accepted it, and the plaintiff took it on account of the promissory note, and afterwards indorsed it to a third person, who was still entitled to sue thereon. Replication, *de injuria*, and demurrer. The court seemed strongly of opinion, that the plea and replication were both bad, and offered the parties leave to amend, which was accepted; the Lord Chief Baron remarking on this case, in *Isaac v. Farrar*, 1 M. & W. 68, puts the opinion of the court as to the badness of the replication, on the ground, that the plea was not in *excuse* for the breach of promise, but of satisfaction for it. *Noel v. Rich*, 4 Dowl. 223, 5 Tyrwh. 632, 2 C. M. & R. 365, S. C., was assumpsit on a bill by the indorsee against the drawer, who was stated to have indorsed to Newton, who indorsed to Lewis, who indorsed to plaintiff. Plea, that the defendant's indorsement was in blank, that the defendant delivered the bill, not to Newton, but to Lewis Levy, to be *dis- [*58] counted for the defendant's own benefit; that Lewis Levy, in violation of good faith, gave it to Lawrence Levy, on other terms and without discounting it; and that Newton, Lewis, and the plaintiff, before and at the times when it was respectively indorsed to them, had notice of the premises; replication, *de injuria*. The court held the plea bad, for not averring that the defendant never received any consideration for the bill. They also held the replication good in substance, but said, that whether it was right in point of form, was a different question. However, in *Griffin v. Yates*, 2 Bing. N. C. 579, 4 Dowl. 647, an opinion was expressed by the Court of Common Pleas on the point of form. The declaration, which was in assumpsit, stated that W. Lambert drew on the defendant, who accepted, and that W. L. then indorsed to plaintiff, who now sued the defendant as acceptor. Plea, that the defendant accepted for the accommodation of the said W. Lambert; that no consideration was ever given for the acceptance; and that W. Lambert indorsed it, after it became due, for the accommodation of the plaintiff, and without consideration for his indorse-

ment. Replication, that the defendant did not accept the said bill for the accommodation of W. Lambert, and without any consideration being given for the acceptance; and that W. Lambert did not indorse it, after it became due, for the plaintiff's accommodation, without any consideration for his indorsement. Demurrer, assigning special cause, *viz.* duplicity and multifariousness. After argument, curia advisari vult. On another day, Tindal, C. J., after stating the pleadings, said, "We thought, at the time of the argument, that there might be some way of putting in issue by the replication all the facts alleged in the plea, and we now find that this has been decided by the Court of Exchequer. But as it has been hitherto doubted, whether this could properly be done, under the new rules, by a replication of *de injuria*, the plaintiff may have leave to amend."

Stephen, Serj. The result is, that *de injuria* may be replied in *assumpsit*. [As to debt, see *Cowper v. Garbett*, 13 M. & W. 33.]

Tindal, C. J. It may, where the plea consists of matter of excuse.

Bosanquet, J. That is, subject to the same rules as in *Crogate's* case.

This last observation of Mr. J. Bosanquet is exemplified by the case of *Solly v. Neish*, 4 Dowl. 248, 4 Tyr. 625, 2 C. M. & R. 355. The declaration was for money had and received. Plea, That the money was the proceeds of goods consigned to the defendant for sale by P. and C., as their own goods and chattels, with the knowledge and consent of plaintiff, (but which were in fact the goods and chattels of P. and C., and of the plaintiff, jointly,) on the terms of the said goods and chattels being a security for any money the defendant might advance to Messrs. P. and C., with a power of sale; and that the defendant, believing the goods to belong to P. and C., and not knowing the plaintiff to be interested therein, advanced 6,000*l.* on the security of the goods, to P. and C.; and afterwards sold them, in pursuance of the power of sale; and received the money mentioned in the declaration for them; against which, the defendant averred, he was willing to set off the money still due to him on account of advances, which exceeded the money mentioned in the declaration. Replication, *de injuria*, with a new assignment. Demurrer. The court thought the replication bad, because the plea did not contain *matter of excuse*, but facts amounting to an argu-

mentative denial of the promise; so that the replication, which assumed that a breach of promise had taken place, but stated it to have taken place *without the cause* alleged by the defendant, was not a traverse of the plea, which stated no *cause* of the breach, but denied the promise, and of course the breach, altogether. The replication, therefore, neither traversed the plea nor confessed it. "Secondly," said Lord Abinger, delivering the judgment of the court, "it would be bad if the principles of pleading in trespass as contained in *Crogate's* case, and other authorities, are applied to an action of *assumpsit*: for the defendant *claims an interest* in the money, and he claims a right to retain it by and in consequence of *an authority given by the plaintiff*, in either of which cases the general replication is not allowed." In *Jones v. Senior*, 4 M. & W. 123, the replication of *de injuria* was held bad, where the plea was not by way of excuse, but of discharge. [*Hortley v. Manton*, 5 Q. B. 247; *Barnes v. Price*, 1 C. B. 214, acc. And where the plea is one of set-off, or in the nature of set-off, the replication is equally inadmissible as where the plea is one of discharge by satisfaction or release. *Cleworth v. Pickford*, 7 M. & W. 314; *Purchell v. Salter* (in error), 1 Q. B. 197.] In *Whittaker v. Mason*, 2 Bingh. N. C. 359, a replication of *de injuria* to a plea to a *declaration in *assumpsit*, was held bad, [*59] because the plea was not in excuse for not performing the contract stated in the declaration, *but amounted to a denial thereof*. S. P. *Elwell v. G. J. Railway*, 5 M. & W. 669; [*Cleworth v. Pickford*, 7 M. & W. 314; see *Schild v. Kilpin*, 8 M. & W. 672, where the plea showed that a third person was the holder of the bill sued on; *Pelley v. Rose*, 12 M. & W. 435; *Fisher v. Wood*, 1 Dowl. & L. 95, stated post 59 c.] *Parker v. Riley*, 3 Mee. & Welsb. 230, 6 Dowl. 379; in that case the court hinted that *de injuria* would probably be inadmissible, where the plea showed the contract to be void ab initio for illegality. Vide tamen *Curtis v. M. of Hereford*, 6 Dowl. 502, [in which Coleridge, J., held *de injuria* to be a good replication to a plea of gaming: a decision now confirmed by *Humphreys v. O'Connell*, 7 M. & W. 370; *Scott v. Chappelow*, 4 Man. & Gr. 336, 5 Sc. N. R. 148; *Cowper v. Garbett*, 13 M. & W. 33, which establish that *de injuria* may be replied to a plea of illegality, see post 59 b.] The case

in the Exchequer alluded to by Tindal, C. J., in which *de injuria* was decided to be a good replication in *assumpsit*, was *Isaac v. Farrar*, since reported, 1 M. & W. 65. *Assumpsit* on a note indorsed by payee to R. H., and by him to plaintiff. Plea, that, before the making, an advertisement was inserted in the newspapers, offering to lend money to persons of responsibility, in consequence of which the defendant called on advertiser, who fraudulently procured from him the note in question, under pretence of getting it discounted for him; that there never was any consideration between any of the parties, and that they were all privy to the fraud. Replication, *de injuria*. Demurrer, and the replication was held good. "This form," said the Lord Chief

[*59a] *Baron, delivering the judgment of the court, "though most commonly used in actions of trespass, or trespass on the case for an injury, is not inappropriate to an action of trespass on the case for a breach of promise, where the plea admits a breach, and contains only matter of excuse for committing that breach. The defendant's breach of promise may be considered as a wrong done, and the matter included under the general traverse *absque tali causa* and thereby denied, as a matter of excuse alleged for the breach." Accord. *Watson v. Wilks*, 5 A. & E. 247, where a failure of consideration averred in the plea was held to be well answered by *de injuria*. [In actions by indorsees against acceptors of bills of exchange, or makers of promissory notes, the replication *de injuria* has been held sufficient in answer to pleas, that the bill had been presented for acceptance, dishonoured and protested, that plaintiff took the bill with notice of that fact, and that the defendant had not notice of non-acceptance, *Whitehead v. Walker*, 9 M. & W. 506; that the bill was accepted for the accommodation of the drawer to be deposited with R. as a collateral security for a debt due from the drawer, that the drawer before maturity paid R. part of the debt, and tendered the rest which R. refused to accept, and that R. afterwards indorsed the bill to the plaintiff in order that he conspiring and colluding with R. might recover of the defendant as trustee for R., *Herbert v. Sayer*, 5 Q. B. 965; that the note was given as a collateral security for payment of a bill of exchange of the same amount, subject to an agreement with the payee, that the note should not

be negotiated, and that the defendant had paid the holder of the bill of exchange, of which the plaintiff had notice at the time of the indorsement. *Gibbons v. Mottram*, 7 Scott, 535, 1 Dowl. & L. 810, S. C. See also *Basan v. Arnold*, 6 M. & W. 559, where the pleadings were very similar to those in *Isaac v. Farrer*.] *Reynolds v. Blackburne*, 6 Dowl. 21, where the plea was bad for duplicity, but both the defences being by way of *excuse*, it was held to be properly answered by *de injuria*. See *Hemingway v. Hamilton*, 4 M. & W. 117.

[The replication *de injuria* may be employed in debt on simple contract. *Purchell v. Salter*, 1 Q. B. 197; *Cowper v. Garbett*, 13 Mee. & W. 33. And it has been employed without objection in actions of covenant, where the pleas consisted of matter of excuse. It seems also to be the better opinion that it is in the option of the plaintiff, where *de injuria* is appropriate, either to employ that form of traverse, or to traverse the material facts which would be put in issue by *de injuria*, in the terms in which they are alleged. *Garten v. Robinson*, 2 Dowl. N. S. 41. But *in such [*59b] cases the replication *de injuria* is obviously preferable, as its use may save the pleader from special demurrers on the ground of the traverse being too large, too narrow, in the conjunctive, of some immaterial averment, negative pregnant, or what not; see *Flight v. Cooke*, 1 Dowl. & L. 714. It is hardly necessary to observe, that a traverse in general terms, as that the averments in a plea "are not true," or the like, is improper, if there be any single averment in the plea the truth or falsehood of which is not material. *Mitchell v. Cragg*, 10 M. & W. 367.

The replication *de injuria* may be pleaded in an action *ex contractu* to a plea of fraud or of illegality of the contract, whether the plea is pleaded in an action at suit of the original contractor, or of any person claiming under him, as for instance, an indorsee, *Humphreys v. O'Connell*, 7 Mee. & W. 370; *Scott v. Chappelow*, 4 Man. & Gr. 536, 5 Sc. N. R. 148, where the Court of Common Pleas laid down, as a general rule, that, in all cases where the contract is avoided by matter of law, the replication *de injuria* is proper, *Cowper v. Garbett*, 13 M. & W. 33; *Lansdale v. Clarke*, 1 Exch. 78. In *Cowper v. Garbett* the plea was

one of fraud to a declaration in debt on simple contract. In the course of the judgment, Pollock, C. B., observed: "It may be that, where the fraud or illegality is between the parties to the action, the case may not fall within the principle on which *Crogate's Case* is presumed to be founded, which is, that the plaintiff may include in a general traverse matters which do not presumably lie within his own cognizance, and must traverse separately those which do; but the case is within the express words of the rule laid down in that case and universally adopted, and not within any of the exceptions, and we think we ought to abide by the terms of it, and not to introduce any further distinctions." This seems to have closed the door, and very wisely, against speculative discussions upon the *reason* of the rule in *Crogate's Case*, and to admit the use of the replication de injuria in all cases in which it is not *in terms* excluded by that rule.

It has been already stated that the replication de injuria cannot properly be pleaded to a plea denying, or amounting to a denial, of a material averment in the declaration. For instance, not in an action against a railway company, charged as common carriers, to a plea setting forth facts which bring the case within a section of the railway company's act exempting them from liability, *Elwell v. Grand Junction R. Co.*, 5 M. & W. 669, that being in substance, a denial that the company are liable as alleged, in the capacity of common carriers. Nor, in an action by indorsee against the acceptor of a bill, to a plea stating that the [*59c] plaintiff had indorsed away the bill, and that it was outstanding at the commencement of the suit. *Schild v. Kilpin*, 8 Mee. & W. 673; the plea being an argumentive denial of any breach of contract, for which the plaintiff could sue. Nor, in an action against the acceptor of a bill, alleged to be payable at one month, to a plea that it was accepted in blank, with an authority to draw at two months. *Fisher v. Wood*, 1 Dowl. N. S. 55, that being in effect a denial of the acceptance. And in *Pelley v. Rose*, 12 M. & W. 435, where, to a declaration in debt for Ramsgate Harbour dues, the plea stated facts which showed the vessels to be within an exemption in 32 Geo. 3, c. 74, a replication de injuriâ was held bad, the plea amounting in substance to a denial that the dues ever became payable. In *Simons v.*

Lloyd, 2 Dowl. & L. 981, to a plea that the action was for work and labour as an attorney, and that no signed bill had been delivered, the replication de injuria was holden bad on the ground that the plea was not in excuse.

One replication de injuria may be replied to several pleas. *Price v. Woodhouse*, 16 M. & W. 1.

In some cases it is advisable both to reply de injuria and new assign excess, and that course may in general be followed where the declaration is large enough to cover several trespasses, or the continuance of one. *Worth v. Terington*, 13 M. & W. 781. *Aliter*, where it states only one trespass on a single occasion; *Polkinhorn v. Wright*, 8 Q. B. 197.]

The improper use of de injuria was once held to be ground of general demurrer. *Fursden v. Weeks*, 3 Lev. 65; *Hooker v. Nye*, 4 Tyrwh. 777. These cases are however overruled by *Parker v. Riley*, 3 Mee. & Welsb. 230; and it is held now to be ground of special demurrer only. *S. P. Curtis v. Marquis of Headfort*, 6 Dowl. 502.

As to the evidence under this replication—de injuria puts in issue the whole of the defence contained in the plea. *Phillips v. Howgate*, 5 B. & A. 220; *Barnes v. Hunt*, 11 East, 451; *Lucas v. Nockels*, 10 Bing. 157; [that is to say, all the averments in the plea necessary to constitute a good defence and not expressly admitted, as in *Renno v. Bennett*, 3 Q. B. 768, where there was a replication de injuria absque residuo causæ, admitting part of the plea; but not immaterial averments. *Shearn v. Burnard*, 10 Ad. & E. 593; *Davies v. Chapman*, 2 M. & G. 597, 3 Sc. N. R. 238; except perhaps where all the averments are equally immaterial, by reason of the plea being substantially insufficient, even supposing all the facts averred therein were found for the defendant, in which case it would seem that all the facts must be proved strictly as averred. Also, it seems that in general, to sustain the issue raised *by that replication, the defendant must prove so much of his plea as furnishes a defence to the whole of the cause of action pleaded to; in a word, that the issue is not divisible; for instance, action on a bill of exchange, plea that the bill was accepted by a co-partner of the defendant without authority, for moneys due from the firm before the defendant

became a member, replication de injuria; on proof that any part of the money was a debt of the firm after the defendant joined, the plaintiff is entitled to the verdict. *Wilson v. Lewis*, 2 M. & G. 197, 2 Sc. N. R. 115.] But if the plea state some authority in law, which would prima facie be a justification of the act complained of, the plaintiff will not be allowed under de injuria to show an abuse of that authority such as would, according to the doctrine laid down in *Six Carpenters' case*, convert the defendant into a tort-feasor ab initio. *Lambert v. Hodson*, 1 Bingh. 317; *Price v. Peek*, 1 Bingh. N. C. 387. See *Okes v. Wood*, 3 Mee. & W. 150. [*Woods v. Durrant*, 16 M. & W. 149.] The reason of which is, that the defendant comes to prove the truth of the justification stated in his plea, and would be taken by surprise, were the plaintiff allowed to make a new case at Nisi Prius by a species of confession and avoidance of it. And in analogy to this, it was held in *Okes v. Wood*, 2 Mee. & Welsby, 792, that the defendant's motive in committing an assault which he had justified in order to remove a riotous person, could not be inquired into under de injuria, notwithstanding *Lucas v. Nockells*, 10 Bing. 157.

But if the defendant state in his plea some fact on the existence or non-existence of which the question whether he be a trespasser ab initio or no depends, there it will be sufficient to reply de injuria, as where in trespass for breaking, entering, assaulting, and imprisoning, the defendants justified [the assault and imprisonment] under a ca. sa., "*the outer door being open*," the plaintiff was allowed under de injuria to show that it was shut, so as to render them trespassers ab initio. *Kerby v. Denbey*, 1 Mee. & W. 336. [See, as to this case, the note to *Semayne's case*, ante 46 b.]

There is a point of very frequent occurrence, to which, though perhaps not immediately connected with the main subject of this note, I will here advert, inasmuch as it mostly arises in cases in which de injuria has been adopted as a replication. It often happens, that a defendant pleads *not guilty* to the whole of a declaration, and then, singling out certain parts of it which he thinks he is able to justify, pleads, as to those, a special plea stating his justification. In answering such plea, it is necessary for the plaintiff to consider whether the special

plea cover the whole of the substantial *injury complained of in the declaration, omitting only matter of [*59e] aggravation; for then, if he rely upon the excess, he ought to new assign it, instead of merely joining issue on *not guilty*, and replying de injuria to the special plea. For it has been held, that in such a case, if the defendant prove his special plea, the plaintiff will not be at liberty to give the excess in evidence under the issue joined on the plea of *not guilty*. In *Monprivatt v. Smith*, 2 Camp. 175, to trespass for breaking and entering a house, *staying therein three weeks*, and carrying away goods, the defendants pleaded, 1st. Not guilty; 2nd. As to breaking, and entering, and staying *twenty-four hours parcel of the three weeks*, and also as to carrying away the goods, a justification under a fieri facias. Replication to the last plea, admitting the writ, *de injuriâ suâ propriâ absque residuo causæ*. The defendants proved the justification, but it appeared that they stayed in the house more than twenty-four hours. *Garrow and Wigly*, for the plaintiff, submitted that the excess stood merely on the plea of not guilty, and that the plaintiff was entitled to a verdict in respect of it. But Lord Ellenborough ruled, that, if the plaintiff intend- [*60]

ed to *rely on that excess, he should have done so by a new assignment. See *Okes v. Wood*, 3 Mee. & Welsb. 150; *Atkinson v. Warne*, 5 Tyrw. 481; *Penn v. Ward*, 5 Tyrw. 980.

In a learned note to this case the reporter cites *Taylor v. Cole*, 3 T. R. 292; 1 H. Bl. 555; *Dye v. Leatherdale*, 3 Wils. 20; *Fisherwood v. Cannon*, 3 T. R. 297; *Gates v. Bayley*, 2 Wilson, 313; and deduces from them, as a general principle, that "where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed, that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new assignment, that the defendant has overlooked a part of the grievances he complains of, or has altogether misapprehended his meaning." But if there be several trespasses alleged in one and the same count in the declaration, and the defendant plead *not guilty* to some, and specially to others, and at the trial prove his special plea; still, if the plaintiff prove the several distinct acts of trespass stated in the decla-

ration, he must have a verdict for as much as is not covered by the special plea. *Stammers v. Yearsley*, 10 Bing. 37; *Bush v. Parker*, 1 Bing. N. C. 732; *Phillips v. Howgate*, 5 B. & A. 220. The difficulty in these cases is in deciding whether the matter excluded from the plea of justification forms a distinct wrong, or is only in aggravation of what the special plea professes to justify. In *Bush v. Parker*, the action was in trespass for assaulting the plaintiff, seizing, pulling, and dragging him, forcing him into a pond, and there imprisoning him. — *Pleas*: 1. *Not guilty*; 2. As to the assaulting and seizing, and a little pulling and dragging the plaintiff, a justification in defence of possession. The jury having found the defendants guilty on the first issue, and a verdict for them on the second, it was moved to enter judgment for them on the whole record, but the Court of Common Pleas refused: "I agree," said Tindal, C. J., "in the rule of law, that where, in trespass, the defendant pleads a justification going to the gist of the action, it is not necessary to include that which is mere matter of aggravation; and this brings us to the application of the rule, and to the inquiry whether it will serve the defendants or not; and we have only to look at the pleadings here, and to apply our common sense to the allegation, that the defendants dragged the plaintiff through the pond, to see that it is a distinct and substantive trespass, and not part of the assault of which the plaintiff first complains." Lord Loughborough, in *Taylor v. Cole*, uses some language cited by the Chief Justice in *Bush v. Parker*, which may prove useful in distinguishing between statements of aggravation and statements of several trespasses, such as that in the latter case. The declaration was for breaking and entering the plaintiff's house, and expelling him. *Plea*—justifying the breaking and entering only.—"Undoubtedly," said his Lordship, "to enter into a house, and to expel the possessor, may be distinct acts, and they may be also connected. But where the plaintiff charges them as parts of one trespass, as is the case in this declaration; and the defendant sets forth a justification to the principal act, the entry; it is just that the plaintiff should, either by replication or new assignment, state, that he insists upon the expulsion as a substantive trespass, supposing the entry should be lawful. If he does not,

it is just to consider it only as matter of aggravation." There is a class of cases decided upon st. 22 & 23 Car. 2, c. 9, [repealed as to costs 3 & 4 V. c. 24], certainly with no view to the present question, but which yet, upon examination, seem to have some bearing on it. Their effect is thus stated by Mr. Tidd, in his *Practice*, 9th edit., 964: "Where an injury is done to a personal chattel, it is not within the statute; or where an injury to a personal chattel is laid in the same declaration with an assault and battery, or local trespass; and consequently, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs without a certificate. *But then it must be a substantive independent injury; for where it is laid or proved merely in aggravation of the assault and battery or local trespass, or there is a verdict for the defendant upon that part of the declaration which charges him with injury to a personal chattel, it is within the statute.* So where a *laceravit** or tearing the plaintiff's clothes, is laid in the declaration, or found by the jury, to be merely consequential to, or committed at the same time as, an assault and battery, the plaintiff, recovering less than forty shillings damages, is not entitled to full costs without a certificate; and in a late case it was held by the Court of Common Pleas, that if the plaintiff declare, in one count, for assaulting him, and beating his horse, on which he was riding, whereby it was injured, and the jury give a verdict with general damages under forty shillings, the plaintiff shall have no more costs than damages." In the cases thus collected by Mr. Tidd, it will be observed, that the question, as in *Monprivatt v. Smith*, *Taylor v. Cole*, and *Bush v. Parker*, was, whether a particular injury, stated in the declaration, was part of the gist of the action, or merely in aggravation. And the decisions in those cases may therefore be found not altogether inapplicable in controversies arising on the point which we have just been discussing. [In *Pritchard v. Long*, 9 M. & W. 666, Baron Parke expressed his opinion, that the taking of goods laid in a count for trespass to the realty is a substantive injury.

In *Woods v. Durrant*, 16 M. & W. 149, the question was raised, "whether the assuming to answer matter of aggravation which need not have been aver-

red, and answering it imperfectly, so that the plea, though perfect as to the material averments in the declaration, is not complete in omnibus, makes it bad in substance?" The point was not decided. It seems, that the imperfect answer ought, in such a case, to be rejected as surplusage, there being as yet no allegation of the plaintiff upon the record calling upon the defendant for any answer

to such matter. For, the plaintiff may recover in respect of a cause of action imperfectly alleged in the declaration, if the imperfection be cured or supplied by the plea, *Brooke v. Brooke*, 1 Sid. 184; but not in respect of a cause of action disclosed by the plea only, and not alleged as a cause of action in the declaration, *Marsh v. Bulteel*, 5 B. & Ald. 507.]

IN this country, where costs are seldom large in amount, and where amendments are readily allowed, it is important to observe that, even where the replication de injuria is improperly employed, the defect will be cured by verdict. This point was determined in New York, in the case of *Lytle v. Lee*, 5 John. 112; and as this decision agrees with the English cases cited above, it must be taken as stating the law on this subject, throughout the United States.

In this case, however, the court held that the replication would have been bad on special demurrer, as the plea was one of justification, not excuse, and alleged a complete right in the defendants, under process regularly issued by a court of record. This doctrine is based upon the obvious distinction, that a replication traversing the plea of the defendant, as assigning a cause for an act otherwise wrongful, cannot be properly employed, where the defence is that the act complained of is right in itself; and was again recognised in the cases of *Plumb v. McCrear*, 12 John. 491; *Griswold v. Sedgwick*, 1 Wendell, 26; and *Berry v. Cahanan*, 2 Halsted, 277; while in *Coburn v. Hopkins*, 4 Wendell, 577, and *Stickle v. Richmond*, 1 Hill, 78, it was held to apply, notwithstanding *Selby v. Bardons*, (supra,) to a plea of justification, in which the legal authority relied on, was a mere warrant from a justice of the peace, because the justification shown by the plea, was equally complete, whether the process had issued from a court of record or from an inferior source. As it turns, however, on a question between abstract right, and right derived from circumstances, it must evidently be difficult to apply it with precision in practice. In *Collier v. Moulton*, 7 Johnson, 109, the court expressed their opinion that, "*molliter manus imposuit*," could not be given in evidence, under a replication de injuria to a plea of son assault demesne; since that instead of traversing the plea would be merely in confession and avoidance. This decision evidently rests on the same general principle, that the replication de injuria sua propria can never avail, except as a direct denial of some cause alleged as an excuse by the defendant. Of course it follows that it must be equally inadmissible, where the plea amounts to a denial of the breach, whether directly or by implication; *Schild v. Kilpin*, 8 M. & W. 675.

In *Lytle v. Lee*, cited above, the C. J. threw out a doubt whether matter of record, when so averred, in connexion with matter of fact, as to constitute but one plea, might not be traversed in a replication de injuria; and *WELCH J.*, in delivering the opinion of the court in the case of *Sampson v. Henry*,

11 Pick. 379, expressed the opinion, that this replication might be resorted to, when the defendant pleaded in excuse for an assault and battery, that it was committed in defence of the possession of a dwelling-house, of which he was seised, and which the plaintiff attempted to enter without right. This last opinion seems not to be law.

In order that a plea should be good, it is necessary that it should present but a single defence, although the facts which go to make up the point may be many, and it might consequently be supposed, that when the plea is good, and the defence it contains single, a traverse of the facts constituting the defence would not be bad for duplicity. Such, however, is not in all instances the case; and in *Tubbs v. Caswell*, 8 Wendell, 129, where the defendant pleaded to an action on a promissory note, that it was made jointly with another party whom the plaintiff had released, and the plaintiff in reply traversed both the making and release, the Court of Errors held that the plea was good, and while containing two points, presented only a single defence, but that the replication, though traversing merely the matters which went to make up that defence, was bad for duplicity. But it appears from the case of *Griffin v. Yates*, cited above in the note of the English editor, that when a direct traverse of several points going to make up a single defence in a plea, would be bad for duplicity; the traverse *absque tali causa*, although putting the same number of points in issue, will be good as far as this fault is concerned, if allowable in other respects. Whether this opinion be consistent with the last resolution in *Crogate's case*, that this form of replication is bad when multifarious in matter, it is too late to inquire, since it is abundantly supported by the decision in *Selby v. Bardons*, and by many other cases. Hence arises the great advantage of this mode of replying, when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest the fate of his cause on an issue joined on one fact alone. This has caused its application in England to actions of *assumpsit*; and as it has been resorted to and sanctioned in actions nominally in case, but really of contract, there does not appear to be any sufficient reason why it should not be employed, even in those actions where both form and substance are of the latter character. This opinion is supported by a decision of the Court of Queen's Bench, sustaining a replication *de injuria* in an action of debt; *Purchell v. Salter*, 1 Q. B. 197; and although the decision was reversed on another point by the Exchequer Chamber, *Ibid.* 209, it has since been sustained as to this, by the court of Exchequer, in the case of *Cowper v. Garbett*, 13 M. & W. 333. It has notwithstanding been held in this country, that this replication is only admissible where the action is founded in tort and not in contract; *Coffin v. Bassett*, 2 Pick. 357.

The recent cases in England appear to determine, that in actions on bills or notes, even where, from the nature of the plea as setting up matter in avoidance of the contract, *de injuria*, could not be replied were the suit between the original parties to the instrument, it will be good in an action brought by the indorsee, for the law will intend that the plaintiff is a bona fide holder for value, and *prima facie* entitled to recover, notwithstanding the fraud or want of consideration which may have existed in the first

instance; *Humphreys v. O'Connel*, 7 M. & W. 370. *Scott v. Chapellon*, 5 Scott, N. R. 148. *Gibbons v. Mottram*, 6 M. & G. 691.

But where in an action against the acceptor of a bill of exchange, the plea set forth that before suit brought, the plaintiff endorsed the bill to a third person, to whom the defendant was liable for its amount, a replication *de injuria*, was held inadmissible; *Schild v. Kilpin*, 8 M. & W. 675; and in *Gibbons v. Mottram*, 6 M. & G. 691, it was said that this decision rested on the ground, that the indorsement set up as a defence, was to be regarded as an averment of an authority given by the plaintiff to a third person, to receive payment from the defendant, and was therefore within the third resolution in *Crogate's case*. The authority of the plea in *Schild v. Kilpin*, was therefore determined to be inapplicable to the plea in *Gibbons v. Mattram*, which consisted in an averment that the bill had been given as collateral security for a debt, which had been paid by the defendant before the indorsement to the plaintiff, of which he had notice, as the defence thus set up, rested merely in excuse; and contained no matter of authority or justification.

In *Oystead v. Shed*, 12 Mass. Reps. 506, the very obvious principle was laid down, that when the defendant justified under a writ the entering upon a house, which was the trespass complained of in the declaration, the plaintiff could not under a replication admitting the writ and replying *de injuria*, &c., *absque residuo causæ*, give in evidence new matter to show that the defendant had broken open the outer door, since that would be to bring forward a distinct cause of trespass, which could not be insisted on without a new assignment. Substantially the same point was held in *Stickle v. Richmond*, already cited. But where disobedience of orders has been pleaded by the defendant, as master of a vessel, in excuse for assault and battery committed by tying up the plaintiff and whipping him, the latter was held entitled to prove under a replication *de injuria* that the whipping was immoderate, and thus in effect disprove the cause, by showing that the fact was without the limits of its operation; *Hannen v. Edes*, 15 Mass. 341. The distinction between this case, and the one last cited is, that in the former, new facts were insisted on, while in the latter, the evidence was merely given to prove excess in the old. The same principles were applied in the case of *Sampson v. Smith*, 15 Mass. 365.

The two cases last cited, appear to point out an exception to the doctrine of new assignment, under which it is ordinarily held, that when the plaintiff relies upon an excess, he must re-assign it instead of replying *de injuria*, by establishing, that if the excess take the trespass altogether out of the operation of the cause, it will be admissible in evidence under the general replication *de injuria sua propria*; *Curtis v. Carson*, 2 New Hampshire, 539.

[*62] *THE SIX CARPENTERS' CASE.

MICH.—8 JACOBI 1.

[REPORTED, 8 COKE, 146 a.]

If a man abuse an authority given him by the law he becomes a trespasser ab initio.—Contra of an authority given by the party.—The abuse is good matter of replication.—Mere nonfeasance does not amount to such abuse as makes a man a trespasser ab initio.

IN trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac., in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the (b) new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house, *præd' tempore quo, &c., et diu antea et postea*, was a common wine tavern of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd' tempore quo, &c., viz. hora quartâ post meridiem*, into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, *by way of replication*, did confess, that the said house was a common(c) tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it; but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, [*63] and upon request did refuse to pay for the same: *upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment, upon request, is a denying in law,) makes the entry into the tavern tortious. And first, *it was resolved when entry, authority or(d) license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio: but where an entry, authority, or license is given by the(e) party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio.* And the reason of this difference is, that in the case of a general authority or license(f) of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for *acta*

(a) See 6 Mod. 70. 216. Fitzgib. 86. 185. (b) 2 Co. 5, a. 18, b. (c) Kelw. 38, a.

(d) 2 Roll. 561. Yelv. 96, 97.

(e) 5 H. 7, 11, a. Perk. sect. 191. Yelv. 96, 97. 21 E. 4, 19, b.

(f) 2 Roll. 561. 21 E. 4, 19, b. 76, b, per Catesby. Yelv. 96, 97. Perk. sect. 191. 5 H. 7 11, a.

exteriora indicant interiora secreta. Vide 11 H. 4, 75, b. But when the party gives an authority or license himself to do any thing, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern: so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. Vide 12 E. 4, 8, b. 21 E. 4, 19, b. 5 H. 7, 11, a. 9 H. 6, 29, b. 11 H. 4, 75, b. 3 H. 7, 15, b. 28 H. 6, 5, b. But if he who enters into the inn or tavern doth a trespass, as if he(*g*) carries away any thing; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the(*h*) distress; or if he who enters to see waste breaks the house, or(*i*) stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered, for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if(*j*) a purveyor takes my cattle by force of a commission, for the king's house, it is lawful; but if he sells them in the markét, now the first taking is wrongful; and therewith agrees 18 H. 6, 19, b. *Et sic de similibus.*

2. It was resolved *per totam curiam*, that(*k*) not doing cannot make the party, who has authority or license by the law, a trespasser *ab initio*, because not doing is no trespass, and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing *cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, [*64] 47, a. So if a man takes cattle damage-feasant, and the other offer sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover(*l*) damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69, g. *temp. E.* 1. Replevin, 27. 27 E. 3, 88. 45 E. 3, 9. So in the case at bar, for not(*m*) paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point(*n*) 12 E. 4, 9, b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put is not(*o*) law, for it is no trespass, but the taverner shall have an action of debt: and there before(*p*) Brown held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have(*q*) a special action of debt; *scil.* that A. did put cloth to him to make a gown

(*g*) Perk. sect. 119. 2 E. 4, 5. Cro. Car. 196. Yelv. 96.

(*h*) 12 E. 4, 8, b. 9 Co. 11, a. 1 And. 65. Cro. Jac. 148. Perk. sect. 191.

(*i*) 2 Roll. 561. 11 H. 4, 75, b. Fitz. Tresp. 176. Br. Tresp. 97. Br. Replica. 12.

(*j*) 2 Roll. 561. 18 H. 6, 9, b. 2 Inst. 546.

(*k*) Cr. Car. 196. 2 Bulstr. 312. 1 Roll. Rep. 130.

(*l*) Lit. Rep. 34. Dr. & Stud. lib. 2, 112, b. Hct. 16.

(*m*) 1 Roll. Rep. 60. 2 Bulst. 312.

(*o*) 12 E. 4, 9, b.

(*p*) 12 E. 4, 9, b.

(*n*) 1 Sid. 5. 12 E. 4, 9, a. b.

(*q*) 1 Sid. 5.

thereof for the said A., and that A. would pay him as much for making, and all necessaries thereto, as he should deserve, and that for the making thereof, and all necessaries thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor over-values the making, or the necessaries to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessaries thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c. for so much, unless it is so especially agreed. But in such case he may^(r) detain the garment until he is paid, as the hostler may the horse. Vide Br. Distress, 70, and all [*65] this was resolved by the court. Vide the Book in *30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord, or his bailiff comes to distrain, and^(s) before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8, b. in the Mr. of St. Mark's case, and so is the opinion of Hull to be understood in 13 H. 4,^(t) 17, b., which opinion is not well abridged in title Trespass, 180. *Note reader this difference, that tender upon the(u) land before the(v) distress makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful: tender after(w) the impounding makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined.* But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *Detinue* for the detainer after: or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said books in 13 H. 4, 17, b. 14 H. 4, 4. Registr' Judic' 37. 45 E. 3, 9, and all the books before. Vide 14 Ed. 4, 4, b.; 2 H. 6, 12; 22 Hen. 6, 56; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72, and Pilkington's case, in the Fifth Part of my Reports, fol. 76, and so all the books which prima facie seem to disagree, are upon full and pregnant reason well reconciled and agreed.

(r) Hob. 42. Yelv. 67. Cro. Car. 271, 272. Br. Distress, 71. Palm. 223. Hut. 101. 22 E. 4, 49, b. Moor, 877. 5 Ed. 4, 2, b. 1 Roll. Rep. 44. 2 Roll. Rep. 439. 2 Roll. 85. 928. 3 Bulstr. 269.

(s) Br. Distr. 37. Br. Tender, &c. 18.

(t) 2 Roll. 561. See *Ansecombe v. Shore*, 1 Camp. 285. 1 Taunt. 261. Replevin for taking and impounding, *plea* a tender after the taking and before impounding: held good, for the detaining after tender is a new taking. *Evans v. Elliott*, 5 Ad. & Ell. 142.

(u) 2 Sid. 40.

(v) 5 Co. 76, a. 2 Inst. 107.

(w) 2 Roll. 561. 1 Brownl. 173. 2 Inst. 107. 5 Co. 76, a. [It seems to have been thought in the case of *Smith v. Goodwin*, 4 B. & Ad. 415, that this doctrine does not apply to the case of a distress for rent, but that a tender of the rent and charges after impounding would make the subsequent detainer tortious. In that case, however, there was a seizure, an impounding upon the premises, then a tender of the rent and charges, then a relinquishment of the distress, and then a second seizure. In *Thomas v. Harries*, 1 M. & Gr. 695, 1 Sc. N. R. 524, Maule, J., thought that under the 11 Geo. 2, c. 19, s. 22, the right of tender remained as long as the distress was on the premises; but the other judges differed from him. The doctrine laid down in the *Six Carpenters' Case* is affirmed by *Ellis v. Taylor*, 8 M. & W. 415; and *Ladd v. Thomas*, 4 Perr. & D. 9; 12 Ad. & El. 117, S. C.]

FROM this case, which is one of the most celebrated in Lord Coke's Reports, three points are to be collected :

1. That if a man abuse an authority given to him by the law, he becomes a trespasser ab initio.

2. That in an action of trespass, if the authority be pleaded, the subsequent abuse may be replied.

3. That a mere *nonfeasance* does not amount to such an abuse as renders a man a trespasser ab initio.

The first of these points has been frequently confirmed. In *Oxley v. Watts*, 1 T. R. 12, the plaintiff sued the defendant in trespass for taking a horse; the defendant justified taking him as an estray. Replication, that, after the taking mentioned in the declaration, the defendant worked the horse, and so became a trespasser ab initio. On motion in arrest of judgment, the court held the replication good, and the defendant a trespasser ab initio. The same point, precisely, was decided in *Bagshaw v. Goward*, B. N. P. 81; *Cro. Jac.* 147, where it arose on demurrer; *accord. Gargrave v. Smith*, Salk. 221; *Sir Ralph Bovey's case*, 1 Vent. 217; *Aitkenhead v. Blades*, 5 Taunt. 198. One consequence of this doctrine was, that, if a party, entering lawfully to make a distress, committed any subsequent abuse, he became a trespasser ab initio. In *Gargrave v. Smith*, Salk. 221, and [*66] *Dye v. Leatherdale*, 3 Wilson, 20, this was expressly decided. [But, if there be a seizure of several chattels, some of which are by law seizable, and some not, or some of which are subsequently abused, and the rest not, the seizure is or becomes illegal, only as to the part which it was unlawful to seize, or which was subsequently abused, and the seizure of the rest continues legal; *Dod v. Monger*, 6 Mod. 215; *Harvey v. Pocock*, 11 M. & W. 740.] As it was found however that this doctrine [of trespass ab initio] bore extremely hard on landlords; to relieve them, stat. 11 G. 2, c. 19, s. 19, provided, "That where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainer a trespasser ab initio; but the party grieved may recover satisfaction for the damage in a special action of trespass or on the case, [*66a] at the election of the *plaintiff,

and, if he recover, he shall have full costs." The true construction of the above words, "*trespass, or the case*," is, that the party injured must bring trespass if the injury be a trespass, and case, if it be the subject matter of an action on the case. The nature of the irregularity determines the form of action. Hence, case ought to be brought for an irregularity in omitting to appraise the goods before selling them, and trespass for remaining in possession beyond the five days. *Winterbourne v. Morgan*, 11 East, 395; see *Etherton v. Popplewell*, 9 East, 139. [Note the diversity between such cases and *Miles v. Bough*, 3 Q. B. 845, where a statute gave an option to sue by action of debt, or on the case.] By 17 G. 2, c. 38, s. 8, where any distress shall be made for money justly due for the relief of the poor, the party distraining shall not be deemed a trespasser, ab initio, on account of any act subsequently done by him; but the party grieved may recover satisfaction for the special damage in an action of trespass or on the case, with full costs, unless tender of amends is made before action brought.

As to the right of a plaintiff to reply the abuse, where it is such as renders the defendant, who has pleaded the authority which he has abused, a trespasser ab initio: that is established by several cases. In the principal case it seems to have been assumed: for no objection was taken to the replication as being a departure: but Lord Coke says, that the only point was, whether the denying to pay made the first entry into the tavern tortious. In *Gargrave v. Smith*, Salk. 221, B. N. P. 81, trespass for taking goods. Plea, that defendant distrained them damage-feasant. Replication, that he afterwards converted them to his own use. "On demurrer, it was holden to be no departure, but to make good the declaration: for he that abuses a distress is a trespasser ab initio; and it would be of no avail to the plaintiff to state the conversion in his declaration, for it is in no ways necessary to his action, and, if alleged, need not be answered. It would be out of time to state it in the declaration, but it must come in in the replication." [*Acc. Roberts v. Taylor*, 3 Dowl. & L. 1.] See too *Sir R. Bovey's case*, 1 Vent. 217, where Hale, C. J., said, that to state it in the declaration would be "like leaping before you came to the stile;" and see *Taylor v. Cole*, 3 T. R. 292. And the only proper course is to

reply specially; for if the defendant plead an authority in law, and the plaintiff rely on an abuse, he must not reply de injuria, as will be seen in the note to Crogate's case, ante, p. 59, and Price v. Peck, 1 Bing. N. C. 380.

It has been held that the sheriff, if indeed he be a trespasser at all, is not at [*666] all events so ab initio, on account of his detaining a prisoner who came into his custody lawfully beyond the time at which, according to the practice of the Court as regulated by Statute (but of the applicability of which to the

plaintiff's case it was not averred the Sheriff had notice,) he ought to have been detained. In that case, a distinction was drawn by Littledale, J., between cases in which the excess *may* have been contemplated at the time of the original act, and those in which it could not possibly have been so. Smith v. Eggington, 7 A. & E. 161. [See Magnay v. Burt, 5 Q. B. 381.]

As to becoming a trespasser ab initio by nonfeasance, see the dicta in Jacobson v. Blake, 6 Man. & Gr. 925, 7 Scott, N. R. 772.]

1. The first of the three points above-mentioned, that the abuse of an authority given by law, makes the party a trespasser ab initio, is confirmed in Hazard v. Israel, 1 Binney, 240; Colby v. Jackson, 12 New Hampshire, 526, 533; Stephens v. Lawson, 7 Blackford, 275, 276; dicta in Wilt v. Welsh, 6 Watts, 9, 13, in Van Brunt and another v. Schneek, 13 Johnson, 414, and in Nelson v. Miriam, 4 Pickering, 249. Any irregularity in the conduct of a legal agent, whereby any of his acts are without the pre-requisites appointed by the law—as, if cattle seized damage-feasant, are impounded without previous assessment of damages, or goods taken under warrant of distress for fines incurred, or for duties, are sold without, or after too brief an advertisement, or goods distrained for rent are sold without appraisalment and advertisement, where, as in Pennsylvania, the statute 11 Geo. 2, c. 19, s. 19, is not in force—makes a trespasser ab initio; Sackrider v. McDonald, 10 Johnson, 253; Blake v. Johnson, 1 New Hampshire, 91; Purrington v. Loring, 7 Massachusetts, 388; Kerr and another v. Sharp, 14 Sergeant & Rawle, 399; Barrett v. White, et al., 3 New Hampshire, 210, 228. An officer entering a house to serve legal process on goods, becomes a trespasser ab initio, by putting an unfit person in keeping of the goods, against the owners consent; Maleom v. Spoor, 12 Metcalf, 279. See also Rowley v. Rice, 11 Id. 337. A sheriff selling the whole interest in goods, owned by two jointly, upon an execution against one, is a trespasser, ab initio; Melville v. Brown, 15 Massachusetts, 82; Waddell v. Cook, 2 Hill's N. Y. 47.—It is otherwise where the authority is given by the party; Allen v. Crofoot, 5 Wendell, 506, where a different reason is given from that in the principal case.

2. The point of pleading, mentioned above, is confirmed in Hopkins v. Hopkins, 10 Johnson, 369, and decided to be applicable also to replevin; in that case, replevin was brought, avowry made, and the abuse specially replied; it was held that the original taking was thereby rendered unlawful, and replevin lay.

3. Mere non-feasance does not make a trespasser ab initio; Gardener v. Campbell, 15 Johnson, 401; Gates v. Lounsbury, 20 id. 427; Hale v. Clark, 18 Wendell, 498; Bell v. North, 4 Littell, 133; Waterbury v. Lockwood, 4 Day, 257. There must be such a positive act, as if done with-

out authority would be a trespass; *Shorland v. Govett*, 5 B. & C. 485; *Ferrin v. Symonds*, 11 New Hampshire, 363.

The principle that the abuse of a legal authority to enter renders the original entry unlawful, does not extend to criminal law; and the fact that one who has entered an inn and the bar-room, as he had a right by law to do, afterwards commits a larceny in the bar room, cannot relate back so as to make his entry into the house criminal, and render him subject to an indictment for entering the house with intent to steal; *The State v. Moore*, 12 New Hampshire, 42, where the reason of the rule in the principal case, is said to be the policy of the law for preventing its authority being turned into an instrument of oppression and injustice.

H. B. W.

*LAMPLEIGH v. BRATHWAIT. [*67]

MICH. 13 JACOBI.—ROT. 712.

[REPORTED HOBART, 105.]

A mere voluntary Courtesy will not uphold an Assumpsit; but a Courtesy moved by a previous request will.—Labour, though unsuccessful, is a good consideration. Of Assumpsit and Considerations generally.

ANTHONY LAMPLEIGH brought an assumpsit against Thomas Brathwait and declared, that whereas the defendant had feloniously slain one Patrick Mahume; the defendant, after the said felony done, instantly required the plaintiff to labour,^(a) and do his endeavour to obtain his pardon from the king, whereupon, the plaintiff, upon the same request did, by all the means he could and many days' labour, do his endeavour to obtain the king's pardon for the said felony, viz. in riding and journeying at his own charges from London to Roston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, sc. &c., in consideration of the premises, the said defendant did promise the said plaintiff to give him 100*l.*, and that he had not, &c., to his damage 120*l.*

To this the defendant pleaded non assumpsit, and found for the plaintiff, damage 100*l.* It was said in arrest of judgment, that the consideration was passed.

But the chief objection was, that it doth not appear that he did any thing

(a) In a case in *Espinasse*, this consideration was held illegal, viz. *Norman v. Cole*, 3 Esp. 253.

towards the obtaining of the pardon, but riding up and down, and nothing when he came there. And of this opinion was my brother (Warburton), but myself and the other two Judges were of opinion for the plaintiff,* and so he had judgment.

[*68] First, it was agreed, that a mere voluntary courtesy will *not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. Pasch. 10 Eliz., Dyer, 272. Hunt and Bates. See Oneley's case, 19 Eliz., Dyer, 355.

Then, as to the main point, it is first clear, that in this case upon the issue non assumpsit, all these points were to be proved by the plaintiff:

1. That the defendant had committed the felony, prout, &c.
2. Then that he requested the plaintiff's endeavour, prout, &c.
3. That thereupon the plaintiff made his proof, prout, &c.
4. That thereupon the defendant made his promise, prout, &c.

For wheresoever I build my promise upon a thing done at my request, the execution of the act must pursue the request, for it is like a case of commission for this purpose.

So then the issue found ut supra is a proof that he did his endeavour according to the request, for else the issue could not have been found: for that is the difference between a promise upon a consideration executed and executory, that in the executed you cannot traverse the consideration by itself, because it is passed and incorporated and coupled with the promise.† And if it were not indeed then acted, it is *nudum pactum*.

But if it be executory, as, in consideration that you shall serve me a year, I will give you ten pounds, here you cannot bring your action, till the service performed. But if it were a promise on either side executory, it needs not to aver performance, for it is the counter-promise, and not the performance, that makes the consideration;‡ yet it is a promise before, though not binding, and in the action you shall lay the promise as it was, and make special averment of the service done after.

Now, if the service were not done, and yet the promise made, prout, &c., the defendant must not traverse the promise, but he must traverse the performance of the service, because they are distinct in fact, though they must concur to the bearing of the action.

[*69] *Then also note here, that it was neither required, nor promised to obtain the pardon, but *to do his endeavour* to obtain it; the one was his end, and the other his office.

Now then, he hath laid expressly, in general, that he *did his endeavour* to obtain it, viz. *in equitando*, &c., to obtain. Now, then, clearly, the substance of this plea is general, for that answers directly the request, the special assigned is but to inform the court; and therefore, clearly, if, upon the trial, he could have proved no riding nor journeying, yet any other effectual

* See 1 Wms. Saund. 211, c. in notis. 2 Wms. Saund. 136, in notis.

† See R. H. 1834, Passenger v. Brookse, 1 Bing. N. C. 587.

‡ See notes to Pordage v. Cole, 1 Wms. Saund. 320, and to Peters v. Opic, 2 Wms. Saund. 352.

endeavour according to the request would have served:* and therefore, if, the consideration had been, that he should endeavour in the future, so that he must have laid his endeavour expressly, and had done it as he doth here, and the defendant had not denied the promise, but the endeavour, he must have traversed the endeavour in the general, not in the riding, &c., in the special; which proves clearly, that it is not the substance, and that the other endeavour would serve. This makes it clear, that though particulars ought to be set forth to the court, and those sufficient, which were not done, which might be cause of demurrer; yet being but matter of form, and the substance in the general, which is herein the issue and verdict, it were cured by the verdict; but the special is also well enough; for all is laid down for the obtaining of the pardon which is within the request; and therefore, suppose he had ridden to that purpose, and Brathwait had died, or himself, before he could do any thing else, or that another had obtained the pardon before, or the like, yet the promise had holden.

And observe that case, 22 E. 4, 40. Condition of an obligation, to show a sufficient discharge of an annuity, you must plead the certainty of the discharge to the court.† The reason whereof, given by Brian and Choke, is, that the plea there contains two parts, one a trial *per pais scil.* the writing of the discharge, the other by the court, *scil.* the sufficiency and validity of it, which the jury could not try, for they agree, that if the condition had been to build a house agreeable to the state of the obligee, because it was a case all proper for the country to try, it might have been pleaded generally: and then it was a demurrer, not an issue, as is here.

[*70] *WHENEVER the consideration of a promise is *executory*, there must *ex necessitate rei* have been a request on the part of the person promising. For if A. promise to remunerate B., in consideration that B. will perform something specified, that amounts to a request to B. to perform the act for which he is to be remunerated. See *King v. Sears*, 2 C. M. & R. 53. 5 Tyrwh. 587. The only difficulty that can arise in such cases is on the question which sometimes occurs *whether the consideration move from the plaintiff*: as, for instance, if A. in consideration of something to be done by B., were to promise something to C., in this case, C. being a stranger to the consideration, unless he in some

way had intervened in the agreement between A. and B., could not sustain an action on the promise. See *Price v. Easton*, 4 B. & Adol. 433; *Osborne v. Rogers*, 1 Wms. Saund. 264. See *Thomas v. Shillibeer*, 1 Mee. & Welsb. 126. But if the plaintiff have intervened in the agreement, that is sufficient. *Tipper v. Bicknell*, 3 Bingh. N. C. 710; *Webb v. Rhodes*, ib. 734. And in *Lilly v. Hayes*, 5 A. & E. 549, A. transmitted money to B. and afterwards informed him that it was for C.: B. having assented to this, and C. having been informed of it, it was held that C. might maintain assumpsit for money had and received against B. See also *Dutchman v. Tooth*, 5 Bing. N. C. 577. {The

* See the notes to *Bristow v. Wright*, post.

† So to a plea of nul agard in an action on a bond to perform an award, the replication must set out the award in order that the court may judge of its sufficiency. See 1 Wms. Saunders, 327, n. d.

rule seems to be, that where the third person is the *only* one interested in the consideration,—as, where one pays money to another for the use of the third person, or having money of another promises him to pay it to the third,—here, the right of action is in the third person: but, if the contract, though to be performed to a third person, is for the benefit of the promisee, and the third is a stranger to the consideration, as, where the promisee owes the third person, and another promises him that he will pay that person, here the promisee alone has the right of action. *Blymire v. Boistle*, 6 Watts, 182; confirmed in *Morrison v. Berkey*, id. 349; *Hubbert v. Borden* and another, 6 Wharton, 79, 94; *Ramsdale v. Horton*, 3 Barr, 330; *Esling v. Zant-zinger*, 1 Harris, 50, 55: see, also, *Edmundson v. Penny*, 1 Barr, 334; *Beers v. Robinson*, 9 id. 229; *Comfort v. Eisenbeis*, 1 Jones, 13, 16; *Owings's Ex'rs v. Owings*, 1 Harris & Gill, 455; *Carnegie and another v. Morrison* and another, 2 Metcalf, 381; *Sailly v. Cleveland*, 10 Wendell, 156, 159; *Barker v. Bucklin*, 2 Denio, 45; *Treat v. Stanton*, 14 Connecticut, 446, 451; *Hall v. Huntoon*, 17 Vermont, 244, 251; *Motley v. Manuf. Ins. Co.* 29 Maine, 337; *Todd v. Tobey*, id. 220, 224; *Farlow v. Kemp*, 7 Blackford, 544; *Huckabee v. May*, 14 Alabama, 263, 265.} Where the consideration is *executed*, unless there have been an antecedent request, no action is maintainable upon the promise; for a request must be laid in the declaration, and proved, if put in issue at the trial. *Child v. Morley*, 8 T. R. 610; [see *Sutton v. Tatham*, 10 A. & E. 27;] *Stokes v. Lewis*, 1 T. R. 20; *Naish v. Tatlock*, 2 H. Bl. 319; *Hayes v. Warren*, 2 Str. 933; *Richardson v. Hall*, 1 B. & B. 50; *Durnford v. Messiter*, 5 M. & S. 446. {*Livingston v. Rogers*, 1 Caines, 584, and see note to edition of 1813; *Comstock v. Smith*, 7 Johnson, 87; *Parker v. Crane*, 6 Wendell, 617.} See Reg. Gen. Hil. 1832, pl. 8. For [although courts of law will not, in the absence of fraud, enter into the question of *adequacy* of consideration, *Skeate v. Beale*, 11 A. & E. 983; *England v. Davison*, 11 A. & E. 856, yet] a mere voluntary courtesy is not sufficient to support a subsequent promise; but when there was [*70a] previous *request, the courtesy was not merely voluntary, nor is the promise *nudum pactum*, but couples

itself with, and relates back to, the previous request, and the merits of the party which were procured by that request, and is therefore on a good consideration. See *Pawle v. Gunn*, 4 Bing. N. C. 448. [When, however, it is above said that the request must be *laid* and *proved*, it must be understood that there are some cases in which the consideration, though *executed*, is of such a nature that it must have been moved by a previous request, and in which, therefore, as in a case of executory consideration, the statement that what was done was *at the defendant's request*, is merely *expressio eorum quæ tacite insunt*, and, therefore, unnecessary. Such, for instance, is the case of money lent, which, if lent at all, must obviously have been so with the borrower's concurrence. But the demand for money paid to the defendant's use stands on a different footing, for it may be so paid without his request, which, consequently, ought to be averred in terms, and proved, either directly or by circumstances from which it may be implied by law. *Victor v. Davies*, 12 M. & W. 758; 1 M. & Gr. 265, *note*.] Such a request may be either *express* or *implied*. If it have not been made in express terms, it will be implied under the following circumstances:—*First*, Where the consideration consists in the plaintiff's having been compelled to do that to which the defendant was legally compellable. *Jeffreys v. Gurr*, 2 B. & Ad. 833; *Pownall v. Ferrand*, 6 B. & C. 439; *Exall v. Partridge*, 8 T. R. 308; *Toussaint v. Martinnant*, 2 T. R. 100; *Grissel v. Robinson*, 3 Bingh. N. C. 13. {*Draughan v. Bunting*, 9 Iredell, 10, 13.} *Secondly*, Where the defendant has adopted and enjoyed the benefit of the consideration, for in that case the maxim applies *omnis ratihabitio retrotrahitur et mandato æquiparatur*. Vide *Pawle v. Gunn*, 4 Bing. N. C. 448. {*Doty v. Wilson*, 14 Johnson, 378; *Kenan v. Holloway*, 16 Alabama, 54, 58; *Gue-rard v. Jenkins*, 1 Strobhart, 171.} *Thirdly*, Where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, *and* the defendant afterwards, in consideration thereof, *expressly* promises. *Wennell v. Adney*, 3 B. & P. 250 in notis; *Wing v. Mill*, 1 B. & A. 104; S. N. P. 8 ed. p. 57, *n*, 11. *Paynter v. Williams*, 1 C. & M. 818. But it must be observed that there

is this distinction between this and the two former cases, viz. that in each of the two former cases the law will imply the *promise* as well as the *request*, whereas in this and the following case, the *promise* is not implied, and the *request* is only then implied when there has been an express promise. *Atkins v. Banwell*, 2 East, 505. {Without a ratification of the payment, one who pays the debt of another without his request, cannot recover; *Winsor v. Savage*, 9 Metcalf, 347, 348; *Young v. Dibbrell*, 7 Humphreys, 270; *Lewis v. Lewis*, 3 Strobbart, 530; *Matthews v. Colburn*, 1 Id. 258, 270.} *Fourthly*, In certain cases, where the plaintiff *voluntary* does that to which the defendant is *morally*, though not *legally*, compellable, and the defendant afterwards, in consideration thereof, *expressly* promises. See *Lee v.*

Muggeridge, *5 Taunt. 36; [*70b] *Watson v. Turner*, B. N. P. 129, 147, 281. *Truman v. Fenton*, Cowp. 544. *Atkins v. Banwell*, 2 East, 505. But every *moral* obligation is not perhaps sufficient for this purpose. See per Lord Tenterden, C. J., in *Littlefield v. Shee*, 2 B. & Adol. 811. [Indeed it seems to be now clearly settled by the elaborate judgment of the Court of Queen's Bench in *Eastwood v. Kenyon*, 11 Ad. & E. 452, 3 Per. & D. 276, S. C., that a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise, and that the class of considerations derived from moral obligation includes only those cases in which there has been a legal right which is become devoid of legal remedy. Such, for instance, is the case of a bankrupt discharged by his certificate of liabilities which he is nevertheless bound in honesty to satisfy; in such a case, the law considers his moral obligation, though devoid of legal sanction, as capable of sustaining a new express promise to discharge the former liability, and such a promise may be made either before or after certificate; see *Trueman v. Fenton*, Cowp. 544; *Kirkpatrick v. Tattersall*, 13 M. & W. 766, {and *Earle v. Oliver*, 2 Exch. 71, 83.} Of the same nature is a promise made by a debtor whose liability has been barred by the statute of limitations. See note to *Whitcombe v. Whiting*, *post*. And see what is said as to infancy, *Williams v. Moor*, 11 M. & W. 263. The tendency of modern decisions has been to confine the legal efficacy of moral obliga-

tion to such cases. Thus, where a man seduced a woman, and, after cohabitation had ceased, by way of compensation, expressly promised to pay a yearly sum for her support, that promise was held not to be binding in law. *Beaumont v. Reeve*, 8 Q. B. 4*3.]

{See *Mills v. Wyman*, 3 Pickering, 207; *Valentine v. Foster*, 1 Metcalf, 521; Dearborn and another v. Bowman, 3 Id. 155; *Wheaton v. Wilmarth*, 13 Id. 422, 427; *Ehe v. Judson*, 24 Wendell, 97; *Stafford v. Bacon*, 25 Wendell, 384; S. C., 1 Hill, 533; 2 Id. 453; *Nash v. Russell*, 5 Barbour's S. C., 556; *Vanderveer v. Wright*, 6 Id. 547, 551; *Snevely v. Reed*, 9 Watts, 396; *Kennedy's Ex'ors v. Ware*, 1 Barr, 445, 451; *Carman v. Noble*, 9 Id. 367, 371; *Briggs and Ely v. Sutton*, Spencer, 581.}

Whether a father impliedly undertakes to repay any person supporting his child whom he deserts. *Dubitatur*; *Urmston v. Newcomen*, 4 A. & Ell. 899. [It seems that no such undertaking would be implied by law. *Parke, B. in Seaborne v. Maddy*, 9 Car. & P. 497, said "No one is bound to pay another for maintaining his children, either legitimate or illegitimate, except he has entered into some contract to do so. Every man is to maintain his own children as he himself shall think proper; and it requires a contract to enable another person to do so, and charge him for it in an action." The same law was laid down in *Mortimore v. Wright*, 6 M. & W. 452, where, per Lord Abinger, "in point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle, or a mere stranger would be;" and *Parke, B. said*, "It is a clear principle of law, that a father is not under any legal obligation to pay his son's debts, except, indeed, by proceedings under the 43 E., by *which he may, under certain cir- [*70c] cumstances, be compelled to support his children according to his ability; but the mere moral obligation to do so cannot impose any legal liability." The future maintenance of a child would, however, of course be a sufficient consideration for a promise, *Jennings v. Brown*, 9 M. & W. 496; {*Linnegar v. Hodd*, 5 C. B. 437.} And such a promise need not be in express terms, but may be implied from circumstances, *Blachburn v. Mackey*, 1 C. & P. 1; *Law v. Wilkin*, 6 A.

& E. 718, 1 N. & P. 697; though, according to the case of *Mortimore v. Wright*, *supra*, "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person, and it would bring the law into great uncertainty if it were permitted to juries to impose a liability in each particular case according to their own feelings or prejudices," per Lord Abinger.

A remarkable exception from the rule, that a promise to pay may be implied from a previous request occurs in the case of a barrister or physician, who can claim no remuneration for services performed at the request of the client or patient, the circumstance of their profession rebutting the implication of a promise, which would otherwise have arisen. See *Veitch v. Russell*, 3 Q. B. 928. Another may be where there is a covenant under seal, which would rebut the inference of an implied promise, and not sustain an express one to do what is covenanted, for want of new consideration. *Baber v. Harris*, 9 A. & E. 532.]

Upon the question, what will amount to evidence of a request where it is necessary to prove one, see *Alexander v. Vane*, 1 Mee. & Welsb. 513. Where A. & B. went to C.'s shop; A. ordered goods, and B. said in A.'s presence that he would pay for them if A. did not. This was held evidence of a request from A. to B. to pay for them in case of his own default.

One of the most singular, perhaps the most singular case determined on the ground of *nudum pactum*, is *Hopkins v. Logan*, 5 M. & W. 247, where it was held that an account stated, and a sum thereupon found to be due to the plaintiff, will not support a promise to pay such sum *in futuro*, though the law would imply a promise to pay it *in presenti*. [The ground of the decision appears to have been, that the promise implied by law to pay *in presenti* exhausted, as it were, the consideration, and that there was, consequently, no consideration left for any other promise; so that it bears some analogy to *Granger v. Collins*, in which a declaration that B. had agreed to take A.'s house at a certain rent; and that A., in consideration of the premises, promised that he should enjoy without eviction from C. was held bad for want of a

*consideration to support the *assumpsit*, 6 M. & W. 458; and see *Brown v. Crump*, 1 Marsh. 567; and *Jackson v. Cobbin*, 8 M. & W. 790; *Roscorla v. Thomas*, 3 Q. B. 234, 2 Gale & D. 508; *Kaye v. Dutton*, 8 Scott, N. R. 495. In *Hopkins v. Logan*, as has been just observed, a debt payable *in presenti* was held no consideration for a promise to pay *in futuro*; but in *Walker v. Rostrom*, 9 M. & W. 411, the Court of Exchequer held that a debt payable *in futuro* was a good consideration for an appropriation of funds in the hands of the debtor's agent by way of security for the debt. The distinction seems to be between an *executed* transfer and an *executory* promise. {"According to the current of recent authorities, beginning with *Hopkins v. Logan*, 5 M. & W. 241, and ending with *Roscorla v. Thomas*, 3 Q. B. 234, where the consideration is past and executed, it will support only such a promise as the law will imply from that executed consideration:" per Parke, B. in delivering judgment in the Ex. Ch. in *Elderton v. Emmens*, 6 C. B. 160, 174.} In *Kaye v. Dutton*, 2 Dowl. & Low. 296-7, 8 Scott, N. R. 502-3, Tindal, C. J., after citing *Hopkins v. Logan* and other cases of that class, points out the possibility of a distinction between them and cases of executed consideration from which *no* promise can be implied by law, intimating that possibly, although considerations of the former class are only capable of supporting the promise implied by law, yet those of the latter may be capable of supporting any promise otherwise unobjectionable. No decision, however, was pronounced upon that point. And it seems impossible to state any rational distinction between the latter class of cases and moral obligations of pure gratitude for favours past, which, as we have seen page 70*b*, will not sustain a promise.] {In *Earle v. Oliver*, 2 Exch. 71, 90, it was decided, that a debt barred by certificate or by the Statute of Limitations is a sufficient consideration for a qualified or conditional promise to pay it, as well as for an absolute and unqualified one, and that when the debt has become payable immediately, it may be recovered in the ordinary *indebitatus assumpsit*; but that a debt thus barred would not be a sufficient consideration to support a promise to do a collateral thing.}

It is perhaps upon the principle that a

gift while executory is *nudum pactum*, and therefore incapable of being enforced, that a parol gift of chattels is held to pass no property to the donee without delivery. *Irons v. Smallpiece*, 2 B. & A. 558. [The property may be passed by a contract of sale for valuable consideration without delivery. *Dixon v. Yates*, 5 B. & Ad. 340, per Parke, J.]

It has been above stated that one of the cases in which an *express request* is unnecessary, and in which a promise will be *implied*, is that in which the plaintiff has been compelled to do that to which the defendant was *legally* compellable. On this principle depends the right of a surety who has been damnified to recover an indemnity from his principal. *Toussaint v. Martinnant*, 2 T. R. 100; *Fisher v. Fellows*, 5 Esp. 171; {*Appleton* and another v. *Bascom* and another, 3 Metcalf, 169; *Gibson v. Love*, 2 Florida, 599, 620.} Thus, the indorser of a bill who has been sued by the holder, and has paid part of the amount, being a surety for the acceptor, may recover it back as money paid to his use and at his request. *Pownall v. Ferrand*, 6 B. & C. 439. [So may the acceptor, where, under the circumstances, *e. g.* by reason of a composition or the like, the bill ought not to have been negotiated, or ought to have been taken up by some other person. *Hawley v. Beverley*, 6 Scott, N. R. 837; *Horton v. Riley*, 11 M. & W. 492; *Hooper v. Traffrey*, 1 Ex. R. 17.] But then the surety must have been *compelled*, *i. e.* he *must have been under a reasonable obligation and necessity, to pay what he seeks to recover from his principal; for if he *improperly* defend an action and incur costs, there will be no implied duty on the part of his principal to reimburse him those, unless the action was defended at the principal's request. *Roach v. Thompson*, 1 M. & M. 487. See 4 C. & P. 194; [1 A. & E. 31, n.]; *Gillett v. Rippon*, 1 M. & M. 406; *Knight v. Hughes*, 1 M. & M. 247; *Smith v. Compton*, 3 B. & Ad. 407. [Short v. Kalloway, 11 A. & E. 28, ubi per Lord Denman, "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend." See *Walker v. Hatton*, 10 M. & W. 249; and see *Tindall v. Bell*, 11 M. & W. 228.] But if he make a reasonable and prudent compromise, he will be justified in doing so. *Smith v. Compton*. [And where the

plaintiff's claim is of an unliquidated nature and needs investigation, it seems that he may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so. *Blyth v. Smith*, 5 M. & Gr. 407; 6 Scott, N. R. 360. It seems to be for the jury in each case to say, whether in defending and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case, and if the jury find that he did, the costs may be recovered. *Tindall v. Bell*, supra]. However, it is always advisable for the surety to let his principal know when he is threatened, and request directions from him; for the rule *laid down by the King's Bench [*71] in *Smith v. Compton* is, that "the effect of want of notice (to the principal), is to let in the party who is called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if an opportunity had been given him. . . . The effect of notice to an indemnifying party is stated by Buller, J., in *Duffield v. Scott*, 3 T. R. 347. [Recognised in *Jones v. Williams*, 7 M. & W. 493.] The purpose of giving notice is not in order to give a ground of action; but if a demand be made which the party indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." [It is very necessary in this place to observe the distinction between the case of a contract to indemnify, *or a contract [*71a] to do the very thing to which the contractee is liable, and the breach of which, consequently, may raise an obligation to indemnify the contractee against such liability, and a contract to do something not precisely the same with that to which the contractee is liable. In the latter case the Court of Exchequer has held, that the costs occasioned by an action against the contractee, on such liability, were not recoverable over. *Penley v. Watts*, 7

M. & W. 601; where a lessee, who had made an underlease containing covenants not precisely the same with those in the original lease, was held not to be entitled to recover from his underlessee the costs of an action brought against him by his own lessor for the breach of the covenants in the original lease, and some reflexions were both in that case and in *Waleer v. Hatton*, 10 M. & W. 249, which affirms it, cast upon *Neale v. Wylie*, 3 B. & C. 533, which may be considered as finally overruled by *Logan v. Hall*, 4 C. B. 598, where it was holden that a lessee, who had been evicted for breach of covenant could not recover the value of the lease from his sub-lessee, whose sub-lease did not contain any covenants the performance of which would necessarily have included a performance of the covenants in the original lease.]

On the same ground as the liability of a principal to reimburse his surety, *depends the right of one surety or joint contractor* who has been obliged to satisfy the whole demand, to recover a proportionable contribution from his fellow surety or contractor. He is a person who has been compelled to satisfy a demand, parcel of which his fellow was compellable to satisfy: *Cowell v. Edwards*, 2 B. & P. 268; *Turner v. Davies*, 2 Esp. 478; *Browne v. Lee*, 6 B. & C. 697; *Deering v. Winchelsea*, 2 B. & P. 270; [*Kemp v. Finden*, 12 M. & W. 421;] though, indeed, if one have become surety at the instance of the other, particularly if that other have received from the principal a separate indemnity for himself, it will be different. *Turner v. Davies*; see *Thomas v. Cook*, 8 B. & C. 728. [A surety's right to re-imbursement from the principal accrues, *toties quoties*, as often as he is compelled to make a payment; that to contribution from a surety does not accrue till it is ascertained that one surety has paid more than his just proportion of the debt, after which it accrues, *toties quoties*, on the occasion of each payment that he is subsequently forced to make; *Davies v. Humphreys*, 6 M. & W. 168. And he may recover contribution according to the number of sureties, without reference to the number of principals; *Kemp v. Finden*, 12 M. & W. 421.] See as to the right of a joint contractor to contribution, Lord Kenyon's judgment in *Merrywether v. Nixan*, *8 T. R. 186, [*716] and post, vol. 2; *Abbot v. Smith*, 2 Bl. 947; *Hutton v. Eyre*, 6 Taunt.

289; *Bayne v. Stone*, 4 Esp. 13; *Burnell v. Minot*, 4 Moore, 340; *Holmes v. Williamson*, 6 M. & S. 158. [Where several have employed another to do work for their common benefit, there is an implied undertaking by all to contribute rateably inter se; *Edgar v. Knapp*, 6 Scott, N. R. 707. And where, by the nature of the case, the representative of any party dying is to have the same benefit as the deceased would have had if he had lived, the law will imply the like promise on the part of the deceased, that his representative shall contribute, notwithstanding that he is under no direct liability in a court of law, to the common creditor; *Prior v. Hembrow*, 8 M. & W. 873. Nota.—The count was in the indebitatus form for money paid to the use of the executor; *ib.*] It is otherwise, indeed where the joint contractors are partners, for then justice could not be done between them without balancing the partnership accounts, which is the office of a court of equity; *Sadler v. Nixon*, 5 B. & Ad. 936; unless the partnership was merely in an isolated transaction. See *Wilson v. Cutting*, 10 Bingh. 436. But no action for contribution is maintainable by one wrongdoer against another, although the one who claims contribution may have been compelled to satisfy the whole damages arising from the tort committed by them both. This was decided in *Merrywether v. Nixan*, 8 T. R. 186. There, Starkey, having brought an action on the case against Merrywether and Nixan for an injury done by them to his reversion, levied the whole damages, amounting to 840*l.*, upon Merrywether, who thereupon sued Nixan for a contribution: the plaintiff was nonsuited, on the ground that such an action lay not between wrongdoers; and the court afterwards held the nonsuit proper. Lord Kenyon, in his judgment, having laid down the general principle, observed, that "the decision would not affect cases of indemnity where one man employed another to do acts not unlawful in themselves, for the purpose of asserting a right." "From the inclination of the court, in *Phillips v. Biggs*, Hard. 164, from the concluding part of Lord Kenyon's judgment in *Merrywether v. Nixan*, and from reason, justice, and sound policy, the rule that wrongdoers cannot have contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was

doing an unlawful act." Per Best, C. J., in *Adamson v. Jervis*, 4 Bing. 72. Accordingly in *Betts v. Gibbons*, 2 Adol. & Ell. 57, such an action was held to be maintainable. There, the defendant consigned to the plaintiffs ten casks of acetate of lime, for Nyren and Wilson, [*71c] two of which were *delivered, but the remaining eight continued in the plaintiffs' hands up to the time of Nyren and Wilson's bankruptcy, on which the plaintiffs, by the defendant's orders, refused to deliver them to the assignees, who brought an action of trover, which the plaintiffs compromised by paying the value of the casks, together with the costs, and brought this action against the defendants for indemnity. They [*72] were held to be entitled to recover. [*72] **"The principle laid down in Merrywether v. Nixan,"* said Taunton, J., "is too plain to be mistaken. *The law will not imply an indemnity between wrongdoers. But the case is altered where the matter is indifferent in itself, and when it turns upon circumstances whether the act be wrong or not.* The act done here, by changing the destination of the goods at the order of the defendant, was not clearly illegal; and, therefore, not within the rule in *Merrywether v. Nixan*:" accord. *Humphreys v. Pratt*, 2 Dow. & Cl. 288; *Pearson v. Skelton*, 1 M. & Welsb. 504; *Fletcher v. Harcot*, Hutt. 55, S. C. as *Battersey's case*, Winch. 48. In *Colbourn v. Patmore*, 4 Tyrwh. 677, 1 C. M. & Ros. 73, the proprietor of a newspaper sued his editor for falsely, maliciously and negligently inserting a libel therein, without the knowledge, leave, or authority of the plaintiff, "in consequence of which the plaintiff was convicted and fined for falsely and maliciously printing and publishing the said libel." The case was determined against the plaintiff on a slip in the pleading, the court being of opinion that it was consistent with the statement in the declaration, that the plaintiff, though he did not know of the original insertion of the libel, might afterwards have knowingly and wilfully permitted it to be printed, and so have been convicted in consequence of his own criminal act, and not of that of the defendant. But, during the argument, the question, whether a newspaper proprietor, convicted and fined in consequence of the publication of a libel by his editor without his knowledge or consent, could maintain an action for indemnity, was elabo-

ately discussed at the bar, and the court in delivering judgment, expressed a strong opinion that he could not. "I am not aware," said Lord Lyndhurst, C. B., "of any case in which a man convicted of an act declared by law to be criminal, and punished for it accordingly, has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument, I entertain little or no doubt that such an action could not be maintained." (See *Shackell v. Rosier*, 2 Bing. N. C. 634.)

Perhaps this case may be thought to involve considerable *hardship. [72a] The proprietor of a newspaper is, for the security of the public, rendered the single exception to that otherwise universal rule of law, that a master shall not be criminally responsible for the act of his servant, done without his knowledge or authority. See *Rex v. Gutch*, M. & M. 433. His liability to the indictment is, as Lord Lyndhurst expressed it, "an anomaly." Admitting that it would also be an anomaly, that a man convicted of a crime should recover indemnity: still, if one anomaly be permitted in the law in order to convict him, may not another anomaly be introduced in order to indemnify him? It is hard to consider the case anomalous as against the proprietor, and refuse to treat it as such in his favour. If there be one case only in which a man, morally innocent, may be convicted of a crime, should there not be a corresponding exception to the rule which debar persons so convicted from indemnity? It has been said that his liability to the indictment proceeds upon the ground that the law presumes him to be cognizant of the libel. *In presumption juris consistit æquitas.* But what equity is there in continuing such a presumption after its object, namely, the protection of the public, has been satisfied? And that, too, when the effect of doing so is to exempt the person morally guilty from punishment, at the expense of the person morally innocent, for the defendant in the action for indemnity must always be one who has published the libel knowingly, wilfully, and without the knowledge or consent of the proprietor. [In *Campbell v. Campbell*, 7 Clark & Fennelly, 181, it appeared that the appellant and respondent and others were partners in a distillery, and

that in the course of certain illegal transactions which took place in the management of the distillery by one of the partners, the whole firm, including the pursuer, though absent and ignorant of the delict, became liable to penalties. A prosecution was commenced, and the firm, including the pursuer, consented to a verdict against them for 3000*l.* penalties. The pursuer, after payment of the penalty, brought the action for an indemnity, which was opposed *inter alia* on the ground that he was *particeps criminis*, and therefore disentitled; and *Colburn v. Patmore*, *supra*, was cited. However, although no decision was pronounced upon the point, Lord Cottenham, C., seems to have thought it clear, that the pursuer, though liable to the penalty, was not *particeps criminis* in the sense which would disentitle him to sue for contribution.

In *Hunter v. Hunt*, 1 C. B. 300, an unsuccessful attempt was made to extend the limits of the action for contribution. In that case, the plaintiff and defendant were underlessees by different [*726] leases and of distinct parcels of premises, held under one original lease at an entire rent, which being in arrear and paid by the plaintiff under a threat of distress, he brought his action against the defendant to recover a contribution proportionate to his interest, as for money paid to his use. The Court of Common Pleas, however, held the action not maintainable.]

Under the same principle, viz., that a previous *request*, and a *promise* to indemnify, will be implied in favour of a plaintiff, who has been compelled to do that to which the defendant was legally compellable, may be ranked the cases in which a tenant, who has been forced to pay some demand to which the landlord was primarily liable, has been held entitled to deduct the amount from his rent, or to recover it again from the landlord, as money paid to his use. {See *Caldwell v. Moore*, 1 Jones, 58.} Such was *Taylor v. Zamira*, 6 Taunt. 524; that [*73] was an action of replevin, in which the defendant made cognizance as bailiff of Carpue for 8*l.* 15*s.*, being a quarter's rent, under a demise at 35*l.* per annum. The plaintiff pleaded in bar, that, before that demise, Ridout and Tothill were seised each of an undivided fourth part of the premises, and severally demised the same for terms of 99 years to S. S. Still; who assigned them to

Tucker; who, before the demise by Carpue, and before that person had any interest in the premises, granted an annuity of 102*l.* 16*s.* per annum, issuing out of the said two undivided fourth parts, to Mary Knowles, with power of distress; that afterwards, and before the time when, &c., a sum exceeding the arrears mentioned in the cognizance, viz. 205*l.* 12*s.* fell due to M. Knowles, who demanded payment from the plaintiff, and threatened to distrain on him; whereupon, in order to prevent his goods from being distrained, the plaintiff paid 8*l.* 15*s.* (the rent mentioned in the cognizance) in part payment of the annuity. The plea was held good: Gibbs, C. J., remarking, that *Sapsford v. Fletcher*, 4 T. R. 511, was decisive that a tenant, threatened with distress for rent due to a superior landlord, might pay it, and deduct the payment from his own rent; that the only difference was, that there his immediate lessor was personally liable to that rent, and that here the land only was liable, but that nothing could turn on that distinction. And Burrough, J., said, that had the payment by the plaintiff exceeded the rent due from him, he might have brought *assumpsit* against defendant for the surplus. In *Sapsford v. Fletcher*, 4 T. R. 511, above referred to, tenant, to an avowry for rent arrear, pleaded a payment, under threat of distress, of ground-rent to the superior landlord. It was urged, 1st, that this amounted to a set-off, and was not pleadable in replevin; 2nd, that this was a payment by the tenant in his own wrong, for that no man can make another his debtor, by voluntarily paying the debt of that other. But the court said, it was not set-off, but a payment; and that the payment was not voluntary, but compulsory, for it was made under threat of distress, which the superior landlord had it in his power to levy. [In *Johnson v. Jones*, 9 A. & E. 809, the same principle was applied to a payment of interest due upon a mortgage prior to the lease; though in *Boodle v. Cambell*, 8 Scott. N. R. 104, a payment by a tenant of a proportional part of the rent to a person claiming part of the demised premises by title paramount to the landlord, and who demanded the rent after it fell due, so that there was nothing in the case that could be considered as an eviction, was held no answer to the landlord's action for rent, not being a payment of any charge upon the land, or of any debt due from

the landlord. In *Baker v. Greenhill*, 3 Q. B. 143, it was holden that where lands charged with the repair of a bridge were occupied by a person, not the owner, such occupier, although primarily responsible to the public for the repairs, was entitled to reimbursement from the owner.] Nor is it necessary, for the purpose of rendering the payment one by compulsion, that the superior lord should actually threaten to distrain; for a demand by one who has power to distrain is equivalent to a threat of distress; and such a payment, to use the words of Best, C. J., is no more voluntary than a donation to a beggar who presents a pistol. *Carter v. Carter*, 5 Bing. 406. [Acc. *Pitt v. Purssord*, 8 M. & W. 538.] It was stated, as has been already observed by Burrough, J., in *Taylor v. Zamira*, that, if the payment made by the tenant to the head landlord had exceeded the sum due from him to his lessor, he might have sued his lessor in *assumpsit* for the surplus. This is a corollary from the general rule we are discussing, viz. that if A. be *compelled* to pay the debt which B. is legally *compellable* to satisfy, A. may sue B. for the amount, and the law implies a previous request from B. to A., to pay the debt, and a subsequent promise to reimburse him. [It seems unnecessary that there should even be a demand by the person to whom the money is paid, if there be in him a legal right, by the exercise of which the person who pays may be damaged, unless he satisfy it. *Broughton's case*, 5 Rep. 24 a, seems to support that proposition, and with an excellent reason, from 18 E. 4, 27 b, namely, "that terror of suit, so that he dare not go about his business, is a damnification, although he be not arrested or forced by process," &c. See also *Pitt v. Pursord*, 8 M. & W. 538.] Indeed, in *Schlencker v. Moxey*, 3 B. & C. 789, where a lessee by deed, who had been distrained upon for ground-rent, declared against his lessor, on an implied promise to indemnify, it was held that the covenant of quiet enjoyment by the word demise excluded such an implication. [And the word *grant* has been held to have a similar effect, and to exclude the tenant's right to sue for money paid; *Baber v. Harris*, 9 A. & E. 532; *quære* since 7 & 8 Vict. c. 76, s. 6, and 8 & 9 Vict. c. 106, s. 4. But these cases are exceptions to the general rule, see ante page 70 c.] In *Moore v. Pyrke*, 11

East, 53, the general principle was not disputed; but the action failed, because the plaintiff instead of paying the rent to the superior landlord, had suffered his goods to be distrained and sold, so that in fact, he never had paid any money to the defendant's (his lessor's) use; and, as the declaration was for money paid, he failed; [a reason which seems not to have been approved of by the Court of Exchequer in the case of *Rodgers v. Maw*, 15 M. & W. 444, where the goods of a joint contractor were taken under a *fieri facias*]. But in *Exall v. Partridge and others*, 8 T. R. 308, the plaintiff, a stranger, placed his carriage on premises which the defendant and two others rented from Welch for a term of years; the other two had transferred their interest to their co-lessee; but there was a covenant by all three to pay rent, so that all continued liable to Welch, the head landlord. Welch having distrained the carriage for rent, the plaintiff paid the arrears, in order to release it, and was allowed to recover the amount from the defendants in an action of *assumpsit** for money paid. [*74] "One person," said Lawrence, J., in his judgment in that case, "cannot by a voluntary payment raise an *assumpsit* against another; but here was a distress for rent due from the three defendants, the notice of distress expressed the rent to be due from them all, the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore, I am of opinion that this action may be maintained against the three defendants. The justice of the case, indeed, is that the one who must ultimately pay this money should alone be answerable here. But as all the three defendants were liable to the landlord for the rent in the first instance, and as, by this payment made by the plaintiff, all the three were released from the demand of rent, I think that this action may be supported against all of them."

The above words are printed in *italics*, because there is a distinction between this case and the case where one person is compelled to make a payment, to which another is liable, not, however, primarily, but only in consequence of a special agreement with the party who is forced to make it; the remedy in such case not being on any implied *assumpsit*, but on the special agreement itself: thus in *Spencer v. Parry*, 3 Adol. & Ell. 331,

the defendant took a house from the plaintiff, and agreed to pay certain taxes, which were by statute payable by the landlord. The plaintiff, having been compelled to pay these taxes in consequence of the defendant's default, brought an action of debt for money paid against him. It was objected that he ought to have sued upon the special agreement, and the court held the objection fatal. "The plaintiff's payment," said the Lord Chief Justice, delivering judgment, "delivered the defendant *from no liability but what arose from the contract between them*, the tax remained due by his default, which would give a remedy on the agreement, *but it was paid to one who had no claim upon him, and therefore not to his use.*" Accord. *Lubbock v. Tribe*, 3 M. & Welsb. 607, which was decided on the authority of *Spencer v. Parry*. In *Lubbock v. Tribe*, the defendant gave a cheque for money due from him to the K. Co.; the plaintiffs received it as the company's agents; it was afterwards lost, and the plaintiffs agreed with the defendant that he should give them a new cheque on their giving him an indemnity. No new cheque was given; but the plaintiffs having been obliged to pay the amount to the company, brought an action against the defendant *for money paid*, which was held not to be sustainable. "On the special agreement," said Parke, B., "I think an action might be maintained, but not for money paid, because the payment of the money does not exonerate the defendant from any liability at all. It is not money paid to his use, it is money paid to the plaintiff's own use, who are bound to make good the amount to the K. Company." But in a previous case, in which the compulsory payment was made in discharge of a party, who, though not primarily liable, was *ultimately so*, not by any special agreement, but by the provisions of an act of parliament, it was decided, that the party compelled to make the payment might recover on an implied *assumpsit*. In *Dawson v. Linton*, 5 B. & A. 521, goods of the plaintiff, an outgoing tenant, left by him on his farm, were distrained for a tax payable by the tenant, but which the act gave him power to deduct from his rent: the court decided, that, as the tax must ultimately fall on the landlord, and as the plaintiff had been compelled to pay it in order to ransom his goods, he had a right to recover the amount from

the landlord, as money paid to his use. It may, perhaps, be thought, that the payment in this case is liable to the concluding observation of the court in *Spencer v. Parry*, that "*it was made to one who had no claim upon the defendant, and therefore not to his use.*" But though, in *Dawson v. Linton*, there was no claim for the tax against the defendant personally, there was a claim against the land which was his property; nay, there was one contingency, viz. that of there being no sufficient distress, in which the act provided that the land itself might be seized quousque for the arrears due; and *Taylor v. Zamira* shows that a claim against a man's property is equivalent, for this purpose, to one against his person; but, in *Spencer v. Parry*, the defendant had quitted the premises, so that neither he nor his property could have been molested on account of the tax, at the time when the plaintiff paid it. [The doctrine laid down in *Spencer v. Parry* is obviously inapplicable to the case where a liability has been incurred at the request of the defendant, and in consequence of incurring such liability, the plaintiff has been put to expense; because, in such a case, the payment has in truth been made in consequence of the request of the defendant, and it is immaterial whether it has relieved the defendant from a liability or not. *Brittain v. Lloyd*, 14 M. & W. 762.]

Here we must not omit to remark, that there is a peculiarity in the right of the tenant to recoup himself for moneys paid in the discharge of some burden upon the land prior to his own interest therein, which distinguishes that from all other cases of compulsory payment to the use of another. Such payments when made by a tenant under compulsion, are considered as actual *payments* of so much of his rent, and may be pleaded by way of *payment*, as contradistinguished from *set-off*; (see *Taylor v. Zamira* and *Sapsford v. Fletcher*, *supra*, [and *Johnson v. Jones*, 9 A. & E. 809];) whereas, generally speaking, one who has been compelled to pay the demand to which another is liable, although he may recover the amount in *assumpsit*, or set it off in an action against himself, cannot appropriate *it to the payment of a debt due by [*75] him to the person to whose use he paid it, without obtaining that person's consent; the fact is, that, in cases of landlord and tenant, the very relation in

which the parties stand to each other creates an implied consent, upon the landlord's part, that the tenant shall appropriate such part of his rent as shall be necessary to indemnify him against prior charges, and that the money so appropriated shall be considered as paid on account of rent; but this implication is liable to be rebutted, for if the landlord were afterwards to repay the tenant the money paid by him in respect of the charge, he might recover the entire rent, *eo nomine*, without any deduction. All this is well explained by Buller, J., in *Sapsford v. Fletcher*. "There is great difference," says his Lordship, "between a payment and a set-off; the former may be pleaded to an avowry, though the latter cannot. That is a good payment which is paid as part of the rent itself in respect of the land, but a set-off supposes a different demand, arising in a different right. It was said, that if the tenant had paid the ground-rent, and the landlord had afterwards repaid him, the latter could not avow for the whole rent; and my answer is this, that the payment there never was considered by both as a payment, and, if not, the whole rent remains due. I consider this case as a lease from the defendant to the plaintiff, at the annual rent of 50*l.*, out of which 5*l.* per annum was to be paid to the ground landlord; and therefore a payment of that ground-rent is a payment of so much rent to the defendant, and may be pleaded in answer to the avowry for rent. Neither can we suppose, upon this record, that the defendant ever repaid the plaintiff this ground-rent, for, if he had, he might have replied that fact." The landlord, therefore, generally speaking (for in some cases it is taken from him by statute), has the option of repaying the tenant the sum disbursed by him to discharge the prior claim upon the land, and may thus prevent the disbursement from being considered as a payment of so much of the rent; and the tenant may, in like manner, elect not to consider it as such, and may signify his election by bringing an action for the amount, or setting it off in an action brought by his landlord against him for any other debt. And, indeed, in some cases he *must* do so; for, if he owe no rent, or not enough to cover the sums he has been forced to pay, he has no other means of reimbursing himself.

{ In the recent case of *Graham v. All-*

sopp, 3 Exch. 186, 193, Rolfe, B., delivering judgment, explained at full the principle here discussed. Referring to *Sapsford v. Fletcher*, *Taylor v. Zamira*, and *Carter v. Carter*, he said, "Those cases establish the proposition, that a tenant who has been compelled by a superior landlord or other encumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground rent or other like charges, may treat such payment as having been made in satisfaction or part satisfaction of rent due to his immediate landlord, and may plead them as far as they extend, in bar to an avowry for rent in arrear. The principle upon which these cases rest is this:—The immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorised by the landlord so to apply his rent due or accruing due. All such payments, if incapable of being treated as actual payment of rent, would certainly give the tenant a right of action against his landlord as for money paid to his use, and so would, in an action of debt for the rent, form a legitimate subject of set-off. And though in a *replevin* a general set-off cannot be pleaded, yet the Courts have given to the tenant the benefit of a set-off as to payments of this description, by holding them to be in fact payments of the rent itself or of part of it." See, also, *Jones v. Morris*, *id.* 742, 746. }

It is, however, necessary to remark, that there are some cases which qualify the generality of the doctrine just laid down, by compelling the tenant to avail himself of his right to deduct within a given period, if at all. The property-tax by 46 G. 3, c. 64, was directed to be paid by the occupier, who was required to deduct it out of the next rent. In *Denby v. Moore*, 1 B. & Ad. 130, the plaintiff occupied land, and paid the property-tax for about twelve years, and also paid the full rent during that time, and it was held that he could not recover back again the amount of rent thus overpaid. This case, indeed, was decided upon grounds not much akin to the subject of this note, for the action was for *money had and received* to recover back

the rent over-paid, not for *money paid* to the defendant's use on account of property-tax. And the court thought that, as the occupier had made the over-payments with full knowledge of the facts, he could not recover them back again; besides, the words of the act were express, requiring the occupier to deduct the tax from the rent next due, and there were good reasons for insisting on his doing so. And, therefore, in *Stubbs v. Parsons, Bayley, J.*, said, "that he laid Denby v. Moore out of the question, that decision being on the express words of the property act, to prevent frauds on the revenue." *Andrew v. Hancock, 1 B. & B. 37*, was, like *Sapsford v. Fletcher*, an action of replevin, and the defendant having avowed for six months' rent due the 29th of September, 1818, the plaintiff pleaded in bar various payments of land-tax and paying rates made to prevent his goods from being distrained between 1812 and 1818, while he was tenant to the defendant, which payments he claimed to deduct from the rent avowed for. The plea was decided to be bad; principally, however, upon the express words of the acts of parliament, by which, to use the words of *Dallas, C. J.*, the tenant was not only *allowed*, but *required*, to deduct these payments out of the rents of the then current *years. In *Stubbs v. [76] Parsons, 3 B. & Ad. 516*, a similar question again arose with respect to land-tax, that also was an action of replevin, *cognizance* for a quarter's rent due the 25th of March, 1819. The plaintiff pleaded a tender as to part, and as to the residue, that before the 25th of March, and before the said time when, &c. divers sums, amounting to the residue, had been from time to time assessed on the premises for land-tax, which he had been compelled to pay. On demurrer the plea was held bad, because it did not state when the land-tax claimed to be deducted was assessed or paid; and it was consistent with the plea that it might have been a payment for land-tax due before the rent distrained for either accrued, or was accruing, or even before the commencement of the present landlord's title. "The ground," said *Bayley, J.*, "on which my judgment proceeds is, that a payment of the land-tax can only be deducted out of the rent which has then accrued, or is then accruing, due, for the law considers the payment of the land-tax as a payment of so much

of the rent then due, or growing due, to the landlord. And if, afterwards, he pays the rent in full, he cannot at a subsequent time deduct that over-payment from the rent. *He may, indeed, recover it back as money paid to the landlord's use.*" "The occupier," said *Holroyd, J.*, "has a lien on the next rent, given him by the legislature, for the land-tax paid by him; but if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off." [The same rule has been applied to payments of property-tax. *Cumming v. Bedborough, 15 M. & W. 438.*]

The next question is, whether the limitation in point of time established by these cases, with respect to deductions of land-tax, applies to deductions in respect of rent paid, under dread of distress, to the superior landlord, or in respect of arrears of a rent-charge. In order to solve this question we cannot have recourse, as in case of taxes, to the express words of the legislature; we must, therefore, resort to principles of common sense and general convenience. And it seems not unreasonable, that if a tenant, having made such payments, fail to deduct at the next opportunity, he should be taken to have abandoned his right to do so, and to have elected to rely upon his right of action for money paid to the landlord's use; and, indeed, *Park, J.*, in *Carter v. Carter, 5 Bing. 409, 410*, appears to have considered that this point was decided by *Andrew v. Hancock*, to which he refers as to a case of ground-rent. Yet it would be hard to preclude the tenant from deducting from any rent not actually due or accruing at the time of his making the payments in respect of which he claims the right of deduction; for the arrears of rent-charge or head-rent may be extremely heavy, and may cover much more than the amount of the rent then due or accruing from him to his landlord. In order, therefore, to do full justice, he ought to be allowed, after making such a payment, to retain the rent for as many succeeding rent-days as may be necessary to place him in statu quo, for he cannot prescribe to the head landlord or incumbrancer when to insist on payment, and therefore ought not to suffer by their delay.

But it seems reasonable, that the tenant's right to deduct should only exist in respect of payments made by him of

arrears which accrued due in the time of the landlord against whom he claims the deduction. Suppose, for instance, premises be let for 100*l.* a year, and subject to a head-rent of 10*l.* a year, of which five years are in arrear when the mesne landlord assigns his reversion: upon the sixth year falling due the head landlord threatens to distrain, and the tenant is obliged to pay him sixty pounds: shall he deduct the whole of that sum from his current year's rent, or only the 10*l.* which fell due during his present landlord's time? It would be hard upon the assignee to adopt the former part of this alternative.

The right to deduct a payment in respect of ground-rent has not been confined to tenants, for in *Doe v. Hare*, 4 Tyrwh. 29, the plaintiff, having recovered in ejectment, on a demise from the 5th of June, 1830, brought an action for the mesne profits between that day and the 4th of June, 1832, when the sheriff executed the *ha. fa. po.* The defendant was allowed, in reduction of damages, a payment in respect of ground-rent which had become due the 24th of June, 1830, and also two other payments of ground-rent which fell due during his occupation.

*CHANDLOR v. LOPUS. [77]

[REPORTED, 2 CROKE, 2.]

PASCHÆ.—1 JACOBI 1.

The defendant sold to the plaintiff a stone: which he affirmed to be a Bezoar stone, but which proved not to be so. No action lies against him, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

ACTION upon the case: whereas the defendant, being a goldsmith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a Bezoar stone, and sold it to him for a hundred pounds; *ubi, reverâ*, it was not a Bezoar stone.

The defendant pleaded, *Not guilty*.

After verdict, and judgment for the plaintiff in the King's Bench, error was therefore brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, viz., *that he warranted it to be a Bezoar stone, or that he knew that it was not a Bezoar stone*; for, it may be, that he himself was ignorant whether it were a Bezoar stone or not.

And all the Justices and Barons (besides Anderson) held, that for this cause it was error. For the bare affirmation, that it was a Bezoar stone, without warranting it to be so, is no cause of action. *And although he knew it to be no Bezoar stone it is not material.** For every one, in selling

* This proposition which was not necessary to the decision has often been denied. See

of his wares, will affirm that his wares are good, or the horse that he sells is sound: yet, if he warrants them not to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale.* Fitz. Nat. Brev. 94 c. & 98 b.; 5 H. 7, 41; 9 H. 6, 53; 12 H. 4, 1; 42 Ass. [*78] g. 7; 7 H. 4, 15. Wherefore forasmuch as no warranty is *alleged, they held the declaration to be ill. But Anderson to the contrary; for the deceit in selling it for a Bezoar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and judgment was reversed.

If the plaintiff in this case were to declare upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that *every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended*. See *Power v. Barham*, 4 Ad. & E. 473; *Shepherd v. Kain*, 5 B. & A. 240; *Freeman v. Baker*, 2 Nev. & Mann. 446. [Even where there is a written memorandum not relating to the subject-matter of the representation; *Allen v. Pink*, 4 M. & W. 140. See *Wright v. Crookes*, Scott, N. R. 685; *Jeffrey v. Walton*, 1 Stark. 267.] If not, he would at all events succeed, if he were to sue in *tort*, laying a *scienter*, since the fact of the defendant's being a jeweller would be almost irresistible evidence that he knew his representation to be false. When *Chandelor v. Lopus* was decided, as the action of *assumpsit* was by no means so distinguishable from *case*, ordinarily so called, as at present; so the distinction was not then clearly recognised, which is now, however, perfectly established, between an action upon a warranty express or implied, which is founded on the defendant's promise that the thing shall be as warranted, and in order to maintain which it is unnecessary that he should be at all aware of the fallacious nature of his undertaking, and the action upon the case for false representation, in order to maintain which, the defendant must be shown to have been ac-

tually and fraudulently cognisant of the falsehood of his representation; actions of the former description being then usually framed in *tort*, under the name of *actions for deceit*. See *Williamson v. Allison*, 2 East, 446. [*Shrewsbury v. Blount*, 2 M. & Gr. 475, 2 Scott, N. R. 588, S. C.]; the observations of *Grose, J.*, in *Pasley v. Freeman*, 3 T. R. 54, and of *Tindal, C. J.*, in *Budd v. Fairmaner*, 8 Bingh. 53. *Steuart v. Wilkins*, Dougl. 18, is said by *Lawrence, J.*, in 2 East, 451, to have been the *first* case where the question was regularly discussed, and the mode of declaring in *assumpsit* established. However, the main doctrine laid down in *Chandelor v. Lopus* has never since been disputed, viz. that the plaintiff must either declare upon a contract, or, if he declare in *tort* for a misrepresentation, must aver a *scienter*. That such an action is maintainable when the *scienter* can be proved, though there be no warranty, is now (notwithstanding the *dictum* in the text) well established. *Dunlop v. Waugh*, Peake, 223; *Jendwine v. Slade*, 2 Esp. 572; *Dobell v. Stevens*, 3 B. & C. 625; *Fletcher v. Bowsher*, 2 Star. 561.

It is sometimes not very easy to determine whether an action of *assumpsit* upon a warranty should be brought against the vendor of a chattel, or whether the proper remedy be by action upon the case for misrepresentation. We have already observed, that every affirmation respecting the chattel, made, at

the notes post: and the argument for the plaintiff in error in this very case admits the contrary.

* For, if made afterwards, there is no consideration for it. *Finch*, L. 189. 3 Bl. Comm. 166.

the time of sale, by its vendor, is a warranty *if so intended*. But it is sometimes far from easy to decide, whether a particular assertion was, or was not, intended for a warranty; and, if it turn out to have been meant merely for a representation, the plaintiff suing on it must aver a *scienter* in his declaration, and must not treat it as a warranty, but will be defeated unless it turn out to have been false within the knowledge of the party making it. Such was the case of *Budd v. Fairman*, 8 Bingh. 52, where the plaintiff, in order to prove the warranty, put in the following instrument, signed by the defendant:—"Received of Mr. Budd 10*l*. for a grey four-year-old colt, warranted sound in every respect."

It was held at *Nisi Prius*, and afterwards by the court in banc, that the warranty applied only to the soundness, and that the age was mere matter of description, and the plaintiff, who had sued as upon a warranty of the age, was nonsuited.

With respect to actions upon the case for a false representation, although the [*79] declaration always imputes to the defendant fraud, and an intent to deceive the plaintiff; and although it is expressly laid down that "fraud and falsehood must concur to sustain this action," per Gibbs, C. J., *Ashlin v. White*, Holt, 387; still, in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, and occasioned damage to the plaintiff. *Foster v. Charles*, 6 Bing. 396, 7 Bing. 108; *Corbet v. Brown*, 8 Bing. 433. [For which purpose it must appear that the plaintiff relied upon it. See *Atwood v. Small*, 6 Cl. & F. 232. *Shrewsbury v. Blount*, 2 Scott, N. R. 588, 2 M. & Gr. 475; though it would seem, that the fact of a misrepresentation, calculated to mislead, having been made, is sufficient *prima facie* evidence that the plaintiff was misled by, and acted upon it.] In *Polhill v. Walter*, 3 B. & Adol. 122, the defendant, who had formerly been in partnership with Hancorne, and still carried on business in the same house, accepted, as *per procuration* of Hancorne, a bill drawn on the latter. The bill was afterwards indorsed to the plaintiff, who gave value for it, and having been dishonoured by Hancorne, the

plaintiff sued the defendant for "falsely and *fraudulently* pretending to accept the same by procuration of Hancorne." At the trial, the jury being directed by Lord Tenterden to find for the defendant if they thought there was no fraud, otherwise for the plaintiff, found a verdict for the defendant; his Lordship giving the plaintiff leave to move to enter a verdict; which motion was accordingly made, and the rule to enter the verdict for the plaintiff ultimately made absolute.

"If," said Lord Tenterden, delivering the judgment of the court, "the defendant, when he wrote the acceptance, and thereby in substance represented that he had authority from the drawer to make it, knew that he had no such authority (and upon the evidence there can be no doubt he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence." [See *Pontifex v. Bignold*, 3 Scott, N. R. 390, 3 Mann. & Gr. 63, S. C. The modern cases upon the subject of fraudulent misrepresentations are collected in the note to *Pasley v. Freeman*, vol. ii. p. 55.]

The first instance in which an action of *tort* for a misrepresentation respecting the ability of a third person was solemnly adjudged to be maintainable, is the case of *Pasley v. Freeman*, 3 T. R. 53, decided by Lord Kenyon, C. J., Ashurst, J., and Buller, J., against the opinion of Grose, J., A. D. 1789. [See the case at large, vol. ii. p. 55.] It came before the court on motion in arrest of judgment, on a declaration, stating, "that the defendant, intending to deceive and defraud the plaintiffs, did wrongfully and deceitfully encourage and persuade them to deliver certain goods to Falch on credit, and for that purpose did falsely, deceitfully, and fraudulently assert that Falch was a person safely to be trusted, whereas, in truth, Falch was not a person safely to be trusted, and the defendant well knew the same." One of the consequences of its introduction was to qualify considerably the effect of that enactment of the statute of frauds, which requires that guaranties should be in writing: since it frequently happened, that where one person had interested himself to procure credit for another, in a manner which would have been insisted upon as amounting to

a guaranty but for the enactment of the statute of frauds, the expressions used by him in his endeavours to effect his purpose, were relied on as representations respecting his friend's credit or character, and he was accordingly sued in the form of which *Pasley v. Freeman* has established the legitimacy. It was in order to prevent the statute of frauds from being thus trenched upon, that the legislature, in 9 G. 4, c. 14, commonly called Lord Tenterden's Act, enacted sec. 6, "that no action shall be maintained, whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

This section of the act was elaborately discussed in the great case of *Lyde v. Barnard*, 1 M. & W. 101. It was an action on the case for falsely representing, in answer to inquiries on that subject, that the life-interest of Lord Edward Thynne in certain trust-funds was charged only with three annuities, whereby the plaintiff was induced to advance to the said Lord E. T. 999*l.* for [*80] the purchase *of an annuity, secured by his covenant, bond, warrant of attorney, and an assignment of his life-interest in the said funds; whereas the defendant well knew that the said interest was charged not only with three annuities, but with a mortgage for 20,000*l.* At the trial, it appeared that the false representation was made by parol, on which the Lord Chief Baron nonsuited the plaintiff, conceiving the case to fall within the 9 G. 4, c. 14, s. 6. On the motion for a new trial, the court was equally divided, and the learned barons delivered elaborate opinions *seriatim*. Lord Abinger and Gurney, B., thought the case within the statute, conceiving the true construction to be, that the representation or assurance thereby required to be in writing, should concern or relate to the *ability* of the third person effectually to perform and satisfy an engagement of a pecuniary nature, into which he has proposed to enter, and on the faith of which he is to obtain money, credit, or goods; and conceiving that the representation in

this case did concern the *ability* of Lord E. T. to perform an engagement of a pecuniary nature, on the faith of which he was to obtain money, since it concerned his ability to give the plaintiff a sufficient security to repay him, by way of a life annuity, the money he was about to advance. "The ability of a man (it was urged) consists in the sources from which it is derived. He may have a landed estate unfettered by mortgage or other incumbrance, or a sum of money in the funds, or a large capital embarked in a successful trade, or a large balance in his banker's hands. Upon all or any one of these his general ability may depend. Can it be said that a representation of any one of these sources of ability has no relation to his general ability?" To this it may be added, that it is in the nature of things impossible that one man should be cognizant of another's general ability in any other way than by knowing a number of particular facts of this description, for a man's general ability consists of his property, *minus* his debts. With the amount of his property, a third person may be certain that he is, at least, to a certain extent, acquainted, by knowing the items that compose it. But how can any one be certain that he knows the amount of another's debts? Yet if those debts exceed his property, he is insolvent, and his general ability amounts to nothing. It is true, that, the larger his property, the more numerous and valuable its items, the smaller is the likelihood that his liabilities should exceed it; which plainly shows, that to arrive at any estimate of a man's general ability, the items of his property are mainly to be taken into consideration. On the other hand, Parke and Alderson, Barons, conceived that the representation in question did not appear to relate "the character, conduct, credit, ability, trade or dealings" of Lord Edward Thynne; and therefore, did not fall within the statute. "It does not," it was urged, "concern or relate to his *character*, or to his *credit*; it does not relate to his *conduct*, *trade*, or *dealings*, for it is totally immaterial with reference to the inquiry and the answer to it: who had incumbered the fund; the only question in substance being, to what extent it was incumbered. And it does not concern or relate to his *ability*; for that word, especially when we look at those which accompany it, means, in its ordinary sense, some quality belonging

to the third party, and not to the thing to be transferred. In order to bring the particular case within the statute, this last word is relied on, and it is said that the representation of the state of the fund relates to 'the ability' of the intended grantor of the annuity, that is, to his ability to fulfil his contract to charge the fund; or, if no contract was made at the time of the representation (as there was not), then the phrase must be changed, and it must be said to relate to his ability to charge the fund. But this will hardly be sufficient to answer the exigency of the case: for there is really no question as to the power of the person to charge the fund, such as it is; it must, therefore, be said to relate to his ability to give security on a fund of adequate value. But this is a very forced construction of the word *ability*. It is true, that a representation as to the condition of, or value of, a particular part [*81] of a man's property, *may* relate to, or concern his character, credit, &c. It would do so, when the object of the inquirer is to give credit to the third person on his personal responsibility, and he is seeking information as to part of the means which constitute its value. But if it was doubtful whether the present representation was meant to relate to the state of the fund only, or to the state of the fund as an element of Lord Edward Thynne's personal credit, that question ought to have been submitted to the jury."

The court being equally divided, the rule would have been discharged, but

the question being of great importance, a new trial was granted on payment of costs, in order that it might be raised upon the record. I am not, however, aware that it was so. [The point was again raised, but not decided, in *Townley v. Macgregor*, 6 Scott, N. R. 906, 6 Man. & Gr. 46, S. C.; the plea which denied that the representation was in writing having been held at all events ill for argumentativeness.] The opinion of Lord Abinger and Gurney, B., appears, however, to be reinforced by that of the Q. B. in *Swann v. Phillips*, 8 A. & E. 457.

In a subsequent case, the court of Q. Bench held that though the action be for money had and received to recover cash obtained from the plaintiff by means of the misrepresentation, still, if the misrepresentation constitute the whole of the plaintiff's case, parol evidence of it cannot be received. *Haslock v. Ferguson*, 7 Ad. & Ell. 6. Whether in a case depending partly but not wholly on such a misrepresentation, parol evidence would be admissible, is not yet solemnly decided.

The act applies to a misrepresentation by one partner respecting the credit of the firm. *Devaux v. Steinkeller*, 6 Bingh. N. C. 84.

The action for a misrepresentation in the nature of deceit seems to be an exception from the general rule, that in actions for words, or special damage arising therefrom, the very words must be set out, *Gutsole v. Mathers*, 5 Dowl. 70, 1 M. & W. 495.

The policy of the common law seems to have been to limit the effect of a sale, to the transfer of the right of property from the vendor to the purchaser, and to throw the hazards of the purchase upon the latter, unless he had expressly stipulated that they should be borne by the former. No warranty of quality or value, was consequently implied from the sale, either of personal or real estate. A warranty of title, was attached in some cases to the conveyance of land, but only where special words of gift were employed, or a tenure created. And it has recently been decided in England, that the sale of chattels, does not necessarily render the vendor answerable for the goodness of the title conveyed to the vendee. *Morley v. Attenborough*, 3 Exchequer, 500. A different rule prevails in this country, and it is generally held that the sale of chattels implies a warranty, unless the contrary

appear from the circumstances under which they are sold. *Defreese v. Trumper*, 1 Johnson, 204; *Keermance v. Vernoy*, 6 id. 5; *Charnley v. Dulles*, 8 W. & S. 5; *Chancellor v. Wiggins*, 4 B. Monroe, 251. However this may be, it is certain, that the obligations imposed by a warranty of quality and of title are so different, that the existence of the one affords no ground whatever, for reasoning to that of the other. No actual breach could occur of a warranty of land, until an actual eviction, which was usually, if not necessarily, the result of legal proceedings, and after a summons to the warrantor to appear and defend the title warranted. It has been held, on several occasions in this country, that there must be an eviction by judgment of law, to constitute a breach of the implied warranty of title attached to the sale of chattels. *Vibbard v. Johnson*, 19 Johnson, 79; *Case v. Hall*, 24 Wend. 102. And it is, at all events, certain, that a previous surrender of the property to the adverse claimant, is an essential preliminary to the right of action. A warranty of title will, therefore, seldom be made the ground of a suit, unless it is essentially necessary for the protection of the vendee. But no similar restraint exists in the case of a warranty of quality. The vendee may retain and use the goods, and then either set up the existence of a real or alleged defect, as a defence to a suit for the purchase money, or make it the ground of an action against the vendor, without having given the latter any notice of his intention, until an opportunity for verifying the condition of the property, has been lost by its consumption or removal. There is consequently every reason for upholding the rule of law laid down in the principal case, and not affecting a vendor with a liability to consequences which may prove so fatal, unless when, by some express agreement, he has subjected himself to them.

Nor can the common law, in refusing to imply from the representations or concealment of the vendor at the time of the sale, a warranty as to the qualities which he asserts, or the defects which he does not declare, be justly charged with that inattention to the interests of morality, and too close adherence to the practical possibilities of life, which has sometimes been urged against it. In no case whatever does that law allow a misrepresentation, knowingly made or uttered to the injury of another, to go unpunished by an appropriate remedy. And this doctrine is as applicable to sales of chattels, as to all other human transactions. By the side of the action for breach of warranty, stands the action on the case for deceit. Under its operation, the vendor may be made liable for any intentional misstatement, whereby the vendee is induced to purchase under a false impression; or, if the purchase-money has not already been paid, such fraudulent representations may be pleaded or given in evidence, to diminish or defeat a recovery in any suit brought to enforce a payment. The responsibility of the vendor is thus made to extend as far as it can with justice be carried; since, even where there is no express contract, he is bound to answer the questions of the vendee fairly, or else by silence to excite his suspicions, and stimulate his inquiries. But beyond this point the vendor cannot with justice be made liable. There are evidently a variety of different relations under which a contract of sale may be formed; and the rights and obligations of the parties must be as various as those relations. The vendee may effect the purchase exclusively upon his own information and skill, without asking or receiving aid from the vendor; or he may call to his assistance the

knowledge possessed by the vendor, without expecting or demanding any thing more than a faithful statement of such knowledge as it exists; or, finally, he may require from the latter, an express undertaking that the goods purchased shall be of a certain character and quality; thus throwing upon him the risk of all those uncertainties, which must ever attend upon such transactions. In each of these cases, the obligations and rights of the parties are, and ought to be, different. In the first, the vendee having asked and expected nothing from the vendor, the law raises no liability between them; in the second, as the vendee has purchased upon the opinion of the vendor, the latter is bound to state it fairly, but is not responsible for its correctness in point of fact; while in the third case, the vendor will be liable, although he may have acted with the fullest good faith, if the goods do not correspond with the standard fixed by the express warranty which he has given the purchaser. It must be evident, that the duties of the seller, and the claims of the purchaser, vary very much in these different cases, and that to confuse the distinctions which exist between them, and make a vendor who has either made no statement to the vendee, or none which he did not himself believe, answerable in the absence of express warranty, for defects of which he may not have known the existence, is to impose a liability, arising neither out of tort nor contract, the only sources from which actions personal can rightly flow.

This exposition of the law must be regarded as merely a fuller statement of the legal propositions, contained in the assignment of error in the case of *Chandelor v. Lopus*, as cited above. It was there said, that to charge the defendant, the declaration should have averred "that he warranted it to be a Bezoar stone, or that he knew it not to be a Bezoar stone." In other words, that it should have proceeded either in tort or contract; and with sufficient matter expressed, to support one or the other.

The Supreme Court of Pennsylvania has adhered to the principles of the common law as stated above, and in the absence of an express, will not presume an implied, warranty. Thus in the case of *Jackson v. Wetherill*, 7 *Sergeant & Rawle*, 480, the plaintiff, in an action brought against the defendant on the sale of a mare, gave in evidence the repeated declarations of the latter at the time of the contract, that she was perfectly safe, kind and gentle, in harness; and judgment was given against the defendant in the court below, as for breach of an implied warranty, arising out of these statements. This judgment was, however, reversed in error, by the Supreme Court, who held, that the statements of the defendant were mere representations, which, if unfounded, and made with a knowledge of their falsehood, would have entitled the plaintiff to an action on the case, for deceit, but could not be construed either into an express or implied contract of warranty. In the subsequent case of *McFarland v. Newman*, 9 *Watts*, 56, where nearly the same question arose, on a similar sale, this decision was affirmed; and *GIBSON, C. J.*, in delivering the opinion of the court, strongly insisted on the propriety and justice of the common law doctrine on this subject; and held, that, although no particular form of words is necessary to constitute a warranty, the jury must be satisfied that the party actually, and not constructively, consented to be bound, for the truth of his representations.

In the interval of time between the decisions just cited, it had been held in *Jennings v. Gratz*, 3 *Rawle*, 169, that no warranty of quality was

to be implied on a sale of merchandise, even where the defect arose from adulterations, producing, as far as they extended, a change in specie. In the case of *Kirk v. Nice*, 2 Watts, 367, the defendant had contracted to deliver to the plaintiff a large quantity of bar iron, to be made of Centre county metal, for which he had been paid in advance, and the action was instituted to recover damages for the bad and unmerchantable quality of part of the iron, delivered in execution of the contract. Agreeably to the understanding between the parties, the defendants were to cast the bars themselves, thus raising the question of the peculiar obligation supposed to rest upon manufacturers, to furnish merchantable wares; but the Supreme Court before whom the suit was brought in error, while attaching much weight to the proviso that the metal employed should be from Centre county, as restricting the liability of the defendants, held, in general, they were not bound by any implied warranty as to the quality of their wares; and that, in the absence of fraudulent misrepresentation they were not liable to the plaintiffs, even if they knew the bars to be unmerchantable, at the time of delivery. It may, however, be presumed that the defendants would have been made answerable, had the iron of which the bars were cast, been purchased with a knowledge that it was of an inferior quality, or had the defect complained of in the declaration, arisen from a failure in the process of casting.

In like manner, the principles of the common law on the subject of warranty, have been closely followed by the tribunals of New York and Massachusetts; although there may be, in some cases reason to doubt the correctness with which it was applied.

Thus in the case of *Sands v. Taylor*, 5 John. 395, heated wheat had been sold by the plaintiffs, which, although capable of being used as flour, was unfit for malting, the purpose for which it was purchased. Notwithstanding an immediate attempt made by the vendee to disaffirm the contract, on discovering the defect, the court gave judgment for the plaintiff, on the ground that no warranty was to be implied, in a suit brought by him for the purchase-money. Subsequently, nearly the same point was brought up, in the case of *Hart v. Wright*, 17 Wend. 267. Flour made from heated wheat, and from a latent defect not discoverable by examination, unfit to be manufactured into starch, or even used for food, except in the form of biscuit, had been sold to a starch manufacturer. Notwithstanding an attempt to raise an implied warranty, from these circumstances, it was held, in an action brought by the vendee for damages, that the flour had been taken at his own risk, and without any implied warranty by the vendor. This decision was subsequently brought before the Court of Errors, where the judgment of the Supreme Court was affirmed upon the same reasoning as that on which it had been given below. *Wright v. Hart*, 18 Wend. 449. To the same effect is the case of *Salisbury v. Stainer*, 19 Wend. 159, where it was decided that the plaintiff, who had purchased hemp in bales, upon a representation that it was of the first quality, which proved to be of inferior value in the interior of the bales, and mixed with tow, could not recover against the vendor, without proving, knowledge of the erroneous nature of the representation, or an express warranty on the part of the latter.

But the strongest cases against the doctrine of implied warranty to be

found in the whole range of American decisions, are those of *Seixas v. Woods*, 2 Caines, 48, *Holden v. Dakin*, 4 John. 421, and *Swett v. Colgate*, 20 John. 196. In each of these cases, there was not merely a defect in the quality of the merchandise sold, but an entire failure in kind; the articles delivered not corresponding in specie, with the terms or representations employed in the contract of sale. Thus, in the first case, the vendee had contracted to purchase Brazil wood, in the second, white lead, and in the third, barilla; while the vendors, in executing the several contracts, had respectively delivered peachum wood, a white substance, containing but little lead, and kelp; all of them articles of much inferior value, but closely resembling those which were nominally the objects of sale.

It was held under these circumstances, that as the vendor had neither given a warranty nor been guilty of fraud or misrepresentation, he was not responsible for the failure of the goods, to answer the expectations of the purchaser.

The supposed nature of the substance sold was set forth, in each of these instances, in the bill of parcels or advertisement, by which the sale was preceded or accompanied, but the description thus given, was treated as a mere collateral representation forming no part of the contract. A different view is taken on this point at the present day in many parts of this country, and the description given of the thing sold at the time of the sale, is held to enter into and qualify the contract itself. But even if these cases go too far in holding that the description given by the vendor of the nature of that which he sells, is essentially matter of representation and not of contract, their authority is not the less strong on the point, that what is manifestly representation cannot have the effect of contract. And in thus determining that the vendor is not liable, even where he has represented the goods sold to be different from what they prove, they necessarily determine that he will not be so, where no such representations are made, and when the vendee has relied wholly on his own judgment in making the purchase. The law was so held in the recent case of *Moses v. Mead*, 1 Denio, 378, when the previous decisions in New York, on this point were followed, and it was decided that no action could be maintained against the defendant, for selling a number of casks of salt beef at the ordinary market price, which proved to be spoiled and unmarketable, when opened.

A similar decision was made in the case of *Conner v. Henderson*, 15 Mass. 320. The plaintiff there declared on a contract by the defendant, to deliver eighty-nine casks of lime of good quality, and averred a breach, by the delivery of lime of little value, and not merchantable, and added a count for money had and received to his use. The evidence showed that the casks contained a mixture of sand and stone instead of lime, but there was no proof of a scienter against the defendant, who had made the sale as agent, although personally liable, in consequence of not having disclosed his principal.

It was held by the court, that, as no express warranty had been given, and an implied warranty could not be presumed, no action would lie for a breach of warranty, and that the plaintiff could not recover on the count for money had and received, as the contract had not been rescinded by returning the casks. But they expressed an opinion, that a declaration might be framed on the evidence before them, under which the plaintiff would be

entitled to judgment. As there was no warranty, and the defendant was protected from liability in case, by his ignorance of the fraud, the declaration thus hinted at, must have been one setting forth a contract for the sale of lime, and a breach by the delivery of sand and stone. And it seems from the case of *Henderson v. Seevy*, 2 Maine, 139, which was a subsequent suit growing out of the same controversy, that the plaintiff subsequently recovered on a count of that description. The general doctrine that a warranty cannot be implied, has been asserted in Massachusetts, in a number of other instances, and was recently applied in the case of *Lamb v. Crafts*, 12 Metcalf, 353, where the plaintiff was not allowed to recover for a defect in the quality of tallow which he had purchased under circumstances, which did not admit of his proving an express warranty of its quality, even if one had been given.

There have been a great number of other decisions in this country, in which the rule caveat emptor has been held with equal strictness, and has been applied, not only where the question was one purely of pleading, as in *Chandelor v. Lopus*, but where it grew out of evidence as offered before a jury. *Reed v. Wood*, 9 Vermont, 288; *Dean v. Mason*, 4 Conn. 432; *Jones v. Mauray*, 3 Monroe, 83; *Stone v. Denny*, 4 Metcalf, 154; *Mixer v. Coburn*, 10 Id. 559; *Helm v. Shackleford*, 4 Randolph, 5; *Otis v. Alderson*, 10 Smedes & Marshall, 476; *Erwin v. Maxwell*, 3 Murphy, 241; *Perry v. Aaron*, 1 John. 129; *Hyatt v. Boyle*, 5 Gill & Johns. 110; *Johnston v. Cope*, 3 Harr. & Johns. 89; *Stewart v. Dougherty*, 6 Dana, 479; *Beard v. Matthews*, Ib. 129. These cases are substantially to the same effect with those cited above, and may be considered as proving, in connexion with them, that the general current of American law, has continued to flow within the channels marked out in the principal case, and will not affect a vendor with liability for the defective quality of his goods or merchandise, except on the ground of fraud or express warranty.

In some of the states, however, a different rule prevails. Thus, if the language held by GRANT, J., in *Barnard v. Yeates*, 1 Nott & M'Cord, 142, were acted on, it would establish that the recovery in an action brought for purchase-money, may be reduced by whatever sum the jury think a fair compensation, for all defects which were unknown to the vendee at the time of the sale, even where he bought with full opportunity for examination, and when neither fraud nor warranty is shown as against the vendor. No other decision, however, in South Carolina has gone so far. In *Rose v. Beattie*, 2 Nott & M'Cord, 539, the doctrine of implied warranty was restricted to those cases where, as in the sale of cotton packed in bales, no opportunity is offered for an examination of the quality of the property sold. In *Carnochan v. Gould*, 1 Bailey, 179, the court held that a warranty will not be implied, when the goods might have been inspected, and the defect is one discoverable by inspection. And, in the recent case of *Wood v. Ashe*, 1 Strobhart, 407, the obvious position was taken, that when the purchaser knows of the defect at the time of the purchase, the vendor will not be answerable for its existence. The rule of the civil law, as contended for in *Barnard v. Yeates*, is, however, fully adopted in Louisiana; and, where defects exist, rendering the thing sold unfit for the avowed object for which it is purchased, the seller will be obliged to take it back, though ignorant of their existence, and although the buyer

had full opportunity afforded him for examination. *Melançon v. Robichaux*, 17 Louisiana, 101; *Mellaudon v. Price*, 3 Annual R. 4; *Huntington v. Lowe*, Ib. 377.

The English authorities are equally strong in favour of the proposition, that the sale of specific chattels or merchandise, does not imply a warranty under ordinary circumstances. *Parkinson v. Lee*, 2 East, 314; *La Neuville v. Nourse*, 3 Camp. 351; *Bluett v. Osborne*, 1 Starkie, 384; and this rule is held to apply, even where the sale is transacted by words of general description, and not by the designation of any particular article, so far as to exonerate the vendor from liability for the defects of quality, in points not expressly embraced in the terms of the description; *Gray v. Cox*, 4 B. & C. 108. There are, however, a number of decisions, in which it has been held, that, if the purchase be shown to have been made for a particular purpose, communicated at the time to the vendor, which the goods fail to answer when delivered, an action on the case may be supported against him, without other evidence, and without the averment or proof of any knowledge of the defect on his part at the time of the sale. The law was so held in the leading case of *Williamson v. Alanson*, 2 East, 446, where the declaration set forth that the plaintiff had purchased claret for exportation to the East Indies, and that the defendant had fraudulently sold it with a knowledge of its unfitness for exportation. No evidence was given in support of this later averment; but it was held, that as the declaration would have been good without the scienter, it might be treated as surplusage, and a verdict found for the plaintiff on the facts appearing on the rest of the pleading. This case was followed in *Jones v. Bright*, 5 Bing. 533, where the defendant, who had sold sheathing copper, manufactured by himself, to the plaintiff, for the purpose of being used on the bottom of a vessel belonging to the latter, was held liable in an action on the case for deceit, on evidence of these facts, and that the copper had proved unfit for the object for which it was sold. In the more recent decision of *Brown v. Edgington*, 2 M. & G. 279, the defendant, who held himself out as being what he was not in reality, a ropemaker, had undertaken, as such, to manufacture a rope which he knew was to be employed in raising heavy weights. The rope was, however, made in point of fact, by a third person not in his employ, and when delivered, proved wholly defective, by breaking under the weight of a cask of wine, which was consequently lost. Under these circumstances, it was determined, that a declaration on the case, averring a fraudulent warranty of the fitness of the rope for the purpose for which it was designed by the plaintiff, and the injury resulting to the latter from the purchase, on the faith of such warranty, was sustained by the evidence, and would entitle him to recover, not only for the deficiency in value of the rope, but consequential damages for the loss of the wine.

These cases obviously proceed on the ground, that when the object of the purchase is communicated to the vendor at the time of the sale, it must be considered as incorporated with the contract, and as giving rise to a stipulation, that it shall not be defeated by defects not essentially or inseparably incident to the nature of the thing purchased. It is therefore evident, that such a stipulation can only be founded upon the knowledge had by the vendor of the object of the purchase, and that when this is not of a nature to be necessarily inferred, and has not been expressly communicated, he cannot

be made answerable for its failure. Thus it was held by the Court of Common Pleas, in *Shepherd v. Pybus*, 3 M. & G. 867, that where a barge was sold under an executed contract of sale, without warranty, and with full opportunity for inspection, the vendor was not answerable for its unfitness for a special purpose, not communicated to him by the purchaser, although it was said, that he would have been so, had such a communication been made, or if the barge had been unfit for ordinary purposes.

The English courts have moreover, of late, imposed some very necessary restrictions upon the doctrine of implied warranty, as arising out of the knowledge of the seller of the object, for which the purchase is intended by the buyer. Thus in *Chanter v. Hopkins*, 4 M. & W. 399, it was held, that although the vendor may be liable, where the insufficiency of the thing sold, for the object of the purchase, arises from a defect of quality, or construction, and not from its nature, yet that his responsibility can in no case extend to any thing more than furnishing that which he has contracted to sell, agreeably to the designation given by the vendee. In that case, the defendant had agreed to put up a new patent smoke-consuming furnace for the plaintiff, which proved, when erected, instead of having the advantages it was supposed to possess, to be more expensive and troublesome than the furnaces in common use. But it was held by Lord Abinger, that this was nothing more than the "ordinary case of a man, who has had the misfortune to order a particular chattel, on the supposition that it would answer a particular purpose, which he finds it will not," and that the plaintiff was not entitled to recover.

The same point again arose in *Olivant v. Bayley*, 5 Q. B. 288. The plaintiff there brought *indebitatus assumpsit*, to recover the price of work and labour done, and materials furnished, under a contract to put up a two colour printing machine, similar to one then in operation in his shop, constructed on a principle for which he had obtained a patent. The defence set up was, that the machine had been purchased by the defendant, and sold by the plaintiff, expressly for the purpose of printing in two colours, for which, upon trial, it proved wholly unserviceable. Under these circumstances it was held, if the machine in question were a "known and ascertained article," and the defect was not in the workmanship, but in the principle on which it was constructed, the plaintiff, although both maker and inventor, was not answerable for its fitness for the purpose of the buyer, and was entitled to recover the full price originally agreed to be given by the latter. The case of *Camac v. Warriner*, 1 C. B. 356, is to the same effect, although the decision there was entangled with considerations arising out of the particular pleadings.

The doctrine, that a sale made for a particular purpose implies a warranty, that the thing sold shall be fit for that purpose, has been advanced in a number of occasions in this country, although seldom made the ground of direct and positive decision. The sounder view seems to be, that no engagement of this sort can be implied against the vendor, save where the contract is partially, or wholly, executory, and that, in this case, it is not in the nature of a warranty, but of an implied stipulation forming part of the substance of the contract; *Howard v. Hoey*, 23 Wendell, 350. The law was so held in *Chanter v. Hopkins*, where the following masterly exposition of the question was given by Lord Abinger: "A good deal of con-

fusion has arisen," said his Lordship, "from the unfortunate use made of the word warranty." "Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, yet collateral to the express object of it. But in many of the cases, some of which have been referred to, the circumstance of a party selling a particular thing by its proper description, has been called a warranty; and a breach of such a contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him any thing else in their stead, it is a non-performance of it. So if a man were to order copper for sheathing ships, that is, a particular copper, prepared in a particular manner, if the seller sends him different sort, in that case he does not comply with the contract; and though this may have been considered a warranty, and may have been ranged under the class of cases relating to warranties, yet it is not properly so."

These remarks seem to apply with equal force in those instances, where the difficulty or impossibility of inspecting the goods at the time of sale, has been said to justify a presumption, that the purchase was made subject to an implied stipulation, that the property sold was in such a condition as to admit of being used by the purchaser, or resold to other persons. Such a presumption may, no doubt, arise under certain circumstances; *Gallagher v. Waring*, 9 Wendell, 20; *Howard v. Hoey*; *Barrett v. Stanton*, 2 Alabama, 181; *Carnochan v. Gould*, 1 Bailey, 129; but not as it would seem, where the sale is executed, and the intention has been to transfer the right of property in the thing sold absolutely, and not merely in case it shall accord with the express or implied understanding of the parties; *Whiteman v. Freese*, 23 Wend. 213.

In *Misner v. Granger*, 4 Gilman, 69, the point in dispute was as to, whether the sale of a threshing machine by a dealer in such articles, implied an undertaking, that it should be fit for the purpose for which it was purchased. The decision turned chiefly on the insufficiency of the declaration, but the court intimated a strong opinion, that the defendant could not be made liable under any form of pleading. The case, therefore, tends to strengthen the ground taken in *Chanter v. Hopkins* and *Camac v. Wariner*. But it must be remembered, that these decisions are not in point when the contract is executory, and the failure of the thing sold to answer the object for which it is purchased, arises from a want of proper care or skill in the process of manufacture or construction, and not merely from a defect incident to the principle on which it is constructed.

There are, however, some other circumstances under which an implied warranty has been supposed to arise, in opposition to the general rule which forbids its existence. Thus the case of *Van Bracklin v. Fonda*, 12 Johnson, 468, has been regarded as deciding, that the sale of provisions for domestic use implied a warranty of their soundness. The point was not, however, before the court, for the action was in case, and the evidence showed that the vendor knew of the defect at the time of the sale. And in *Emerson v.*

Brigham, 10 Mass. 197, it was decided, that the sale of provisions for immediate consumption does not carry with it a warranty, although it implies an affirmation of their fitness for use, on which the vendor will be liable if he knows them to be unfit. This decision is in a great measure sustained by the recent case of *Burnby v. Bollett*, 16 M. & W. 644, where the court held, that the defendant who had bought the carcase of a pig from a butcher and re-sold it to the plaintiff, was not liable to the latter for the diseased condition of the flesh, of which he was ignorant at the time of the sale. And it is thoroughly well settled, that the sale of provisions in the course of general and commercial transactions, is within the general rule caveat emptor, and that no warranty or affirmation of quality or fitness will be implied against the vendor where he has made none expressly; *Winsor v. Lombard*, 18 Pickering, 57; *Hart v. Wright*, 17 Wendell, 267; 18 Id. 449; *Moses v. Read*, 1 Denio, 378.

In the absence of all liability arising from contract, the vendor may evidently be liable on the ground of tort. This is implied by the assignment of errors in *Chandelor v. Lopus*, where the absence of an allegation of knowledge, was urged as rendering the declaration insufficient in one aspect, as the want of an averment of warranty made it defective on another. The court are undoubtedly reported to have said, that even if the defendant knew the true state of the case, it was immaterial. But this must either be understood with reference to the state of the pleadings which contained no averment whatever of his knowledge, and only an indirect averment of fraud or misrepresentation, or else, as a mere dictum which would not have been followed, even at the time when it was uttered, and which certainly is not law at the present day. There can be no doubt, that the sale of a thing with an express or implied representation of its nature or qualities, which is false within the knowledge of the party who makes it, amounts to a fraud, and not only vitiates the contract, but renders the guilty party liable to an action for damages. If, therefore, the vendor make wilful misstatements as to the condition of the property sold, or sell it as other than he knows it to be, and thereby induce the completion of the purchase, the contract will be voidable at the option of the vendee, who may either avoid it by returning the goods, and bring an action on the case for the deceit, or affirm it by keeping them, and then give the fraud in evidence to diminish or defeat a recovery, in a suit brought to enforce payment of the purchase-money; *Thayer v. Turner*, 8 Metcalf, 550; *Hazard v. Irwin*, 18 Pickering, 95; *Kimball v. Cunningham*, 4 Massachusetts, 504; *Cornefuis v. Molloy*, 7 Barr, 293.

Even where the vendee in a sale vitiated by fraud, has affirmed the contract by using the goods, and has paid the purchase-money, he is not left without remedy, for he may still have recourse to an action on the case for deceit, and recover damages for whatever injury he has sustained, from being led into a disadvantageous purchase, by the wilful misstatements of the vendor; *Harrington v. Stratton*, 22 Pick. 510. In order, however, to support this form of action, it is essentially necessary, that the scienter should be proved: and it will not be sufficient to show, that the defendant made statements which he did not know to be true, and which, in point of fact, were false; *Cornfoot v. Fowke*, 6 M. & W. 358; *Taylor v. Ashton*, 11 id. 401; *Russel v. Clark's ex'ors*, 7 Cranch, 69; *Wilson v. Fuller*, 3 Q. B.

68; *Collins v. Evans*, 5 Q. B. 819; *Tryon v. Whitmarsh*, 1 Metcalf, 1. But where the averments of the defendant have been made, as of his own knowledge, and not as mere general assertions, it will be sufficient to prove that he had not, and could not have had such knowledge; and in that case, his having held himself out as possessing it, will constitute a fraud, and render him liable under the scienter; *Hazard v. Irwin*, 18 Pickering, 95. Moreover, in addition to fraud on the part of the defendant, the plaintiff must prove injury to himself. When, therefore, the vendee knows of the defect at the time of the purchase, he cannot be misled by a denial of its existence, and can have no right to damages for a deceit where he has not been deceived. But in order to exonerate the vendor on this ground, the knowledge of the purchaser should be clearly proved, and it ought not to be inferred merely because the defect might have been discovered by examination, nor, unless it is so far patent as to justify the belief, that it was purposely overlooked at the time of the purchase, in order to found an action upon it afterwards. And this is more especially true, when the false representations of the vendor have been accompanied by a warranty, and thus have tended still further to throw the purchaser off his guard, and prevent him from seeing what might otherwise have been manifest; *Huntington v. Lowe*, 3 Louisiana R. 377; *The India Rubber Co. v. Adam*, 23 Pickering, 265. When, however, it is proved positively, that the purchaser knew of the defect at the time of the purchase, he cannot recover damages for it in any form of action, for in that case he can hardly be exonerated from a want of good faith, and comes within the rule, *volenti non fit injuria*.

To sustain an action on the case for fraud, whether committed in the course of a sale, or any other transaction, there need not necessarily be the allegation or proof of express and positive misstatement. The essence of fraud is undoubtedly deceit, but deceit may be practised either by words or actions. Any course of dealing, therefore, on the part of the vendor, of a nature to create a false impression in the mind of the vendee, will amount to a fraud, and render the guilty party liable in damages; *Misner v. Granger*, 4 Gilman, 69. Thus when provisions are sold for domestic use, the mere fact of selling them is an implied affirmation, that they are sound and wholesome, so far as the knowledge of the vendor extends, and an action on the case for a deceit, may be sustained against him on proving, that he knew them to be unsound, without any proof of an express warranty or a representation of soundness; *Van Bracklin v. Fonda*, 12 Johnson, 468. This is evident from the case of *Emerson v. Brigham*, 10 Massachusetts, 119, where it was held, that no warranty of soundness or quality is to be implied from the sale of provisions for home consumption; and that the defendant could not be made liable for selling salt beef in casks, in a state not fit for food, without proof of the scienter, but that, with such proof, there would be sufficient evidence of fraud from the nature of the article sold, independently of any affirmation as to its goodness. These decisions are obviously mere applications of the general rule, that fraud may arise out of the suppression of truth, as well as the suggestion of falsehood.

The wrong done by concealing a defect which renders the thing sold unfit for the purpose for which it is purchased, is not confined to the sale of provisions for domestic use. There are many other instances, in which the seller should be made answerable for a violation of the confidence reposed

in him by the buyer. And it is at all events certain, that an action may be sustained in every instance, where the course adopted by the vendor has been such as to mislead the purchaser, although not attended by direct or positive misrepresentation. *Allen v. Addington*, 7 Wend. 10; 11 id. 75; *Kidney v. Stoddart*, 7 Metcalf, 252. Thus the mere production of merchandise by a tradesman, in answer to the inquiries of his customers, amounts to an affirmation that it is of the kind for which they have inquired, and even as it would seem that it is not so far defective in quality, as to be unfit for the purpose for which such merchandise is usually purchased. It may be presumed, that a cutler would be liable to an action on the case, for deceit, for selling razors in the way of his trade, and at the price usually paid for cutlery of good quality, which he knew to have been made merely for sale, and to be wholly unfit for the purpose of shaving. In this aspect of the case, the price for which the goods are sold, may be material, for although the demand of a sound price does not imply a warranty of soundness, yet it may reasonably be considered as an assertion, that the seller is not aware of the existence of any gross defect in the article sold. The liability thus imposed on the vendor, should not be carried to the extent of a warranty, which would render him answerable for defects of which he is ignorant, but it may and should be made co-extensive with his knowledge.

It is evident, from the language held by Lord Abinger, in *Chanter v. Hopkins*, (supra, 219,) that even in the absence of warranty, a sale is only so far binding on the vendee, as its execution is tendered or completed by the vendor, and that the latter cannot call for the purchase-money, without proffering or delivering what the former has agreed to buy. The justice of this principle is obvious, and the only difficulty is to determine what cases admit of its application. *King v. Paddock*, 18 Johns. 141; *Howard v. Hoey*, 23 Wend. 250; *Wright v. Barnes*, 14 Conn. R. 518; *Young v. Cole*, 3 Bing. N. C. 724; *Bridge v. Wain*, 1 Starkie, 504. Where the contract is made with reference to specific chattels, there is often room for doubt, as to whether the intention of the parties is to transfer the right of property in the chattels themselves, whatever may ultimately prove their true nature, or only in case it accords with the description given of them by the seller. Thus, the purchaser of a jewel, sold as a ruby or bezoar stone, which turns out to be a gem of some other character, may or may not be bound by the purchase, according to the circumstances of the case, and the understanding between himself and the vendor. But where the sale is made without reference to specific goods or merchandize, this doubt cannot arise, and the nature and object of the contract, can only be gathered from the language of the parties, whether expressed verbally or reduced to writing. And even when specific property is referred to, still, if the reference be through the medium of a sample, the contract will necessarily be so far executory, as to fail of effect, unless the bulk of the commodity correspond with the sample.

It follows therefore, that although properly speaking, there is no warranty of quality on sale by sample, yet that to execute the contract, and render the vendee liable, the goods delivered must correspond with the sample. If there be a material difference in quality, the latter on refusing to receive the goods, or returning them where they have already come into his hands, may resist the payment of the purchase-money, or recover it

back if paid. Even where he has received and used the goods, on bringing suit against the vendor, and averring a contract to sell merchandise of like quality with the sample, and a breach of such contract, he will be entitled to recover whatever damage he has sustained by the inferior quality of the goods actually delivered. *Oneida Manufacturing Co. v. Lawrence*, 4 Cowen, 440; *Andrews v. Kneeland*, 6 Cowen, 354; *Gallagher v. Waring*, 9 Wend. 20; *Boorman v. Johnson*, 12 Wend. 566; *Beebee v. Robert*, 12 Wend. 413; *Waring v. Mason*, 18 Wend. 425. In like manner, the courts of Massachusetts hold, that where there has been a sale by sample, the vendor must be understood to have contracted to sell and deliver goods, corresponding in kind and quality with the sample; and that if articles of different character, or inferior quality, be delivered, there is a breach of contract on his part, for which he may be made liable in damages. *Bradford v. Manley*, 13 Mass. 139; *Williams v. Spafford*, 8 Pick. 250.

The general doctrine, that when a vendor does not fulfil the contract of sale, by tendering that which has formed the subject-matter of the contract, the vendee may either retain or recover the purchase-money, is recognised in Pennsylvania; and was applied in *Borrekins v. Bevan*, 3 Rawle, 23, to the case of sales by sample.

In that case, however, the majority of the court, while of opinion that the sale had been in the particular instance by sample, went further, and held, that the subject-matter of the sale is to be ascertained in all cases, whether the purchaser examines the goods or not, by the terms of the contract; and that if the articles delivered do not correspond with those terms in specie, there is no valid execution by the vendor, or obligation on the part of the vendee. In the words of ROGERS, J., who delivered the opinion of the court, when the goods delivered "do not correspond in kind, the purchaser has a right to say, this is not the article I contracted for, non in hæc fœdera veni; and this, whether he complains at the time of the delivery, or after, unless his conduct amounts to a waiver of indemnity." In illustration of this view of the law, as taken by the court, he put the case of a purchaser at a wineshop who should ask for Madeira; and held that he would not be obliged to accept Teneriffe, sold and delivered to him by the wine merchant as Madeira, although tasted at the time of making the sale. From the opinion of the court so far as it held that to execute a contract of sale in a case free from fraud, there must be a delivery corresponding in specie with the terms of the contract, and not merely with the actual subject-matter contracted for, as seen by the vendee or his agents, GIBSON, C. J., and KENNEDY, J., dissented.

The same course of reasoning was pursued by the Supreme Court of Massachusetts, in the case of *Hastings v. Lovering*, 2 Pick. 214. It there appeared by the wording of the contract, as gathered from the bill of sale and the evidence before the court, that the defendant had agreed to sell the plaintiff prime winter sperm oil, and it was held that the delivery of summer-strained oil would not satisfy the terms of the contract, and that the buyer was consequently entitled to damages for the breach. As the oil was at a distance of many miles from the place of sale, at the time when it was made, the court was fully justified in looking closely to the terms of the contract, as the only means of discovering its subject-matter, and in holding that it

was not performed, by the delivering of a thing substantially different from that which those terms designated. It was held, in like manner, by the Maryland Court of Appeals, in the case of *Osgood v. Lewis*, 2 Harris & Gill, 495, that where under a contract for the purchase of winter sperm oil, and a bill of sale in which the oil sold was thus described, summer-strained oil was delivered, the contract was broken and the vendee entitled to damages. This case was so far different from that of *Hastings v. Lovering*, that the oil was lying at the wharf when sold, and might therefore have been examined by the purchaser. The weight which might otherwise have been due to this circumstance, was, perhaps, diminished by the fact that the difference between the two sorts of oil, though one of chemical constitution, could not be discovered in ordinary weather by the most careful examination, without resorting to the aid of analytic experiment. But even if this had not been so, the fact that the sale was of specific merchandise, which might have been examined by the purchaser, could only have served as prima facie evidence of the nature of the contract, and could not have controlled its construction as finally ascertained from other sources. *Sheppard v. Kain*, 5 B. & Ad. 240. A sale thus made, may raise a presumption, that the vendee knew that the real nature of the property purchased, differed from the description under which it was sold, or that if ignorant of this, he was willing to run the risk of its being different. But these presumptions may be rebutted by other circumstances, or by clear evidence of an opposite understanding between the parties. The recent case of *Henshaw v. Robbins* 9 Metcalf, 83, goes to the full extent of the position, that even where the sale is of specific property or merchandise, and the vendee might have discovered its real nature by examination, the vendor will be liable if it vary in kind from that which he has given in the bill of sale or other written evidence of the contract. And the result must evidently be the same, when the contract is not reduced to writing, if there be a departure from its terms as proved by parol testimony. *Mixer v. Coburn*, 11 Metcalf.

These cases, however, have no bearing on the doctrine, that a warranty cannot be implied, and are strictly limited to the point which they profess to decide, that so far as the terms of the contract are express, they must be pursued by the vendor. When, therefore, the goods delivered correspond in specie with those sold, the vendee will have no remedy for a failure in quality, unless he has stipulated for quality as well as specie. Thus, in *Windsor v. Lombard*, 18 Pick. 1, the plaintiff had purchased several kegs of mackerel described in the bill of parcels as No. 1 and No. 2, but which proved on examination to be of very inferior quality, and much damaged by rust, though not absolutely unmarketable. Under these circumstances, it was held, that the action could not be maintained, as there was no ground for implying a warranty of quality, and the substance of the contract was satisfied by the delivery of mackerel, which had been inspected and branded in a manner corresponding with the terms of the description, although they had deteriorated in condition before the sale. The same ground was taken in *Mixer v. Coburn*, above cited, where it was decided, that although the vendee might resist a recovery for the price of merchandise sold as German cylinder glass, by evidence that it failed to answer the commercial sense of the description, either in quality or specie, yet, that if it was such as described, other or further defects in quality were wholly immaterial. It was

held, in like manner, in *Hyatt v. Boyle*, 5 Gill & Johnson, 110, that no warranty of quality is to be implied in the sale of chattels, and that when the goods delivered accord with the terms of the contract, the purchaser is without remedy, even for hidden defects of such a nature as not to be discoverable by inspection. This case corresponds as closely with *Windsor v. Lombard*, as that of *Osgood v. Lewis* with *Hastings v. Lovering*, and the whole show when taken together, a substantial accordance between the law as held in Massachusetts and in Maryland.

In *Jennings v. Gratz*, 3 Rawle, 168, the doctrine that in the absence of express stipulation, the vendor is not liable for a failure in quality, when there is a correspondence in kind, was carried to the extent of deciding that a sale of chests of tea as "Young Hyson," which proved on examination to be adulterated by a mixture of leaves of other plants, did not render the vendor answerable in damages to the vendee. There can be no doubt of the soundness of this decision, if, as seems to have been the case, the adulteration did not go sufficiently far to destroy the distinctive character of the tea as "Young Hyson," in the commercial sense of the term, for as the contract merely specified kind, and was silent as to quality, there could be no liability on the part of the vendor, if the kind were the same, however inferior the quality. But in the more recent decision of *Fraley v. Bispham*, 10 Barr, 320, the court seem to have supposed, that the decision in *Jennings v. Gratz*, was founded on a distinction between a failure to comply with the contract as to kind and as to quality, when both are embraced by its stipulations. In that case the bill of sale was of "Superior sweet-scented Kentucky leaf tobacco," and the tobacco actually delivered was of inferior quality, and so much impaired by decay as to have a disagreeable smell. Under these circumstances, relief was refused to the purchaser, on the ground that as the seller had complied with the terms of the sale as to specie, he was not bound to go further in the absence of an express warranty of quality. A similar point was decided by the Supreme Court of Illinois, in *Towell v. Gatewood*, 2 Scammon, 22. It is probable, although it does not appear from the evidence, that the description of the tobacco, in *Fraley v. Bispham*, as "superior sweet-scented" was intended merely as a designation of a particular sort known under that name or brand in commerce, and consequently referred to kind, and not to quality or condition. If so, the decision was substantially right, because the agreement of the parties was silent on the latter point, and was fulfilled as to the former. If, however, the terms "superior and sweet scented," instead of referring to a particular kind of tobacco, were intended as a description of quality, it would seem to follow, that the agreement was broken by the failure of the tobacco to answer that description. But the court seem to have supposed, that a substantial distinction exists between the effect of a description of quality and of kind, and that although the latter is *prima facie*, part of the contract, the former is not. It is undoubtedly true, that while a contract of sale must express the kind of goods sold, it may be silent as to their quality, and that under ordinary circumstances, the liability of the vendor cannot be extended by implication, or carried further than the limits fixed by his language. But when the words of description employed extend both to quality and specie, he ought to be answerable to the vendee for any failure as to either. It can hardly be denied, that where the vendor agrees to fill

an order sent for goods of a particular quality, he is liable if they do not correspond with the description when delivered; and there seems no reason why his liability should be different, when the proposition for the sale, and the description of the goods, is furnished by him in the first instance, without any previous application on the part of the vendee.

Whatever may be the true extent and bearing of the doctrine held in *Henshaw v. Robbins*, and *Borrekins v. Bevan*, it is unquestionably at variance with the cases of *Seixas v. Woods*, *Swett v. Colgate*, and *Holden v. Dakin*. Thus in *Holden v. Dakin*, as in *Henshaw v. Robbins*, the merchandise actually sold, failed to correspond in kind with the terms used by the vendor, in describing it at the time of the sale, but while the right of the vendee to redress, was treated as indisputable in the latter case, it was wholly denied in the former. In the recent case of *Carley v. Wilkins*, 6 Barbour, 557, the Supreme Court of New York adhered to their earlier decisions, and held that a vendor is liable only for a false affirmation or express warranty, and that selling an article as of a particular character, is neither an affirmation nor a warranty that it possesses that character. Nearly the same ground was taken on this point in *Barre v. Matthews*, 6 Dana, 129. And it was further held, that a declaration or statement, setting forth that flour had been sold by the defendant as superfine, which proved on delivery, to be of inferior quality, was bad even after verdict, as failing to set forth any cause of action. So far as regards the question of pleading, the case of *Carley v. Wilkins* is a mere re-affirmance of that of *Chandelor v. Lopus*, and is manifestly correct, for it must depend upon circumstances, whether the sale of specific property, under a particular description, does or does not make the description a part of the contract, and the statement of the cause of action was consequently defective, as setting forth evidence instead of the conclusions of fact, which were sought to be founded upon it. *Misner v. Granger*, 4 Gilman, 69. Where the vendee relies neither on misrepresentation nor warranty, and seeks to recover on the ground of the failure of the property sold, to correspond with the description given by the vendor, he should declare on the contract as executory and not as executed, and aver that the vendor has failed to comply with its stipulations by delivering that which he agreed to sell, instead of merely alleging, as in *Chandelor v. Lopus* and *Carley v. Wilkins*, that the goods were sold as one thing, and proved to be another. Such an allegation admits that the sale is executed, and has transferred the right of property, and nothing can be more certain than that where this is the case, there can be no recourse against the vendor, unless on the ground of fraud or express warranty. The general doctrine, that when the vendor does not deliver that which he has undertaken to sell, there is a breach of the contract, is recognised in New York as well as Pennsylvania and Massachusetts. The difference between the courts of these states seems to be merely, as to the circumstances under which it is applicable. Thus, it is held in Massachusetts, that in order to ascertain the subject-matter of the contract, recourse must be had to the description given by the vendor, even where the sale is of specific chattels or merchandise, while many of the cases in New York, determine that an executed contract of sale, must be construed solely by reference to the goods themselves, to the entire exclusion of the language held by the parties, and, therefore, that the right of property will pass to the vendee, although the real nature of the thing

sold, may differ wholly from that which it was his avowed intention to purchase, and that of the vendor to sell. But whichever of these views be correct, it is evident that neither of them conflicts with that taken in *Chandlor v. Lopus*, which is confined simply to the point, that when the sale is executed the declaration must be either in tort or on a warranty. And it must also be remembered, that however general the language of the Supreme Court of New York, in *Carley v. Wilkins*, it had been previously held in the same tribunal, in *Cramer v. Bradshaw*, 10 Johnson, 484, that the description of a slave in a bill of sale, as sound in wind and limb, was a warranty of his soundness. The true conclusion on the whole matter, therefore, seems to be, that although the vendor may avoid all liability by silence, and cannot be made liable for mere representations unless wilfully false, he will notwithstanding be bound by a verbal or written description of the property sold, so worded as to enter into and form part of the contract.

There can, moreover, be no doubt, that even where the contract of sale is executed, and still more where it is executory, the vendor will be liable for any departure from any of the conditions, which are necessarily to be implied from its nature and the circumstances under which it is made. In *Howard v. Hoey*, 23 Wend. 350, the contract was for the delivery on board ship at New York, of good merchantable ale, such as the vendor was in the habit of sending South, and the ale actually delivered, proved to be unsound and unfit for use, on its arrival at New Orleans. This was a manifest breach of the express stipulations entered into by the vendor, for which he was necessarily liable. But the opinion of the court went beyond this point, and further than a decision on the facts actually before them required. It was admitted, that where a specific chattel is sold, the liability of the vendor does not extend beyond his actual engagement, and that no implied condition or warranty can be imported into the contract. But it was held, that when the contract is purely executory, and without reference to particular objects, it will be subject to an implied condition that the goods delivered under it, shall be merchantable and of good quality. A similar view was taken in the case of *Hart v. Wright*, 17 Wend. 267.

The justice of this doctrine is too obvious in some cases to admit of denial. Thus, a manufacturer, who, undertakes to make goods, to order, is bound to make them of good quality, and should not be allowed to render a defect arising from a want of proper materials, proper skill, or proper exertion, a source of gain to himself, or of loss to the purchaser. And, even when the contract is simply to furnish the goods, and not to make them, there would still seem to be an implied condition, that they shall be good and merchantable. Unless this were the law, the vendor might select and set apart goods of the most inferior quality, without a specific designation of the property purchased, and then charge the vendee with a price fixed with reference to those of a much better description. Some doubt is thrown on this doctrine in the cases of *Kirk v. Nice*, 2 Watts, 367, and *Kase v. John*, 10 Id. 109; but it may be presumed to be the law of this country, as it unquestionably is that of England. The English cases, however, go further and hold that the sale of specific chattels for a particular purpose by a manufacturer, by one who holds himself out as such, or even by a mere dealer, renders him liable for any defect in their quality or construction, which makes them unfit for the purpose for which they are sold (*supra*).

The inclination of the court in *Howard v. Hoey*, seems to have been in favour of these decisions, notwithstanding their apparent inconsistency with the rule of *caveat emptor*, which protects the seller from all liabilities which he has not expressly assumed. The departure from this rule is however apparent, rather than real. When a vendor sells goods expressly for a particular purpose, his liability is the result of an express and not of an implied undertaking; and the case is substantially the same, where he is informed by the vendee of the purpose which he has in view, and tacitly adopts that as the basis of the contract, for the language held by either party in making a contract when assented to by the other, becomes the language of both.

The doctrine, that a party who undertakes to comply with an order, for a particular article, must furnish one of good quality, and fit for use, was applied in *Kellogg v. Denslow*, 14 Conn. 411, to the case of machinery made to order in a manufactory, which proved on delivery to be so badly manufactured, as not to answer the purpose for which it was ordered. And on the other hand the distinction taken in *Chanter v. Hopkins*, between a defect arising out of the faulty construction of a machine, and one inherent in the principle on which is constructed, was applied in *Misner v. Granger*, 4 Gilman, 69, to protect the vendor of a threshing machine, from liability for its failure to answer the expectation of the vendee.

The numerous cases which recognise on the right of the vendee, to avoid the contract and sue for damages, where the vendor has been guilty of fraud in the sale, or has failed in the performance of his contract, by not delivering that which he agreed to sell, are very generally regarded as proceeding on the ground of an express or implied warranty. If this view were correct, it would be difficult or impossible to reconcile them with the views presented, in this note. But on referring to the language held by Lord Abinger in *Chanter v. Hopkins*, (*supra*) and attentively considering the cases themselves, it will be seen that they really proceed on the ground of tort or an entire breach of contract, even where the court have treated the question as one of warranty.

This is the more evident, because in most of these cases the right of the vendee to disaffirm the sale and return the goods, was fully admitted; while it is well settled, that he cannot pursue that course on the ground of a mere breach of warranty, unaccompanied by fraud; *Kase v. Johns*, 10 Watts, 109; *Voorhees v. Earl*, 2 Hill, 288; *Carey v. Gruman*, 4 Hill, 526; *Thornton v. Wynn*, 12 Wheaton, 193; *Mondel v. Steel*, 8 M. & W. 858; *Street v. Blay*, 2 B. & A. 456; *Gompertz v. Denton*, 1 Cr. & M. 267; *Pateshall v. Trantor*, 3 Ad. & El. 103; *Young v. Cole*, 3 Bing. N. C. 724. It is indeed obvious, that the numerous cases which turn on what is called an implied warranty arising on a sale by sample, really proceed on the ground, that a vendor who has not delivered that which he has agreed to sell, cannot sue for the purchase-money, and is liable to an action by the vendee for his breach of contract. That the rights of the vendee in a sale by sample, do not grow out of an implied warranty, but depend upon the failure of the vendor to execute the contract into which he has entered, is moreover evident from the case of *Boorman v. Johnston*, 12 Wendell, 566; where a written memorandum was executed of a sale made by sample, and although nothing was said, either as to sample or warranty, the vendor was held liable for the failure of the goods delivered, to correspond in quality with the sample.

It is sufficiently evident, that the engagement implied in a sale by sample, is limited strictly to the correspondence of the goods with the sample

exhibited, and does not extend to their character or quality in other particulars. The buyer cannot therefore recover damages, for any defect however gross, which is common both to the sample and the bulk of the commodity; *Parkinson v. Lee*, 2 East., 313.

The use of the verb *warrantizo*, or of its modern equivalent, is essentially necessary, in order to create an express warranty of title in the conveyance of land. But no particular phrase is requisite to raise a warranty of quality or specie, in a sale of chattels; an apparent intention to warrant being sufficient. *Morrill v. Wallace*, 9 New Hampshire, 111. *Roberts v. Morgan*, 2 Cowen, 438. *Carley v. Wilkins*, 6 Barbour's S. C. *Kinley v. Fitzpatrick*, 4 Howard's Miss. 49. *McGregor v. Prime*, 9 Yerger, 74. *Erwin v. Maxwell*, 3 Murphy, 241. *Ayres v. Park*, 3 Hawke, 359. *Baum v. Stevens*, 2 Iredell, 411. *Taggart v. Blackweller*, 4 Iredell, 238. *Brooks v. Dillahunty*, 8 Porter, 134. *Bradford v. Bush*, 10 Alabama, 386. And as the use of the word *warrant* is not necessary in fact, it need not be averred in pleading. Thus in *Chapman v. March*, 19 John. 290, where the declaration averred "that the defendant undertook and promised that the horse sold the plaintiff was sound," it was held sufficient as an averment of warranty. The question, whether there has been a warranty or not, depends upon the intention and understanding of the parties, as collected from their acts and expressions at the time of the sale; and where the contract is not wholly in writing, is one of fact for the jury, under the direction of the court; *Whitney v. Sutton*, 10 Wend. 413; although in this, as in all other cases, their verdict should be set aside, when contrary either to the law or the evidence, and ought not to be supported in favour of a warranty, unless the evidence is sufficient, expressly or by implication, to establish its existence as a part of the contract. *McFarland v. Newman*, 9 Watts, 35. *Duffee v. Mason*, 8 Cowen, 25; *Cook v. Mosely*, 13 Wend. 277. *Kinley v. Fitzpatrick*. *Kause v. Fort*, 4 Blackford, 293. *Baum v. Stevens*. *Taggart v. Blackweller*. *Barnett v. Stanton*, 2 Alabama, 189. *Williams v. Cannon*, 9 Id. 348. The law was so held in *Foster v. Caldwell*, 18 Vermont, 176, when the court said, that whether an affirmation made at the time of sale was a warranty, depended upon the sense in which it was made by one party, and understood by the other, and was a question of fact for the jury, and not of law for the court. This latter branch of the rule, however, only applies when the contract is verbal, for when it is reduced to writing, it will be the duty of the court to instruct the jury, as to its meaning, and a mere statement in the bill of sale of a horse, that he is considered sound, will not justify a verdict finding a warranty of soundness. *Watson v. Rowe*, 16 Vermont, 525.

It is evident from what has been said, that an affirmation intended as an undertaking, will take effect as a warranty. *Hillman v. Wilcox*, 30 Maine, 170, but that it will not when made as a mere representation. Yet the question has often been treated as one of assertion, and not of contract, and verdicts have been sustained, finding a warranty on evidence of representations made by the vendor, without proof that he meant to make himself answerable for their correctness absolutely, or beyond the point to which his knowledge extended. Thus it was held in the case of *The Onecida Manufacturing Company v. Lawrence*, 4 Cowen, 440, that a positive assertion made by one party, and relied on by the other, would take effect as a warranty; and in *Whitney v. Sutton*, 10 Wend. 413, a representation of soundness,

relied on as such, was said to amount to a warranty, thus making the vendor answerable for the absolute accuracy of every assertion uttered in the course of the sale, which is of a nature to influence the mind of the vendee. This course of decision was criticised by Gibson, C. J., in the case of *Borrekins v. Bevan*, as tending to destroy the practical value of the common law distinction between representation and warranty. A similar criticism may be made on the case of *Morrill v. Wallace*, 9 New Hampshire, 111, where the question for the jury was said to be, whether the language held by the vendor was intended as an expression of opinion as to the nature or quality of the merchandise sold, or as a positive promise or affirmation. The true distinction seems to be between a mere assertion or representation however positive, extrinsic to the contract, although relating to its subject-matter, and influencing the judgment of the purchaser, and a promise or undertaking entering into the contract, and forming one of its terms. A representation, not in the nature of a promise, does not ordinarily render the party who makes it, legally answerable for its correctness, even where it is positive in terms, and not a mere expression of opinion. *McFarland v. Newman*. The only exception to this rule is in the case of the contract of insurance, where it grows out of the implied understanding on which the parties contract, and the peculiar nature of the relations subsisting between them. A vendor may therefore express his belief, with regard to the nature of that which he sells, without rendering himself liable, unless he express it in a form to induce the impression that he is giving a warranty, and not making a representation. *Erwin v. Maxwell*, 3 Murphy, 241. *Taggart v. Blackweller*, 4 Iredell, 238. *Hause v. Fort*, 4 Blackford, 293. But when such a statement is unqualified, it will be a question for the jury, whether the purchaser was not justified in construing it as a promise and not as a mere assertion, and this question is one which they may and will frequently determine adversely to the seller, who ought not to escape from liability on the plea that his language is susceptible of an interpretation, different from that in which it was probably understood at the time when it was uttered; *Taggart v. Blackweller*, 4 Iredell, 238; *Roberts v. Morgan*; *Duffee v. Mason*; *Cook v. Mosely*; *Hillman v. Wilcox*, 30 Maine, 170.

The courts of New York, have been not a little inconsistent, in construing language as a warranty, in cases in which it is less susceptible of that construction, than in others in which they have emphatically held it to be nothing more than a mere representation. If matter of description or representation, can be treated as a warranty in any case, it should be so when incorporated with the written memoranda or evidence of the contract. Yet in *Swett v. Colgate*, an advertisement of the merchandize in question as barilla, before the sale, and a description of it as such in the bill of parcels delivered to the purchaser, was held insufficient to constitute a warranty, while in *Cook v. Mosely*, the assertion of the vendor that the mare sold to the plaintiff was sound, and that he would not be afraid to warrant her, was held to justify a verdict finding an express warranty. It is difficult to understand why an effect should have been given to an incidental assertion in the one case, which was denied to the sum and substance of the contract in the other. Justice cannot be done as between vendor and purchaser, without holding, on the one hand, that mere representation forms no part of the contract, and on the other, that the production and sale of goods, as pos-

sessing a particular character, is not only a representation, but an actual stipulation that they possess it.

The effect which should be attributed to an advertisement, or other general representation of the vendor, as showing what was the governing intention of the parties at the time of entering into the contract, and thus defining its subject-matter, was strongly stated by Parsons, C. J., in the case of *Bradford v. Manly*, 13 Mass. 139, where he said, "A case similar to this in principle, came before me two or three years ago at Nisi Prius. An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas Cocoa. The plaintiff made a purchase of a considerable quantity, and shipped it to Spain, having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it, there was a considerable difference in value in favour of the Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty, and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question, but afterwards abandoned it, and suffered judgment to go against them." The general principle, that whether the sale of a specific chattel be executed or not, is a question of intention, and that it will fail of effect where the property in question, proves to be substantially different from that which it was supposed to be by the parties, is also sustained by the opinion of the court in *Borrekins v. Bevan*; in which it was said, that a wine merchant who should sell teneriffe to a customer as madeira, could not defend himself in an action brought for a breach of contract, on the ground that the wine was examined and tasted when it was purchased. The same doctrine was held in *Hastings v. Lovering*, where the description in the bill of parcels, was taken as *prima facie* evidence of the subject-matter of the contract. And in *Henshaw v. Robins*, the language held by Parsons, C. J. in *Bradford v. Manly*, was cited as ruling the law in Massachusetts; and it was decided that counts for money had and received, and for a breach of warranty, might both be sustained, by showing that the defendant had sold specific merchandize as indigo, and described it as such in the bill of parcels, which proved on delivery to be a mixture of Prussian blue and chromate of iron, although the sale had been made with full opportunity for inspection.

In this case, as well as in that of *Bradford v. Manly*, while the nature of the obligation imposed on the vendor by the contract, was treated as one of warranty, the vendee was held to be entitled to avoid the contract and recover back the purchase money, although the breach of a mere warranty, however flagrant, does not amount to a total failure of performance, nor authorize a return of the goods, and abrogation of the sale. It is, however, probable, that in using this language, the court only meant to say, that the agreement of the vendor bound him to the delivery of goods corresponding with its terms, and was not a mere executed sale of a specific chattel. But in consequence of this want of precision, these cases do not throw much light on the somewhat difficult question, whether the obligation imposed by the sale of goods, as answering a particular description, is to be regarded as a mere warranty, or as entering into the substance of the contract, and entitling the vendee to

return the goods if it be broken, which is one of considerable importance to the rights and remedies of the parties.

Where the contract rests in description, and the character of the goods to be delivered is ascertained only by its terms, it must be executory in all cases, whether the words employed are those of actual sale, or of mere undertaking, for no property can pass until some specific chattel has been set apart by the vendor, as coming within its provisions. In this case there is no doubt that if the goods thus designated, do not correspond with the terms of the contract the breach will be total, and the vendee will not be bound to receive them. On the other hand it is equally well settled, that where the subject-matter of the sale is designated at the time by both parties, as consisting of a specific chattel or parcel of merchandize, the contract will be executed, and any undertaking for the quality or nature of what is sold, a mere collateral stipulation or warranty, which will give a distinct and several cause of action against the vendor, if broken; but will not deprive him of the right of recovery against the vendee, if unperformed. But there are numerous intermediate cases, in which, while a certain reference is had to specific chattels, there is more or less evidence, that the contract is based wholly, on their supposed accordance with something else, which forms the true subject-matter of the sale. Thus, even where a specific parcel of merchandize is set forth in writing, as that which the vendor has agreed to sell, and the vendee to buy, if the sale have been made upon the exhibition of a sample, the substantial identity of the merchandize with the sample, will be of the essence of the contract, which will fail of effect if they prove to be different. In like manner, where the vendor holds himself out by advertisement, as possessed of merchandize of a particular description, a subsequent contract for its purchase will be considered *prima facie*, as based upon the representation thus made, and this presumption will not be rebutted, by showing that the sale was finally concluded, after an exhibition and examination of the merchandise itself, if it appear that the intention of the vendee had reference primarily to the advertisement, and the acquisition of what was there described; and that the purchase in question was a mere means to that end. In this case the assent of the vendee to buy the particular property exhibited, will be controlled by his general intention, and although it may have the effect of executing the contract, and passing the right of property, if not retracted, it will not preclude him from showing that it was given under an erroneous impression of fact, created by the language or conduct of the vendor. But although there is no rule of law, which precludes the possibility of a sale subject to an implied condition, that the goods sold are of a particular nature, even where the parties contract with reference to specific chattels, which are supposed by one or both to satisfy the condition, the presumption is undoubtedly the other way, *prima facie*, and in favour of regarding every such sale as unconditional, and as entitling the vendor to enforce it, however much the real nature of the property sold may differ from that which it was supposed to be. Under these circumstances, the latter can only protect himself by alleging a warranty, when, as we have seen, the question will depend on whether the statements made by the vendor at the time of the sale, were understood as mere representations, or as forming part of the contract.

There can be no doubt, that when the vendee is acquainted with the real

nature of that which he purchases, he cannot rely on its failure to accord with the representation or description given of it by the vendor, as a breach either of a warranty of the substance of the contract. This rule is essentially necessary for the right construction of the language of trade, which frequently designates things by technical or conventional names, which are well known not to express the true nature of that to which they are applied. Thus it was held in *Welsh v. Carter*, 1 Wend. 185, that the vendor was not liable for selling a mixture of charcoal and common salt as barilla, where it appeared that it had been examined and analyzed by the vendee, before the purchase.

Notwithstanding the general rule, that a suit in tort cannot be based upon contract, it is well settled that an action on the case may be sustained for a mere breach of warranty, without evidence of any fraud or misrepresentation on the part of the defendant; *Williamson v. Allanson*, 2 East, 446; *Jones v. Bright*, 5 Bing. 533; *Brown v. Edgington*, 2 N. & G. 279. In thus allowing a declaration in tort, to be supported by evidence of a mere breach of contract, these cases are anomalous at the present day, however consistent with the earlier precedents. The action of *assumpsit* was once in reality, as it still is in name, an action on the case, and the gravamen of the complaint was the wrong done the plaintiff, by the defendant's breach of promise, which was always alleged to be fraudulent in the pleadings, and might be proved to be so in fact. Fraud may still be shown in *assumpsit*, in aggravation of damages, though not as the substantial cause of action; and the plaintiff may recover when the evidence shows that the promise declared on, was meant as a fraud, and may even aver and prove that it was made deceitfully and fraudulently; *Hillman v. Wilcox*, 30 Maine, 170; *Stuart v. Wilkins*, 1 Douglass, 18; but a promise must be proved, in order to sustain the action. Thus, in *The Executors of Everton v. Miles*, evidence that the defendant had represented a horse to be sound and gentle, with a knowledge that such was not the case, was held inadmissible under a count in *assumpsit* on a warranty, or without a declaration in case, setting forth a *scienter*, and giving full notice of the real nature of the cause of action. And on the other hand, when the action is on the case for deceit in the sale of goods, and a false representation on the part of the vendor, is averred as the substance of the complaint, there can be no recovery without proof, that the defendant was aware of the falsehood of his representations, at the time of making them; *Stone v. Denny*, 4 Metcalf, 151; *Freeman v. Baker*, 5 B. & A. 797. This course of decision, is fully in accordance with the doctrines of modern pleading, which treat actions on the case, as substantially actions of tort, and only appropriate when the injury complained of, arises from the breach of a general duty, and not merely of a special contract. It is therefore somewhat inconsistent, to permit a suit in case, to be brought on a warranty, in the absence of fraud or wilful deception. The presumption against intentional wrong, seems to be stronger where the vendor gives a warranty, which turns out to be untrue, than where he makes an unfounded representation, for he is necessarily liable for the truth of his assertions in the former case, while proof of wilful falsehood must be given, in order to charge him in the latter. The mode of declaring adopted in *Williamson v. Allanson*, is however too well established to be called in question; and it is well settled, both in Eng-

land and this country, that an action on the case may be sustained for a breach of warranty, without showing that the defendant knew it to be false at the time when it was given; *McLeod v. Tatt*, 1 Howard's Miss. R.; *Osgood v. Lewis*, 2 Harris & Gill, 495; *Hillman v. Wilcox*, 30 Maine, 170; *House v. Fort*, 4 Blackford, 293; *Beeman v. Buck*, 13 Vermont, 53; *West v. Emery*, 17 Id. 584; *Vail v. Strong*, 10 Id. 457; *Bartholomew v. Bushnell*, 20 Conn. 271.

It was held in *Beeman v. Buck*, *Vail v. Strong*, and *West v. Emery*, that when the declaration on a warranty is in case, with an allegation that it was made fraudulently, it may be supported either by proving the warranty, without proof of the fraud, or by proving wilful misrepresentation, without proof of the warranty. It was however admitted in *West v. Emery*, that while there might be a recovery under the same declaration, on evidence either of a breach of contract, apart from actual fraud, or of fraud apart from breach of contract, the two causes of action were substantially different, and that although the plaintiff might prove a qualified representation of soundness, under an allegation of an unqualified warranty, if the object were to show fraud, he could not do so, if he relied merely on a breach of warranty, and not on fraud. And in *Bartholomew v. Bushnell*, 20 Conn. 271, it was decided, that if the plaintiff declared in tort on a warranty, which he failed to prove, he could not make out his case by evidence of wilful misrepresentations, not amounting to a warranty. All difficulty, on this point, may be avoided by joining a count for wilful misrepresentation, to a count alleging a fraudulent warranty; but the difference of opinion existing between the courts of Vermont and Connecticut, illustrates the essential incongruity of the form of action sanctioned in *Williamson v. Allanson*, with the modern doctrine of pleading.

Whatever may be thought of the theoretical soundness, of allowing an action of tort to be sustained by evidence of a mere breach of contract, without proof of actual falsehood or fraud, its practical advantage is unquestionably great. When the plaintiff declares on a warranty in assumpsit, he cannot introduce a count in tort, without a misjoinder of actions, nor recover on proof of misrepresentation, however gross, unless it amounts to a warranty. And as it is often impossible to determine beforehand, what view the court and jury will take of the evidence, and whether they will regard it as proving a warranty, and not fraud, or fraudulent misrepresentation, and not warranty, the plaintiff may be unexpectedly defeated, even when the merits are in his favour, unless he resort to the expedient of framing the whole declaration in case, and alleging falsehood, in one count, and a mere breach of warranty in another. In this way all technical difficulties may be obviated, and a recovery had according to the substantial justice of the case, as finally disclosed at the trial.

Where the vendor offers to warrant at the commencement of a treaty of sale, his offer will be incorporated with the conclusion of the contract, although not effected until some days afterwards: *Wilmot v. Hurd*, 11 Wend. 585. If, however, the contract be finally consummated by a writing, in which the previous parol warranty does not appear, all that is excluded from the writing, will be presumed to have been excluded from the minds and assent of the parties, at the time when it was written; and the ordinary rule, that parol evidence cannot be given to modify a written contract, will

preclude the vendee from relying on the warranty; *Van Ostrand v. Reed*, 1 Wend. 424, 432; *Mumford v. McPherson*, 1 Johnson, 417; *Reed v. Wood*, 9 Vermont, 288; *Dean v. Mason*, 4 Conn. 432; *Bush v. Bradford*, 15 Alabama, 317; *Cain v. Old*, 2 B. & C. 627. And when the plaintiffs in a suit for the price of goods sold to an agent, proved an authority from the principal to make the purchase, if warranted, and then gave in evidence a written memorandum of the sale signed by the agent, in which nothing was said about warranty, it was held that they could not recover by proving that the goods had been warranted verbally: *Peltier v. Collins*, 3 Wend. 459. The court were of opinion, that if the warranty in parol did not form part of the contract, it was void, as not pursuing the authority; and if it did, that the whole contract was avoided by the Statute of Frauds, because one of its material points was not expressed in writing.

It can hardly be necessary to state, that a misrepresentation or warranty made or given, subsequently to the conclusion of a contract of sale, without some new matter between the parties, cannot support either an action of deceit or warranty; in the one case, from the absence of consideration to the vendor, in the other of injury to the vendee; *Year book*, 5 Henry 7, 7; *Roseorla v. Thomas* 3 Q. B. 234; *Hogins v. Plympton*, 11 Pick. 97. The same point was decided in *Bloss v. Kittridge*, 5 Vermont, 28, where it was held, that if the defect appear on the face of the declaration, it will not be cured by a verdict.

Although what has passed in parol, cannot be incorporated into a written contract, yet, as already stated, fraudulent parol representations preceding or accompanying such a contract, and on the faith of which it was entered into by the vendee, will be a sufficient ground either for an action of deceit, or for avoiding the sale altogether on the score of fraud: *Munford v. McPherson*, 1 Johnson, 418; *Wilson v. Marsh*, *ib.* 504; *Cozzins v. Whitaker*, 5 Stewart & Porter, 322.

It was determined in the case of *Nelson v. Cowing*, 6 Hill, 336, that an agent, whether general or special, with authority to sell, is presumed, unless the contrary be made to appear, to have authority to warrant. But it is more difficult to determine, how far a principal is answerable for the truth of the representations of his agent, when made without his authority. In *Cornfoot v. Fowke*, 6 M. & W. 358, statements were made by an agent, which were proved to be inconsistent, with the facts as known to the principal, but there was no evidence that he was aware of their being made, or that the agent knew them to be false. It was held by the majority of the court, Abinger, C. B., dissenting, that as no positive falsehood or fraud was made out, the contract was not vitiated, and the plaintiff was entitled to recover in the suit which he had brought upon it. The same question arose in *Fuller v. Wilson* 3 Q. B. 58, in an action of deceit against the principal, on the ground of statements made by the agent, which though untrue in point of fact, were not known to be so by the latter. The opinion of the court as delivered by Lord Denman, sustained the action on the ground taken by Lord Abinger in *Cornfoot v. Fowke*, that in such cases there is some moral fraud in the conduct of the principal, in concealing a material fact, and in that of the agent in making a statement which he does not know to be positively true. But this determination was reversed on error by the

Exchequer Chamber, *Wilson v. Fuller*, 3 Q. B. 68. The King's Bench having decided a similar point the same way in *Evans v. Collins*, 5 Q. B. 804, on the authority of a previous decision, supposed to be in point with the special circumstances of the case, were again reversed by the Court of Exchequer Chamber, *Collins v. Evans*, Id. 819, on the broad ground, that an action can be sustained, for the injury resulting from a statement which is honestly made, although untrue in fact, and that a party who seeks to protect himself, or to charge another, on the ground of misstatements made in the course of a transaction, must show that they were known to be untrue by the person who made them; in other words, that there was actual falsehood, as opposed to mere mistake, or misapprehension. This decision is fully sustained by the authorities: *Moens v. Heyworth*, 10 M. & W. 147; *Taylor v. Ashton*, 11 Id. 401; *Ormrod v. Hath*, 14 Id. 651; *Russell v. Clark's ex'ors*, 7 Cranch, 60; *Young v. Cavell*, 8 Johnsen, 25; *Tryon v. Whitmarsh*, 1 Metcalf, 1, and seems to be a necessary consequence of the general rule, that where the plaintiff has not sufficient ter to sustain an action on the contract, he cannot recover by turning it into a proceeding in tort, unless he can show some actual wrong on the part of the defendant: *Rawlings v. Bell*, 1 C. & B. 951.

The question of the good faith of the defendant, is however, one of evidence for the jury, under the direction of the court; and a party will not only be liable, as in *Hazard v. Irwin*, for the false assertion of a knowledge which he does not possess, but where his representations, although true in themselves, are so worded as to give the idea, that they convey the whole truth, while a material fact is kept back with a view to deceive, and with the effect of creating a false impression. *Allen v. Addington*, 7 Wend. 10; 11 id. 75; *Kidney v. Stoddart*, 7 Metcalf, 252. It would seem, moreover, that a vendor may be made answerable for gross neglect in his dealings with a vendee, as well as in any of the other relations of life; but in order to recover on this ground, the declaration must be so framed as to show that the gist of the action is for negligence, and not for deceit.

The vendee may of course recover damages on a warranty, for a defect, of which he was ignorant at the time of the purchase, even when it was made with full opportunity for examination, or where the goods have been retained, and their price paid in full, after the defect was discovered; *Adams v. Rogers*, 9 Watts, 123; *Boorman v. Johnston*, 12 Wend. 566; *Cook v. Mosely*, 13 id. 279; *Kellogg v. Denslow*, 14 Conn. 411; although these circumstances may afford ground for an argument in the one case, that the goods were not really defective, and in the other, that they were known to be so when purchased, and thus authorise the jury to find for the defendant. And it is now generally admitted, that instead of resorting to an action on the warranty, he may wait until suit has been brought against him for the purchase-money, and then take advantage of the breach; not as a technical set-off, but as proof of failure of consideration, and in mitigation of damages. *McAllister v. Reab*, 4 Wend. 489, S. C., in error; 8 Wend. 189; *Judd v. Dennison*, 10 Wend. 513; *Boorman v. Johnston*, 12 Wend. 556; *Strigleman v. Jeffries*, 1 S. & R. 478; *Wilmot v. Hurd*, 11 Wend. 585; *Street v. Blay*, 2 B. & Ad. 456; *Harrington v. Stratton*, 22 Pick. 510.

Although a contract of sale cannot be avoided for a breach of warranty,

unaccompanied by fraud, yet it will not be binding, even when there is neither warranty nor fraud, unless the goods delivered under it correspond with its terms. Under these circumstances, whether the purchaser has returned or retained the goods, he is entitled to show that they are not such as he agreed to buy, either as a cause of action against the vendor for failing to fulfil his contract, was a defence to an action against himself for the purchase-money. *Borrekins v. Bevan*, 3 Rawle, 23; *Hastings v. Lovering*, 2 Pick. 215; *Mixer v. Coborn*, 11 Metcalf, 139; *Osgood v. Lewis*, 2 Harris & Gill, 495; *Kellogg v. Denslow*, 14 Conn. 411; *Wright v. Barnes*, id. 519; *Howard v. Hoey*, 23 Wend. 350; *Hart v. Mills*, 13 M. & W. 85.

A mere breach of warranty unattended by fraud, does not entitle the vendee to rescind the contract, or return the goods. *Kase v. Johns*, 10 Watts, 109; *Voorhees v. Earl*, 2 Hill, 228; *Cary v. Gruman*, 4 Hill, 626; *Thorn-ton v. Wynn*, 12 Wheaton, 183; *Street v. Blay*, 2 B. & Ad. 456.

In Maryland, however, a breach of warranty without fraud is held to justify the return of the goods. *Hyatt v. Boyle*, 5 Gill & Johnson, 121; *Franklin v. Long*, 7 id. 407. And in the recent case of *Clark v. Baker*, 5 Metcalf, 452, the question was treated as still open in Massachusetts; but the court avoided the point, and rested their decision on the ground, that if the right did exist, the vendee had not done what was necessary to enable him to enforce it. It should be remembered, that in many instances when the default of the vendor is treated as a mere breach of warranty, it really goes further, and affects the substance of the contract; and when this is the case, the vendee is no doubt entitled to return the goods, on the ground of their failure to satisfy the stipulations of the agreement, into which he has entered.

It is also thoroughly well settled, that when there have been fraudulent acts or representations on the part of the vendor, the vendee is entitled to avoid the sale *ab initio*, and may either rely on the fraud as a defence to suit for the purchase-money, or make it the ground of an action on the case, in which he may recover back the price of the goods if paid, and compensation for any special injury, which has resulted from the deceit. *Voorhees v. Earl*, 2 Hill, 288; *Kase v. John*, 10 Watts, 109; *Burton v. Stewart*, 3 Wend. 238; *Hazard v. Irwin*, 18 Pick. 99; *Thayer v. Turner*, 8 Metcalf, 550. And it has been held in Massachusetts, that the contract may be avoided for the fraudulent representations of the vendor, even when under seal; *Hazard v. Irwin*, 18 Pick. 102; but this decision seems to be a departure from the common law, which refused to allow a sealed instrument to be invalidated for fraud, relating merely to the consideration, and not immediately affecting its execution. *Infra*.

However this may be, it is well settled, that contracts vitiated by fraud, are regarded by the law as voidable and not void. For as the end in view is the protection of the injured party, it is best attained by giving him an election to annul or enforce the sale, as the peculiar circumstances of the case may require. He cannot, however, play fast and loose with the vendor, even under these circumstances, and if he elect to retain the goods, will be obliged to pay for them. But although when the vendee has once elected to affirm the contract, he cannot afterwards set it aside, it is sometimes difficult to determine whether this election has actually been made. There can, however, be little doubt, that if he keep and use the goods after

the fraud is discovered, he will thereby make them his own, and cannot subsequently throw them on the hands of the vendor, although still entitled to give the fraud in evidence as proof of failure of consideration, in any suit brought for the purchase-money, or to make it a distinct and independent ground of recovery. *Burton v. Stewart*, 3 Wend. 238; *Beecher v. Vroom*, 13 Johns. 302; *Com. v. Henderson*, 5 Mass. 322; *Hazard v. Irwin*, 18 Pick. 102; *Borrekins v. Bevan*, 3 Rawle, 44; *Voorhees v. Earle*, 2 Hill, 288; *Harrington v. Stratton*, 22 Pick. 510.

The question whether the right to sue for the fraud by accepting, is lost by accepting or retaining the goods after it is discovered, underwent a repeated and thorough examination in a recent case, in New York, in which it was decided by the Supreme Court and Court of Appeals, that the affirmance of the contract renders it binding as such, but does not destroy the right to recover damages for the tort, as a distinct and independent cause of action. *Whitney v. Allaire*, 4 Hill, 184; 4 Denio, 534; 1 Comstock, 305. And it is obviously just, that the vendee should be able to insist on the performance of a contract, which may be essential to his interests, without waiving his right to compensation, to the full extent to which he has been led to make a worse bargain, by the misrepresentations of the vendor.

It has, moreover, been repeatedly held, that an entire contract of sale, cannot be apportioned by the vendee, even when the defect extends only to some of the goods; and that, if affirmed as to part, it will be binding as to the whole, notwithstanding an offer to return the rest; *Vorhees v. Earl*, 2 Hill, 288; *Kimball v. Cunningham*, 4 Mass. 504. And this rule holds good, even where the sale has been made of a certain number of parcels, and at a stipulated price for each; *Voorhees v. Earl*. Thus in *Clark v. Baker*, 4 Metcalf, the plaintiff had purchased from the defendant, a large quantity of white and yellow corn, at that time on board a vessel at the wharf, and paid for it at a certain rate per bushel, which differed with regard to the two species of corn. Before the actual delivery was completed, it was discovered, that the quality of the corn did not correspond with the terms of the contract, upon which the defendant refused to receive any more, and brought his action to recover back the purchase-money paid for what had been delivered, without offering to return it. But it was held by the court, that the mere circumstance, that the value of the grain was estimated by the bushel, did not entitle him to accept the performance in part, and reject the remainder; and that as the property in the whole of the corn, had passed under the contract, the right to rescind was lost, by his omission to return that portion which came to his hands.

But the question in such cases, as in all others of the construction of contracts, is one of intention; and the general rule merely proceeds upon a presumption, which may be rebutted by particular circumstances. Thus, where articles differing in nature, were sold at auction in different parcels, it was held that the contract of sale was not entire, and that the purchaser might accept some of the parcels, without waiving his right to reject the rest, as not agreeing with the sample exhibited, at the time of the purchase. *Barclay v. Tracy*, 5 Watts & Sergeant, 45.

A question of more difficulty arises, where the contract is so far unperformed as to entitle the vendee to return the goods, and when, instead of

adopting that course, he converts them wholly or in part to his own use. Under these circumstances, it would seem more logical to regard the acceptance of the property, as evidence of a new implied contract to pay what it is worth. *Wills v. Hopkins*, 5 M. & W. 7. But it may also be regarded as a waiver of a further and more complete performance, or as an assent to receive what has actually been sent, instead of what was stipulated for in the first instance. The former view is sustained by the case of *Hart v. Mills*, 15 M. & W. 85, where the plaintiff, who had exceeded the terms of the contract, by sending four dozen of wine instead of two, was not allowed to recover for more than one dozen, which the defendant had actually kept; the act of the latter in receiving and using part of the wine, being held to prove nothing more than the existence of an implied contract to pay as much as it was worth. In like manner it was said, in *Mondel v. Steele*, 8 M. & W. 858, 871, that where there is an executory contract for the delivery of goods made in a particular manner, or corresponding to a sample, which may be refused or returned in a reasonable time, if not such as bargained for, the acceptance or non-return, affords evidence of a new contract on a *quantum valebant*. And it is obvious, that if the acceptance of goods which do not correspond with the terms of a contract, be regarded as proving a waiver of the default, or an assent to a substituted performance, it must deprive the vendee of all remedy by set-off or action, a result inconsistent with the general course of decision, unless under peculiar circumstances. It seems, however, to have been supposed in *Barclay v. Tracy*, that when goods differ materially from the sample under which they have been sold, the vendee will be rendered liable for the whole by keeping part; and a similar view was taken in *Clark v. Baker*, although the point was not actually decided on either occasion.

The right of the vendee to give in evidence, as a defence to an action for the purchase money, either the breach of a mere warranty, or a failure to comply with the terms of an executory contract, may now be regarded as established in England, and in most of the courts of this country. In both cases, however, it is subject to some restrictions; and there is a difficulty in the former, in reconciling it with the established principles of pleading, which does not exist in the latter. The question was examined, and the distinctions between the two species of contracts, ably considered by the Court of Exchequer in the recent case of *Mondel v. Steele*, 8 M. & W. 858. The plaintiff there brought suit, on a contract for building a ship according to a certain specification, and averred a breach by a failure to comply with its terms, but confined his demand to the damages arising on a voyage subsequent to the delivery, from the delay and expenditures for repairs, rendered necessary by the unfitness of the vessel, to encounter the perils of the navigation. The defendant pleaded, that before action brought, he had sued the plaintiff in *indebitatus assumpsit* for the price of the ship, and that the failure to comply with the contract, having been given in evidence by the latter, the jury, under the charge of the court, had reduced the recovery against him, by the amount of compensation and damages, to which he was entitled for such failure. Under these circumstances, it was held upon a demurrer to this plea, that in the case of an executory contract for the delivery of chattels, answering a particular description, as in the instance of a sale by sample, or an agreement to manufacture goods in a specified manner, there can be no recovery on the contract itself, unless it is performed by delivering

that which the vendor has agreed to furnish. This rule was said to hold good, even where the vendee accepts and retains the property actually delivered, although in that case, the law will imply a new contract, and regard the old one merely as furnishing a standard of value, fixed by the agreement of the parties. And it was held to follow from this reasoning, that as the contract in suit was executory, and had not been fulfilled, it was not strictly before the court in the former action, in which the only question was as to the value of the vessel actually delivered to the vendee, and not as to the amount of damages which he had sustained, by the failure of the defendant, to deliver a vessel corresponding with the stipulations into which he had entered, except in so far as the latter question was identical with the former. It was consequently decided, that the matter set forth in the plea, was not an estoppel on the right to recover for the loss sustained in making the repairs, which the faulty construction of the vessel had rendered necessary: and the rule of law was held to be, that when goods are sold and delivered with a warranty, or work and labour are done, or goods furnished according to a contract, the defendant cannot set-off the amount of damages which he has sustained by a breach of the contract, in answer to an action for the price, but is confined to showing how much less the goods or work are worth by reason of the breach of contract; and that a defence, based on this ground in one action, is no bar to a recovery in another for any subsequent and consequential injury, resulting from the failure in the performance of the contract.

So far as this decision is law in this country, it restricts the right to rely on the defective quality of the goods, furnished under a contract of sale, whether executory or executed, to the resulting diminutions of marketable value. But, even if the general principle thus asserted be correct, it may be doubted whether it was correctly applied. The distinction taken by the court, was between actual deficiency in value, and mere consequential injury, and the necessity for repairing the vessel at an earlier period than would have been necessary, if she had been properly constructed, which constituted the gravamen of the declaration, was held to fall under the latter category, and not under the former. But the inability of a vessel, built in an inferior manner, to go to sea without meeting with injuries, and requiring repairs, is precisely one of the things which make her less valuable, than if more care had been employed in her construction, and the contingency of loss from this cause, should, therefore, be taken into account by the jury, when an action brought by the builder, is resisted on the ground of the non-fulfilment of his contract. It is, therefore, difficult to see how that which is the necessary result of a faulty mode of construction, and which necessarily enters into any defence founded upon it, can be subsequently brought forward as an independent cause of action. This, it would seem, can only arise, where a subsequent injury is sustained, which, although occasioned by the breach of the contract, is not one of its necessary or probable consequences. Thus, it is obvious, that the injury occasioned by the breaking of the rope in *Brown v. Edgington*, (*supra*), could not have been taken into consideration, in any suit brought against the vendee for its price, and consequently that the judgment in such a suit, would not have been a bar to a subsequent action for the damages, sustained by the loss of the wine.

The principles asserted in *Mondel v. Steele*, as supporting the right of a

purchaser, under an executory contract, which has not been fulfilled, to set up the consequent deficiency in value, as a defence to an action by the vendor, apply fully in the case of an executed contract, which has been rendered inoperative, by the fraud of the party who seeks to enforce it. It was, however, admitted by the court, that these principles are of more difficult application, in the case of a mere breach of warranty. That is regarded by the law as an executory undertaking, the performance of which is not a condition precedent, and need not be proved or averred even in a declaration in special assumpsit, upon the contract itself. Nor does it enter into the essence of the undertaking, or attach itself to the nature of that which the vendor has stipulated to sell, and thus the breach does not give the purchaser, a right to treat the contract as unperformed and return the goods. It follows that whether he is sued in general or special assumpsit, his liability accrues under the original contract: in the latter case, on the ground that the undertaking of the plaintiff has been performed as far as is necessary to give a right of suit, in the former on the well recognised principle, that indebitatus assumpsit may be maintained on a specific contract, which has been so far fulfilled, that, if specially declared on, it would show a right to the receipt of money. The breach of the warranty, ought, therefore, under these circumstances, to come under the rule which governs the construction of other independent stipulations, and not be admissible in evidence, for the purpose either of diminishing or defeating a recovery.

It was accordingly well settled at common law, that a breach of warranty gave a right to bring a cross action, but could not constitute a defence, either by way of set-off, or in mitigation of damages to a suit brought on the original contract. The rule was the same, even where the action was laid in indebitatus assumpsit, for there the implied promise, follows the liability imposed by the express promise, on which it is based. This rule was adopted in *Thornton v. Wynn*, 12 Wheaton, 183, and said to apply in every case of a partial failure of consideration, whether arising out of fraud or warranty, although necessarily inapplicable, when an executed contract has been avoided by the return of the property sold, or when an executory contract has not been fulfilled. The same doctrine was held in *Palsifer v. Hotchkiss*, 12 Conn. ; *Bain v. Wilson*, 1 J. J. Wilson, 282. But the course of decision at the present day, in this country and in England, tends in the opposite direction, towards the position taken in *Mondel v. Steel*, that a partial failure of consideration may be given in evidence in mitigation of damages, even when the original contract remains in full force, and the suit is expressly or impliedly founded upon it. *Parson v. Sexton*, 4 C. B. 899; *Beecker v. Vrooman*, 13 Johnson, 302; *Spalding v. Vanderoock*, 2 Wend. 431; *Barton v. Stewart*, 3 Id. 236; *McAllister v. Reab*, 4 Id. 483; 8 Id. 109; *Harrington v. Stratton*, 22 Pick. 510; *Miller v. Smith*, 1 Mason, 437; *Peden v. Moore*, 1 Stewart & Porter, 71; and in the recent case of *Withers v. Greene*, 9 Howard, 203, the Supreme Court of the United States receded from the ground taken in *Thornton v. Wynn*, and held that a partial failure of consideration, growing out of fraud or breach of warranty, may be set up as a defence, to a note given for the price of the chattel warranted. It must, however, be remembered, that the defence in such cases, rests solely on the equitable ground of reducing the right given by the contract, in the ratio of the failure of the consideration on which it is

founded, and not on that of a technical set-off. A set-off, in the technical sense of the term, can only arise where the demand of the plaintiff, and the counterdemand of the plaintiff, are certain, or susceptible of being reduced to certainty by calculation. *Wilmot v. Hurd*, 11 Wend. 585. There can consequently, be no set-off, when the cause of action, or the defence is founded on a breach of warranty, and consists in a claim for unliquidated damages. Hence, the defalcation from the plaintiff's demand must stop short, as in *Mondel v. Steel*, with the failure of the consideration, and cannot extend to the consequential damages sustained by the defendant. But this rule is not applicable in Pennsylvania, where the jury are authorised to take into view every injury, which may have been occasioned by any breach of contract on the part of the plaintiff, and even to mulct him in any amount necessary to compensate the defendant.

The doctrine that a contract entire in itself, cannot be apportioned on the ground of a failure of consideration, is still applied in England, where the question arises on a bill or note given for the purchase money, although it is no longer held applicable in suits brought directly on the contract itself, *Obbard v. Betham*, *Moody & M.* 483; *Jones v. Bright*, 5 Bing. 433; *Trickey v. Larne*, 6 M. & W. 278. The law is the same in some parts of this country; *Scudder v. Andrews*, 2 McLean, 464; *Washburn v. Picott*, 3 Devereux, 396; *Wise v. Keeley*, 2 A. R. Marshall, 545. But many of the states have adopted the more liberal rule, that where the contract has not been fully performed on one side, it shall not be enforced on the other beyond the limits of justice; and this whether the suit is brought on the contract itself, or on a negotiable security, of which it forms the consideration; *Spalding v. Vanderecock*, 2 Wend. 431; *McAlister v. Reab*, 4 Id. 489; *Judd v. Dennison*, 10 Id. 512; *Payne v. Cutter*, 13 Id. 605; *Harrington v. Stratton*, 22 Pick. 511; *Goodwin v. Morse*, 9 Metcalf, 278; *Parkett v. Gregory*, 2 Scammon. 44. And in the recent case of *Withers v. Greene*, 9 Howard, 226, the Supreme Court of the United States were obviously disposed to adopt this view of the question, although they rested their decision more especially on the local law of Alabama; and there can be little doubt that it will ultimately prevail throughout this country, and perhaps, even in England. *Chitty on Bills*, 89, note.

It is proper to observe, that where the contract of sale is vitiated by wilful misrepresentation or fraud, and has been actually avoided, no recovery can be had on a note given for the purchase money. *Sill v. Road*, 15 Johnson, 230. *Lewis v. Cosgrave*, 2 Taunton 2. Where, however, the contract has not been actually avoided, a failure of consideration arising from fraud, stands on the same footing as if it arose from a mere breach of warranty. And it was held, on this ground, in *Palsifer v. Hotchkiss*, 12 Conn. 234, that a false representation as to the value of a patent right, made to induce the vendee to complete the purchase, could not be given in evidence in a suit on a note given for the purchase money, unless it were shown, either that the patent was destitute of all value, or that the contract had been rescinded by the purchaser.

Failure of consideration could not be given in evidence at common law, as a defence to a suit on a specialty, for, as the existence of a consideration was immaterial, proof of its failure was necessarily irrelevant. Hence, a breach of warranty could not be set up in bar of a recovery, on a bond given

for the purchase money of the property warranted. *Vrooman v. Phelps*, 2 Johnson, 178. And the same rule applied, even where the defence rested on fraud, unless it attached directly to the execution of the bond, instead of consisting merely in a misrepresentation of the nature or value of that for which it was given. *Stevens v. Judson*, 4 Wend. 471. Fraud and failure of consideration have, however, always been held a sufficient defence to a contract under seal in equity, and therefore, in Pennsylvania, where the courts of law administer justice on equitable principles. And it has been decided in Massachusetts, that every contract induced by fraud, is voidable without regard to its form, and although the fraud may have related solely to the consideration. *Hazard v. Irwin*, 18 Pick. 872. The strict common law rule has been abrogated in New York, by the revised statutes, and failure of consideration, rendered admissible in evidence, whether the contract in suit is a specialty or in parol.

It was decided by the Supreme Court of New York, in *Carey v. Gruman*, 4 Hill, 626, that in all cases where the vendor becomes liable to the vendee, for the defective quality of the goods which he has sold, whether his liability arises through fraud or breach of contract, the true measure of damages, is the actual value of goods corresponding to his representations or agreement; and it was held, that the amount of the purchase-money, although strong, is not conclusive evidence of such value. This rule for the estimation of damages, was also recognized in *Borrekins v. Bevan*, 3 Rawle, 44. In certain cases, however, the right of recovery may extend beyond this, to consequential injuries sustained by the plaintiff in consequence of the breach of the contract.

It need hardly be said, that a declaration on a warranty, as well as on every other contract, must strictly pursue its legal intent. Thus in the case of *Hills v. Bannister*, 8 Cowen, 31, where the defendant had warranted, that a bell cast by him would not crack within a year, and if it did, that he would recast it, the court decided that he could not be made liable, without an averment of notice of the defect, and a request to recast. At the same time, it was held, that the defect might be given in evidence under the general issue, on notice, as failure of consideration and in mitigation of damages.

In like manner, if the action be in tort, the declaration must set forth the averments, substantially necessary to sustain the action; and if it does not, the plaintiff cannot be allowed to establish them at trial by proof. The scienter must be averred; and if not averred, cannot be proved. The executors of *Everton v. Miles*, 6 Johns. 138; *Stone v. Denny*, 4 Metcalf, 154; *Conner v. Henderson*, 15 Mass. 320; *Reed v. Ward*, 9 Vermont, 288; *Smith v. Miller*, 2 Bibb, 616.

It would appear, notwithstanding, that as an averment that the representations of the vendor were made fraudulently, and with an intent to deceive, is sufficient in a plea in bar, it must also be sufficient in a declaration, although without a direct allegation, that their falsehood was known at the time when they were made. *Allen v. Addington*, 7 Wend. 1; 11 Id. 399. But in whatever mode the fraud practised by the defendant, is alleged, care must be taken to show that it has been productive of actual injury to the plaintiff, by inducing him to enter into the purchase, or take some other step, which would otherwise have been avoided. The anomalous

mode of declaring in tort on a mere breach of warranty, which was sanctioned in *Williamson v. Allanson*, (*supra*) is, of course, not within the scope of these remarks, for there the action is so far founded in contract, that the judgment will be a bar to a new suit in assumpsit on the warranty, though not to one laid in tort for actual fraud. *The Salem India Rubber Co. v. Adams*, 23 Pick. 256.

[*82] *COGGS v. BERNARD.

TRINITY.—2 ANN.Æ.(a)

[REPORTED LORD RAYMOND, 909.†]

If a man undertakes to carry goods(*b*) safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage.

IN an action upon the case, the plaintiff declared, *quod cum Bernard* the defendant, the 10th of November, 13 Will. 3, &c. *assumpsisset, salvo et secure elevare, Anglice* to take up several hogsheads of brandy then in a certain cellar in *D. et salvo et secure deponere, Anglice* to lay them down again in a certain other cellar in *Water-lane*: the said defendant and his servants and agents, *tam negligenter et improvide*, put them down again into the said other cellar, *quod per defectum cure ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz., so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

Gould, J. I think this a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way; and that any man that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost, or come to any damage; and if a *præmium* be laid to be given, then it is without question so. The reason of the action is, [*83] the particular *trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which, he has miscarried by

(a) S. C. Com. 133. Salk. 26. 3 Salk. 11. Holt, 13. Entry, Salk. 735. Raym. vol. 3, p. 240.

† [There is a report of this case, tot. verb., in the Hargrave MSS., No. 66, and 182, therein said "to be transcribed from the MS. Reports of Herbert Jacob, Esq., of the Inner Temple, written with his own hand."]

(b) Vide Jones on Bailments, 60.

his neglect. But if a man undertakes to build a house, without any thing to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 Hen. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears: if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. So is Doct. et Stud. 129, upon that difference. The same difference is, where he comes to goods by finding. Doct. et Stud. *ubi supra*. Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable, without a gross neglect. So is Keilw. 160. 2 Hen. 7. 11. 22 Ass. 41. 1 R. 10. Bro. Action sur le case, 78. Southcote's case is a hard case indeed, to oblige all men that take goods to keep, to a special acceptance, that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. Eliz. 815, that it was adjudged by two judges only, viz. Gawdy and Clench. But in 1 Vent. 121, there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for 30*l*.; the defendant showed that he locked the money up in his master's warehouse, and it was stolen from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he has the goods committed to his custody upon those terms.

Powys, J., agreed upon the neglect.

Powell, J. The doubt is, because it is not mentioned in the declaration that the defendant had any thing for his pains, nor that he was a common porter, which of itself imports a hire and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular *neglect shown? And I hold, an action will lie, as this case is. And in [*84] order to make it out, I shall first show that there are great authorities for me, and none against me; and then secondly, I shall show the reason and *gist* of this action: and then, thirdly, I shall consider Southcote's case.

1. Those authorities in the Register, 110, a. b. of the pipe of wine, and the cure of the horse, are in point; and there can be no answer given them, but that they are writs which are framed short. But a writ upon the case must mention every thing that is material in the case; and nothing is to be added to it in the count, but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, c. where there is a declaration so general. The year-books are full in this point. 43 Edw. 3, 33, a. there is no particular act showed: there indeed the weight is laid more upon the neglect than the contract. But in 48 Edw. 3, 6, and 19 Hen. 6, 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 Hen. 7, 11. 7 Hen. 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now to give the reason of these cases, the *gist* of these actions is the

undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is 1 Jones, 179. Palm. 548; for the bailee is not bound upon any undertaking against the act of God. Justice Jones, in that case, puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case; for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because [*85] they have a remedy against the wrong-doers: as in case the goods are stolen from him, an appeal of robbery *will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is, between being obliged to do the thing, and answering for things which he had taken into his custody upon such an undertaking. An action indeed will not lie for not doing the thing, for want of a sufficient consideration: but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore when I have reposed a trust in you upon your undertaking, if I suffer, when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action(c) would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's(d) case is a strong authority; and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events: that is hard. Coke reports the case upon that reason; but makes a difference, where a man undertakes a case specially, to keep goods as he will keep his own. Let us consider the reason of the case: for nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Edw. 4, 40, b. there is such an opinion by Danby. The case in 3 Hen. 7, 4, was of a special bailment, so that the case cannot go very far in

(c) Vide Com. 627. Burr. 1638.

(d) The notion in Southcote's case, 4 Rep. 83, b. that a general bailment, and a bailment to be safely kept is all one, was denied to be law by the whole court ex relatione m^{ri} Bunbury. Note to 3d. Ed.

the matter. 6 Hen. 7, 12, there is such an opinion by the by. And this is all the foundation of Southcote's case. But there are cases there cited, which are stronger *against it, as 10 Hen. 7, 26, 29 Ass. 28, the case of a pawn. My lord Coke would distinguish that case of a pawn [*86] from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep, 8 Edw. 2, Fitzh. Detinue, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers who do not know that difference; or however it may be with them, half mankind never heard of it. So, for these reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if(e) a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

Holt, C. J. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely; and he managed them so negligently, that for want of care him in some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour, so that the defendant is not chargeable by his trade, and a private person cannot be charged in action without a reward.

I have had a great consideration in this case; and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And(f) there are six sorts of bailments. The first sort(g) of bailment is, a bare naked bailment of goods, delivered by one man to another to keep, for the *use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in [*87] Southcote's case. The second sort is, when goods or chattels that are useful are lent to a friend *gratis*, to be used by him; that is called *commodatum*(h) because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin, *vadium*, and in English, a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the

(e) Vide Jones, 44.

(f) Vide Jones, 35.

(g) Just. Inst. lib. 3, tit. 15, text 3.

(h) Ibid. text 2. The references to the Inst. in this case are by Serj. Hill.

person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody who is to carry them, or to do something about them *gratis*, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the (i) first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me; where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted to keep them only as you would keep your own. But (i) my Lord Coke has improved the case in his report of it; for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. (k) For if he keeps the goods in such a case with an ordinary [*88] care, he has performed the trust reposed in him. *But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this manner; and by them show, that there never was any such resolution given before Southcote's case. The 29 Ass. 28, in the first case in the books upon that learning; and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitzh. Detinue, 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, it was held that the bailee should answer for the goods; that case they say differs because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest; for the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40, b. was but a debate at bar; for Danby was but a counsel then: though he had been chief justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genny for his client, said the contrary.

(i) Vide Jones, 36.

(k) Vide L. Ray. 655. Jones, 46.

(l) Vide Jones, 46, 62.

The case in 3 Hen. 7, 4, is but a sudden opinion, and that by half the court; and yet that is the only ground for this opinion of my Lord Coke which besides he has improved. But the practice has been always at Guildhall, to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all chief justice Pemberton's time, and ever since, against the opinion of that case. When I read Southcote's case heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first; and came not to be of this opinion till I had well considered and digested *that matter. Though I must confess, reason is strong against the case, to charge a man for doing such a [*89] friendly act for his friend; but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he(m) keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them; for the keeping them as he keeps his own is an argument of his honesty. A fortiori, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton lib. 3, c. 2, 99, b. *'Is apud quem res deponitur re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidie vel negligentie, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare.'* As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow.(n) So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author; but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes further; for there it is said: *'Ex eo solo tenetur si quid dolo commiserit: culpæ autem nomine, id est, desidie ac negligentie, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, qui qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati, id imputare debet.'* So that such a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words; yet even that would not charge him with all sorts of neglects; for if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong-doers. 3 Cro. 214, acc., 2 Cro. 425, acc., upon a* promise for a quiet enjoyment. And if a promise will not charge a man against wrong-doers, when put in writing, it [*90] is hard it should do it more so when spoken. Doct. & Stud. 130, is in point, that though a bailee do promise to re-deliver goods safely, yet, if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason nor authority to sup-

(m) Hanise Vinn. p. 605.†

(n) Sed vide Doorman v. Jenkins, 2 A. & E. 256. post 96, in nota.

port the opinion in Southcote's case. If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect.

As to the second sort of bailment, viz. *commodatum*, or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward or for a month; if the bailee go northward, or keep the horse above a month; if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra*: his words are, (o) '*Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel oblata. Et qui rem utendum accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alias eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitas non tenetur quis, nisi culpa sua intervenierit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illum incursu hostium vel prædonum, vel naufragio, amiserit, non est dubium quin ad rei restitutionem teneatur.*' I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put his horse in his stable, and he were stolen from thence [*91] the bailee shall not be *answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable: because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care; but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio*, or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b.; (p) '*Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem (q) diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est.*' From whence it appears, that if goods are let out for a reward, the hirer is bound to the (r) utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a

(o) This is cited from Bracton, but is in effect the text of Just. Inst. lib. 3, tit. 15, text. 2.

(p) Just. Inst. lib. 3, tit. 25, text 5.

(q) Vide Jones, 87.

(r) Comm. Vinn. in Just. Inst. lib. 3, tit. 25, text 5, n. 2, 3.

diligent man is not so liable as a careless man, the(s) bailee shall not be answerable in this case, if the goods are stolen. *

As to the fourth sort of bailment, viz. *vadium*, or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge; and secondly, for what neglects he shall make satisfaction. As to the first, he has a special property, for(t) the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the(u) pawnee cannot use it, as cloths, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she(v) might use them; but then she must do it at her peril; for whereas, if she keeps them locked up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit,* and, as such, is not liable to be used. And to this effect is Ow. 123. But if the pawn be of [*92] such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then(w) the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompence for the meat. As to the second point, Bracton, 99, b. gives you the answer:—‘*Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujus modi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis et in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casa amiserit, securus esse possit, nec impediatur creditum petere.*’(x) In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote’s case is. But, indeed, the reason given in Southcote’s case is because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee by detaining them after the tender of the money, is a wrong-doer, and is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to

(s) D. acc. post. 1087.

(t) S. P. 3 Salk. 268. Holt, 528. Salk. 522.

(u) Ibid.

(v) Ibid. Vide Jones, 80, 81.

(w) S. P. 3 Salk. 268. Holt, 528. Salk. 522. Vide Jones, 80, 81.

(x) This is also the text of Just. Inst. lib. iii. tit. 15, text 4. De pignore.

[*93] have a reward, he is bound *to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c.; which case of a master of a ship was first adjudged, 26 Car. 2, *in the case of *Mors v. Slew*, Raym. 220. 1 Vent. 190, 238. [*93^a] The law charges this person thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, (a) for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailees, factors, and such like. And though a bailey is to have a reward for his management, yet he is only to do the best he can; and if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, *because he was to have nothing for his pains. [*94] Then the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another *gratis*, and in the executing his commission behaves himself negligently, he is answerable. Vinnius in his Commentaries upon Justinian, lib. 3, tit. 27, 684, defines *mandatum* to be *contractus quo aliquid gratuito gerendum committitur et accipitur*. This undertaking obliges the undertaker to a diligent management. Bracton, ubi supra, says, ‘*Contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus et mandatis*. I do not find

(a) Just. Inst. lib. 4, tit. 5, text 3. Vide Vinn. Comm. in Just. Inst. lib. 3, tit. 27, text 1, n. 2.

this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For, when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7, 11, a strong case to this matter. There the case was an action against a man who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if, after, he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to *oblige him to a careful management. Indeed if [*95] the agreement had been executory, to carry these brandies from the one place to the other such a day, the(a) defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man(b) will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court—what if he had built the house unskilfully?—and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A., and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed; and, according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at; and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution; and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667. Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a

(a) Vide Jones, 56, 57, 61.

(b) Just. Inst. lib. 3, tit. 27, text 11.

good consideration. And so a bare being trusted with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors v. Slew*, was drawn by the greatest drawer in England at that time; and in that declaration, as it was always in all such cases, it was [*96] thought most prudent to put in, that *a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point; but I do not know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

THE case of *Coggs v. Bernard*, is one of the most celebrated ever decided in Westminster Hall, and justly so, since the elaborate judgment of Lord Holt contains the first well-ordered exposition of the English law of bailments. The point which the decision directly involves, viz. that if a man undertake to carry goods safely, he is responsible for damage sustained by them in the carriage through his neglect, though he was not a common carrier, and was to have nothing for the carriage, is now clear law, and forms part of a general proposition in the law of principal and agent, which may be stated in the following words:—*The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.* [See *Shillibeer v. Glynn*, 2 M. & W. 143; *Whitehead v. Greetham*, 2 Bing. 464.] And this proposition includes cases stronger than that reported in the text. For there Bernard had undertaken to lay the goods down *safely*, whereby he introduced a special term into his contract; for it will be seen from the judgments, particularly Lord Holt's, that notwithstanding what was said by Lord Coke in *Southcote's case*, there is a difference between the effect of a gratuitous undertaking to *keep* or *carry* goods, and a gratuitous undertaking to *keep* or *carry* them *safely*. But, under the rule just laid down, a gratuitous and voluntary agent who has given no special undertaking, though the degree of his responsibility is greatly inferior to that of a hired

agent, is yet bound not to be guilty of *gross negligence*. This proposition is affirmed by several recent cases. In *Wilkinson v. Coverdale*, 1 Esp. 74, it was alleged that the defendant had undertaken *gratuitously* to get a fire-policy renewed for the plaintiff, but had, in doing so, neglected certain formalities, the omission of which rendered the policy inoperative. Upon it being doubted at *Nisi Prius* whether an action would lie under these circumstances, Erskine cited a MS. note of Mr. J. Buller in *Wallace v. Telfair*, wherein that judge had ruled, under similar circumstances, that, though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so *negligently or unskilfully* that the party could derive no benefit from it, in that case he should be liable to an action; in which distinction Lord Kenyon acquiesced. So in *Beauchamp v. Powley*, 1 M. & Rob. 38, where the defendant, a stage-coachman, received a parcel to carry *gratis*, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was *great negligence* on the part of the defendant, and the jury thinking that there was, found a verdict against him. So, too, in *Doorman v. Jenkins*, 2 Adol. & Ell. 256, in *assumpsit* against the defendant, as bailee of money entrusted to him to keep *without reward*, it was proved that he had given the following account of its loss, viz. that he was a

coffee-house keeper, and had placed the money in his cash-box in the tap-room, which had a bar in it, and was open on Sunday, though the other parts of his house were not, and out of which the cash-box was stolen upon a Sunday. The Lord Chief Justice told the jury that it did not follow, from the defendant's having lost his own money at the [*97] same time as the plaintiff's, *that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and he added, that that fact afforded no answer to the action, if they believed that the loss occurred from *gross negligence*. The jury having found a verdict for the plaintiff, the court refused to set it aside.

It is clear, from the above decisions, that a gratuitous bailee or other agent is chargeable when he has been guilty of *gross negligence*; and it is equally clear, both from the words of the judges in several of the above-cited cases, and also from express decisions, that for no other kind of negligence will he be liable, except in the single case which shall by and by be specified. In *Doorman v. Jenkins*, Patteson, J., says, "It is agreed on all hands that the defendant is not liable, unless he has been guilty of *gross negligence*." "The counsel," *says Taunton, J., "[97a] properly admitted, that as this bailment was for the benefit of the bailor, and no remuneration was given to the bailee, the action could not be maintainable except in the case of *gross negligence*." In *Shiells v. Blackburne*, 1 H. Bl. 158, the defendant, having received orders from his correspondent in Madeira to send a quantity of cut leather thither, employed Goodwin to execute the order. Goodwin accordingly prepared it, and sent it, along with a case of leather of the same description belonging to himself, to the defendant, who, to save the expense of two entries, voluntarily and without compensation, by agreement with Goodwin, made one entry of both cases, but entered them by mistake as wrought leather, instead of dressed leather, in consequence of which mistake the cases were both seized; and an action having been brought by the assignees of Goodwin, who had become bankrupt, against the defendant, to recover compensation for the loss, the general issue was pleaded, and there was a verdict for the plaintiff, which the court set aside, and granted

a new trial, upon the ground that the defendant was not guilty either of *gross negligence* or fraud. This case was much remarked upon in *Doorman v. Jenkins*, which it resembled in the circumstance that the bailee in each case lost property of his own along with that which had been entrusted to him. "The case of *Shiells v. Blackburne*," says Taunton, J., "created at first some degree of doubt in our minds. It was said that the court in that case treated the question as a matter of law, and set aside the verdict, because the thing charged, viz. the false description of the leather in the entry, did not amount to *gross negligence*, and therefore the jury had mistaken the law. I do not view the case in that light. The jury there found that in fact the defendant had been guilty of negligence, but the court thought they had drawn a wrong conclusion as to that fact." In *Dartnall v. Howard*, 4 B. & C. 345, the declaration stated, that in consideration that the plaintiff, at the request of the defendants, would employ them to lay out 1,400*l.* in purchasing an annuity, the defendants promised to perform and fulfil their duty in the premises, and that they did not perform or fulfil their duty, but, on the contrary, laid out the money in the purchase of an annuity on the personal security of H. M. Goold and Lord Athenry, who were both in insolvent circumstances. The court, after verdict, arrested the judgment upon the ground that the defendants appeared to be *gratuitous* agents, and it was not averred that they had acted either with negligence or dishonesty. See also *Bourne v. Digges*, 2 Chitt. 311; and *Moore v. Mogue*, Cowp. 480.

From the two classes of cases just enumerated, it is plain that an unpaid agent is liable for *gross negligence*, and equally plain that he is liable for nothing less. From the latter of these propositions there is, however, as has been already stated, one exception, and it is contained in the following words of Lord Loughborough, when delivering judgment in *Shiells v. Blackburne*:—"I agree," said his lordship, "with Sir William Jones, that when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, then the bailee is only liable for *gross negligence*. But if a man *gratuitously* undertakes to do a thing to the best of his skill, *when his situa*

tion or profession is such as to imply skill, an omission of that skill is imputable to him as *gross negligence*. If, in [*98] this *case, a shipbroker, or a clerk in the custom-house, had undertaken to enter the goods, a wrong entry would in them be *gross negligence*, because their situation and employment necessarily imply a competent degree of knowledge in making such entries." It perhaps may be more correct to call this a distinction engrafted on the general doctrine, than an exception from it: since it does not render any unpaid agent liable for less than *gross negligence*; but renders that *gross negligence*, in some agents, which would not be so in others. [See *Wylde v. Pickford*, 8 M. & W. 443, and *Wilson v. Brett*, 11 M. & W. 113, where it was laid down that an unpaid agent is bound to use such skill as he is shown to possess, and is guilty of culpable negligence if he do not. And Rolfe, B., in that case said, that there is no difference between negligence and *gross negligence*, that it is the same thing, with the addition of a vituperative epithet. See *Pothier Contract de dépôt*, cap. 2, art. 1, s. 72.]

The case of *Coggs v. Bernard* derives most of its celebrity from the elaborate dissertation upon the general law of Bailments delivered by Lord Holt in pronouncing judgment. His lordship as we have seen, distributes all Bailments into the following six classes, viz.:—

1. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.
2. *Commodatum*. Where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.
3. *Locatio rei*. Where goods are lent to the bailee, to be used by him *for hire*.
4. *Vadium*. Pawn.
5. *Locatio operis faciendi*. Where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.
6. *Mandatum*. A delivery of goods to somebody, who is to carry them, or do something about them, *gratis*.

Sir William Jones, in his *Treatise on Bailments*, objects to this division; "for," [*98a] says he, "in truth *his fifth sort is no more than a branch of the third, and he might with equal reason have added a seventh, since the fifth is capa-

ble of another subdivision." The fifth of the classes enumerated by Lord Holt is, as we have seen, *Locatio operis faciendi*, i. e. *where goods are delivered to be carried, or something is to be done about them for reward to be paid to the bailee*. And this, with due submission to so great an authority as Sir William Jones, cannot be reasonably treated as a branch of the third, which is *Locatio rei*, i. e. *where goods are lent to the bailee, to be used by him for hire*; for there exists between them this essential difference, viz. that in cases falling under the third class, or *locatio rei*, the reward is paid by the bailee to the bailor; whereas in cases falling under the fifth class, or *locatio operis faciendi*, the reward is always paid by the bailor to the bailee. It is true that in Latin both classes are described by the word *locatio*, which probably gave rise to Sir William Jones's opinion that both ought to be included under the same head; but then in the third class, *locatio rei*, the word *locatio* is used to describe a mode of bailment, viz. by the hiring of the thing bailed; whereas in the fifth class, *locatio operis faciendi*, the same word *locatio* is used, not to describe any mode of bailment, but to signify the hiring of the man's labour who is to work upon the thing bailed; for as to the thing bailed, that is not hired at all, as it is in cases falling within the third class. If, indeed, Lord Holt had been enumerating the different sorts of hirings, not of bailments, he would no doubt, like the civilians, have classified both *locatio rei* and *locatio operis* under the word hiring, since in one case goods are hired, and in the other labour. But he was making a classification, not of hirings, but of bailments; and since in cases of *locatio rei* there is a hiring of the thing bailed, and in cases of *locatio operis* no hiring of the thing bailed, it was impossible to place, with any degree of propriety, two sorts of bailment under the same class, one of which is, and the other of which is not, a bailment by way of hiring. As to the objection that Lord Holt's fifth class of bailments is capable of another subdivision, there is no doubt but that it may be split, nor only as Sir W. Jones suggests, into *locatio operis faciendi*, where work is to be done upon the goods, and *locatio operis mercium vehendarum*, where they are to be carried, but into as many different subdivisions

as there are different modes of employing labour upon goods; and, in point of fact, the civilians, in their division of hirings, enumerated another class, viz. *locatio custodiæ*, or the hiring of care to be bestowed in guarding a thing bailed, which is omitted by Sir W. Jones. For these reasons, it is submitted that Lord Holt's classification is the correct one, and it remains to make a *few [*99] remarks on each of the six classes enumerated by him.

1st. With respect to *Depositum*, which it will be recollected is a bailment without reward, in order that the bailee may keep the goods for the bailor, the law respecting the bailee's responsibility may be summed up in the words in which Lord Holt concludes his observations on that head of bailment, viz., "if the bailee be guilty of *gross negligence*, he will be chargeable, but not for any ordinary neglect." An important modern case respecting *deposit* has been already cited in this note, viz., *Doorman v. Jenkins*, 2 Ad. & Ell. 256, where, as has been stated, the question whether there had been *gross negligence* was left to the jury. There are some expressions in this part of Lord Holt's judgment, from which a superficial reader might infer that his lordship thought that a depositary would always be secure, provided that he kept the goods deposited with as much care as his own; but, on looking attentively at the whole context, it appears that his lordship considered the bailee's keeping the goods bailed as he keeps his own, rather as an argument against the supposition that *gross negligence* has been committed, than as any substantive ground of discharge. "The keeping them (says his lordship) as he kept his own, is an *argument* of his honesty," and consequently an *argument* against the supposition of *gross negligence*, for Lord Holt considered *gross negligence* almost the same thing with dishonesty. "If," says he, "there be such *gross neglect*, it is looked upon as *evidence of fraud*." And it is quite clear, especially from *Doorman v. Jenkins*, that *gross negligence* may be committed by a depositary, although he may have kept the property entrusted to him with as much care as his own; and that if it be, his negligence of his own goods is no defence. See also *Rooth v. Wilson*, 1 B. & A. 61. On the other hand, it is also clear that a depositary is not liable

for any thing short of *gross negligence*; and though Lord Coke, in *Southcote's* case, 4 Rep. 83, b., 1 Inst. 89, a. b., expressed an opinion that a depositary is responsible if the goods are stolen from him, *unless he accepts them specially to keep as his own*, that doctrine has been completely overthrown by Lord Holt in the principal case. How far a depositary may add to his responsibility by inserting special terms in his promise to his bailor, is a point not by any means clearly settled. See *Kettle v. Bromsall*, *Willes*, 118, and the observations of Sir William Jones on *Southcote's* case; Jones on Bailments, 42, 3; and of Mr. J. Powell in the principal case; {and see *M'Lean v. Rutherford*, 8 Missouri, 109.} A depositary has no right to use the thing entrusted to him. *Bac. Ab. Bailment, D.*; [*Clark v. Gilbert*, 2 N. C. 343.] Where a man finds goods belonging to another, he seems bound, after he has taken them into his possession, to the same degree of care with a depositary. See *Isaac v. Clarke*, 2 Bulst. 306, 312; 1 Roll. 125, 30; *Doct. & St. Di. 2, c. 38*; sed vide *Bac. Abr. Bailment, D.*

2dly. As to *Commodatum* or *loan*, the responsibility of the bailee is much more strictly enforced in this class of bailments; and that with justice, for the *loan* to him is for his own advantage,—not, as in the case of deposit, for that of the bailor. [Besides, he may justly be considered as representing himself to the bailor to be a person of competent skill to take care of the thing lent. See *Wilson v. Brett*, 11 M. & W. 115, per Parke, B.] He is, therefore, bound to use great diligence in the protection of the thing bailed, and will be responsible even for *slight negligence*; nor must he on any account deviate from the conditions of the loan, as in *Bringloe v. Morrice*, 1 Mod. 210, 3 Salk, 271, where the loan of a horse to the defendant to ride was held not to warrant him in allowing his servants to do so. [But where a horse was for sale, and the agent of the vendor let A. have the horse for the purpose of trying it, A. was held justified in putting a competent person upon the horse to try it, an authority to do so being implied. *Lord Camoys v. Scurr*, 9 Carr. & P. 383.]

3rdly. *Locatio rei*. This, as we have seen, is where goods are lent to the bailee *for hire*. In such case, Lord Holt tells us that the bailee is bound to

use *the utmost care*. This expression, as Sir W. Jones has remarked, appears too strong, for it would place a hirer who pays for the use of the goods on the same footing as a borrower; and indeed Lord Holt himself qualifies it, by citing, immediately after, a passage of Bracton, in which the care inquired is described to be "*talis qualis diligentissimus paterfamilias suis rebus adhibet*." Sir William has, in an able criticism upon this passage, shown that it was copied verbatim from Justinian, in whose work, he further proves, that it must have been used to signify, not *extreme*, but *ordinary* diligence. Accordingly, in *Dean v. Keate*, 3 Camp. 4, the diligence [100] required from the *hirer of a horse was such as a prudent man would have exercised towards his own, and, therefore, having himself prescribed to it, instead of calling in a veterinary surgeon, he was held responsible. See the notes to that case, and *Davy v. Chamberlain*, 4 Esp. 229; see also *Reading v. Menham*, 1 Moo. & Rob. 234; and *Longman v. Galini*, Abbott on Shipp. 259, n., 5th Ed. [This species of bailment is determined by a wrongful sale of the goods, and the owner may at once maintain an action of trover against even a bona fide purchaser, *Cooper v. Willomatt*, 1 C. B. 672.]

4thly. Vadium or pawn. In this case also the pawnee is bound to use *ordinary* [100a] *diligence* in the care *and safe-guard of the pawn, but he is not bound to use more; and therefore, if it be lost notwithstanding such diligence, he shall still resort to the pawnor for his debt. See Lord Holt's judgment in the text; *Vere v. Smith*, 1 Vent. 121; *Anon.* 2 Salk. 522. So, too, if several things be pledged for the same debt, and one be lost without default in the pawnee, the residue are liable to the whole debt. *Ratcliffe v. Davies*, Yel. 178; *Bac. Abr. Bailment, B.* If the pawnor make default in payment at the stipulated time, the pawnee has a right to sell the pledge, and this he may do of his own accord, without any previous application to a court of equity. See *Pothener v. Dawson*, Holt, 385; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 9 Mod. 278; 3 Atk. 303; or he may sue the pawnor for his debt, retaining the pawn, for it is a mere collateral security. *Bac. Abr. Bailm. B*, *Anon.* 12 Mod. 564. If he think

proper to sell; the surplus of the produce, after satisfying the debt, belongs to the pawnor; while, on the other hand, if the pawn sell for less than the amount of the debt, the deficiency continues chargeable on the pawnor. *South Sea Co. v. Duncombe*, 2 Str. 919. From all this, it will be seen that a *pawn* differs, on the one hand, from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt in respect of which the lien was created has been satisfied; and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged to the mortgagee conditionally, so that when the condition is broken the property remains absolutely in the mortgagee; whereas a *pawn* never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus, which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right at any time to redeem it. *Com. Dig. Mortgage, B.*; *Waller v. Smith*, 5 B. & A. 439; *Kemp v. Westbrook*, 1 Ves. 278; *Demandray v. Metcalfe*, Prec. Cha. 420; 2 Vern. 691; *Vanderzee v. Willis*, 3 Bro. 21; *Ratcliffe v. Davies*, Yel. 178. [There is a passage in the judgment of the Court of Common Pleas in *Clarke v. Gilbert*, 2 N. C. 356, which at first sight, seems opposed to the doctrine above laid down as to the sale of a pledge, but which, on consideration of the nature of the article pledged in that case, will be found quite consistent with the proposition that the simple pledge of a mere chattel gives a right of sale on default. In that case a lease had been pledged to a solicitor for the amount of his bill of costs. The *client became bankrupt, and [100b] the solicitor, with the concurrence of the assignees, sold the lease, and received his bill of costs out of the proceeds. The commission was superseded for default of the petitioning creditor's debt, and a fresh commission issued, under which the plaintiffs were appointed assignees. They were held entitled to recover against the solicitor the amounts which he had received. *Tindal, C. J.*, in delivering judgment said, "It

appears that they were part of the proceeds arising from the sale of a lease belonging to the bankrupt. Now that lease at the time of such sale, was in the possession of the defendant as a pledge or security for the payment of his demand against the bankrupt, being either in his possession as solicitor, under a claim upon it for his lien which the law gives him, or having been expressly deposited with him as security for his demand according to the evidence of Stevens. *In either case the right and power of the defendant over the lease was precisely the same*, he had the right to retain the lease in his possession until his demand was paid, and so far by means of the possession of the lease to enforce payment of his demand, but he had that right only, he had no right to sell the lease and pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it without either payment of the demand or a tender and refusal, which is equivalent to payment. But if instead of keeping the thing pledged he sells it, or enables any other person to sell it by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease in an action of trover." It is conceived that the above passage is not to be considered as propounding generally that a chattel pledged cannot be sold in default of payment, and that it must be confined to the case under discussion, of a pledge of a lease or other title deed which gives the pledgee an equitable mortgage upon the land with a certain known legal remedy by sale under the decree of a Court of Equity, a remedy inconsistent with his parting with the possession of the deed only, for which, without the land, but little could be obtained, whilst great damage could be inflicted on the pledgor by putting his title deed in peril.] After the debt has been discharged or tendered, it of course becomes the pawnee's duty to return the pawn. See the text; *Isaac v. Clarke*, 2 Bulst. 306; *Anon.* 2 Salk. 522; *B. N. P.* 72. And if the pawnor have, as he may do, assigned his property in the pledge, subject to the pawnee's rights and special property, the assignee will have, it is said, the same right as the pawnor, both in law and equity; *Kemp v. Westbrook*, 1 Ves. 278; [*Franklin v. Neate*, 13 M. & W. 481]; whereas it is

clear that the *assignee of the equity of redemption in a thing [*100c] mortgaged could have no rights *at law*. [A mere pledge of chattels personal, is therefore not properly speaking a mortgage, and though in writing, need not bear a mortgage stamp. *Harris v. Birch*, 9 M. & W. 592.] There *may*, however, be a mortgage, properly speaking, of chattels, which will be subject to the same incidents as any other mortgage. If the pawnee, after payment or tender, insist upon retaining the goods pledged, he is a wrong-doer, and becomes liable to an action, and chargeable with any damage which may afterwards happen to the pledge, whether with or without his default. See the text, Lord Holt's judgment; *Anon.* 2 Salk. 522; *Com. D. Mortg. B.*

A pawn being a sort of bailment transfer of the possession of the chattel pledged, is of the essence of it; and if the pawnee part with the possession, he loses the benefit of his security. *Ryal v. Rolfe*, 1 Atk. 165; approved of in *Reeves v. Capper*, 5 Bing. N. C. 140, 141. But if the pawnee, after the pawn has taken place, redeliver the chattel to the pawnor for some purpose consistent with the continuance of the contract of pledge, the possession of it by the pawnor is looked upon as the possession of the pawnee, and the security remains. *Reeves v. Capper*, *ibid*.

See, on the subject of pawnbrokers, st. 39 & 40 G. 3, c. 99, 28th July, 1800, intitled *An Act for better regulating the Business of Pawnbrokers* [amended as to the hours of business by 9 & 10 Vict. c. 93]; and see *Nickesson v. Trotter*, 3 Mee. & Wel. 130. This act limits the interest which pawnbrokers may take [upon loans not exceeding ten pounds, leaving loans of larger amount subject to the ordinary law, see *Pennell v. Attenborough*, 4 Q. B. 865], and contains provisions guarding against the facility of putting away stolen goods through pawnbrokers. At the expiration of a year and a day the pledges may be sold, by public auction only, unless the pawnor give a notice to the contrary, in which case the sale must be postponed for three months; but if the pawnbroker neglect to sell, the pawnor will, as at common law, have a right to redeem at any time. *Waller v. Smith*, 5 B. & A. 439.

*5thly. *Locatio operis facienda*. In this case, goods are entrusted by the bailor to the bailee, to be

safely kept, or to be carried, or to have some work done upon them, for hire to be paid to the bailee. Such is the bailment of goods to a warehouseman or wharfinger to be taken care of, of cloth to a tailor to be made into a garment, of jewels to a goldsmith to be set, of a seal to a stone-cutter to be engraved, &c. In such cases the rule is, that the bailee is bound not only to perform his contract with regard to the work to be done, but also to use *ordinary* diligence in the [*101a] care and preservation of the property entrusted to him. Vide *Best v. Yate*, 1 Vent. 268. Thus, if a watch be left with a watchmaker for repairs, he must use *ordinary* care about its safeguard. If he use less, and the watch be lost, he is chargeable with its value. *Clarke v. Earnshaw*, 1 Gow, 30, [So a wharfinger who takes upon him the mooring and stationing of the vessels at his wharf is liable for any accident occasioned by his negligent mooring. *Wood v. Curling*, 15 M. & W. 626; 16 M. & W. 628.] So if cattle be agisted, and the agister leave the gates of his field open, he uses less than *ordinary* diligence; and if the cattle stray out and are stolen, he must make good the loss. *Broadwater v. Bolt*, Holt, 541. If an uncommon or unexpected danger arise, he must use efforts proportioned to the emergency to ward it off. In *Leck v. Maestaer*, 1 Camp. 138, the defendant was the proprietor of a dry-dock, the gates of which were burst open by an uncommonly high tide, and the plaintiff's ship, which was lying there, forced against another ship and injured. It was sworn, that with a sufficient number of hands the gates might have been shored up in time so as to bear the pressure of the water; and, though the defendant offered to prove that they were in a perfectly sound state, Lord Ellenborough held that it was his duty to have had a sufficient number of men in the dock to take measures of precaution when the danger was approaching, and that he was clearly answerable for the effects of the deficiency. So a warehouseman, who is a bailee of this description, does not use ordinary diligence about the goods entrusted to him, if he have not his tackle in proper order to crane them into the warehouse, whereby they fall and are injured. *Thomas v. Day*, 4 Esp. 262. But he is not liable for loss by a mere accident, not resulting from his negligence. *Garside v. Trent Nav. Co.* 4 T. R. 581; see *Hyde*

v. Do. 5 T. R. 389; In re *Webb*, 8 Taunt. 443; *Vere v. Smith*, 1 Vent. 121. [Yet, in case of a loss the onus is on the bailee to prove that it occurred through no want of ordinary care on his part, *Mackenzie v. Cox*, 9 Car. & P. 632.] There are, however, two cases in which the liability of bailees falling within this class is extended very much beyond the limit just pointed out, viz. where the bailee is an *innkeeper* or a *common carrier*. The extent of the innkeeper's liability has already been discussed in the notes to *Calye's case*, the leading authority on that subject. A few words shall be now devoted to that of the carrier.

A *common carrier* is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Such is a proprietor of wagons, barges, lighters, merchant-ships, or other instruments for the public conveyance of goods. See the text; *Forward v. Pittard*, *1 [*101b] T. R. 27; *Mors v. Slew*, 2 Lev. 69; 1 Vent. 190, 238, commented on in the text by Lord Holt; *Rich v. Kneeland*, Cro. Jac. 330; *Maving v. Todd*, 1 Stark. 72; *Brook v. Pickwick*, 1 Bing. 218; { *Benett v. Peninsular Steamboat Co.* 6 C. B. 775. } A person who conveys passengers *only* is not a common carrier. *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 2 Camp. 79; see *Sharpe v. Grey*, 9 Bing. 460. [But see *Brotherton v. Wood*, 3 B. & B. 54, and *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747. As to the liability of a cab proprietor for passenger's luggage, see *Ross v. Hill*, 2 C. B. 877.] Nor is a town carman so, who does not ply from one fixed terminus to another, but undertakes casual jobs. *Brind v. Dale*, 2 M. & Rob. 80. A railway company are common carriers unless exempt by some special provision. *Palmer v. Grand Junction Canal Co.*, 4 M. & W. 749. [*Pickford v. Grand Junction Railway Company*, 10 M. & W. 399; *Parker v. Great Western Railway Company*, 7 Scott, N. R. 835.] The extraordinary liabilities of a carrier were imposed upon him in consequence of the public nature of his employment, which rendered his good conduct a matter of importance to the whole community. He is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot

convey, or is not in the habit of conveying. *Jackson v. Rogers*, 2 Show. 327; *Riley v. Horne*, 5 Bing. 217; *Lane v. Cotton*, 1 Lord Ray. 646; *Edwards v. Sherratt*, 1 East, 604; *Batson v. Donovan*, 1 B. & A. 32. [And in a declaration against him for refusing to carry, it is enough to aver readiness and willingness to pay the hire without a formal tender, *Pickford v. Grand Junction Railway Company*, 8 M. & W. 373; *Wyld v. Pickford*, 8 M. & W. 443. The hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one than to another, for the same service. *Pickford v. Grand Junction Railway Company*, 10 M. & W. 399; *Parker v. Great Western Railway Company*, 7 Scott, N. R. 835. As a general rule, "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is," per Parke, B., *Walker v. Jackson*, 10 M. & W. 169, where it was held that the uncommunicated fact that a carriage contained valuable jewellery and watches, did not exonerate the owners of a ferry over which it was carried, from liability for a loss, which was alleged to have been partly occasioned by the weight.] While the goods are in his custody, he is bound to the utmost care [*101c] of them; *and, unlike other bailees falling under the same class, he is, at common law, responsible for every injury sustained by them occasioned by any means *whatever, [*102] except only the act of God or the King's enemies. 1 Inst. 89; *Dale v. Hall*, 1 Wils. 281; *Covington v. Willan*, Gow, 115; see *Davies v. Garrett*, 6 Bing. 716. [*Bourne v. Gatliffe*, 8 Scott, N. R. 604, 11 Cl. & Fin. 45.] However, when the increase of personal property throughout the kingdom, and the frequency with which articles of great value and small bulk were transmitted from one place to another, had begun to render this degree of liability intolerably dangerous, carriers, on their part, began to insist that their employers should, in such cases, either diminish it, by entering into special contracts to that effect upon depositing their goods for conveyance, or should pay a rate of remuneration proportionable to the risk undertaken. To this end, they posted up and distributed written

or printed notices, to the effect that they would not be accountable for property of more than a specified value, unless the owner had insured and paid an additional premium for it. If this notice was not communicated to the employer, it was of course ineffectual. *Kefr v. Willan*, 6 M. & S. 150. But if it could be brought home to his knowledge, it was looked upon as incorporated into his agreement with the carrier, and he became bound by its contents. *Mayhew v. Eames*, 6 B. & C. 601; *Rowley v. Horne*, 3 Bing. 2; *Nicholson v. Willan*, 5 East, 507. Still the carrier, notwithstanding his protection by the notice, was bound to avoid gross negligence; and if the property was lost or injured by such negligence, he was responsible. *Smith v. Horne*, 2 B. M. 18; *Duff v. Budd*, 3 B. & B. 177; *Birkett v. Willan*, 2 B. & A. 356; *Garnett v. Willan*, 5 B. & A. 53; *Sleat v. Fagg*, ib. 512; *Wright v. Snell*, ib. 350; [*Wyld v. Pickford*, 8 M. & W. 443]; see *Owen v. Burnett*, 4 Tyrwh. 143; [*Hinton v. Dibbin*, 2 Q. B. 646]. Unless, indeed, the employer had lulled his vigilance by an undue concealment of the nature of the trust imposed on him, for such conduct would have exonerated the carrier, even had he given no notice. *Batson v. Donovan*, 4 B. & A. 21; *Miles v. Cattle*, 6 Bing. 743; see 4 Burr. 2301; B. N. P. 71; [and as to the mode of pleading such a defence, see *Webb v. Page*, 6 Scott, N. R. 951, which shews that it cannot be raised under the plea of not guilty] Very many questions, as was naturally to be expected, having arisen upon the construction of these notices, and whether they had come to the customer's knowledge, the legislature has thought proper to step in, and by several enactments to regulate the responsibility of carriers by land and water. The land-carrier's act is stat. 11 Geo. 4 & 1 Will. 4, cap. 68, which enacts that no common carrier *by land* for hire, shall be liable for loss or injury to any gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, watches, clocks, time-pieces, trinkets, [see, *Davey v. Mason*, 1 Car. & M. 45], bills, bank-notes, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated article, glass (see *Owen v. Burnett*, 4 Tyrwh. 143), china, silks—manufactured or unmanufactured—wrought-

up or not wrought-up with other materials, [see *Davey v. Mason*, 1 Car. & M. 45,] furs (see *Mayhew v. Nelson*, 6 C. & P. 59,) or lace, contained in any parcel, when the value exceeds the sum of 10*l.*, unless at the time of delivery, the value and nature of the article shall have been declared, and the increased charges, or an engagement to pay the same, accepted by the person receiving the parcel. By sect. 2, the carrier may demand for such parcels an increased rate of charge, which is to be notified by a notice affixed in his office, and customers are to be bound thereby, without further proof of the notice having come to their knowledge. Carriers who omit to affix the notice are, by sect. 3, precluded from the benefit of this act, and, by sect. 4, they can no longer by a notice limit their responsibility in respect of articles not within the act. Special contracts, however, between the carrier and his employer are still allowed, and are not affected by this statute. [See *Wyld v. Pickford*, 8 M. & W. 443.] By sect. 5, the act is not to protect carriers from their liability to answer for loss occasioned by the felonious acts of their own servants, nor is it to protect the servant from answering for his own neglect or misconduct. And it has been held that, notwithstanding this statute, the carrier is still answerable for gross negligence on his part, which has occasioned a loss of property such as the act directs to be insured, even although the owner has neglected to insure it; for the protection given to the carrier by the act is [*103] substituted for the *protection which he formerly derived from his own notice, and the former, therefore, it has been supposed] will not now protect him, in a case in which the latter would not have been allowed to do so, in consequence of his misconduct. *Owen v. Burnett*, 4 Tyrwh. 142. [But the Court of Queen's Bench has lately decided that, in a case within the carriers' act, the carrier is not liable for a loss by his servant of the articles mentioned in the statute, even though it may have been occasioned by *gross negligence not amounting to a misfeasance*. *Hinton v. Dibbin*, 2 Q. B. 646, where the general subject is discussed in a most elaborate judgment.] {See *Machu v. Railway Co.* 2 Exch. 415.}

[*103a] *With respect to carriers by water, besides the exemptions for which they stipulate in their

charter-parties and bills of lading, (which latter always contain a clause discharging them from liability for losses occasioned by "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever;" the first two of which exemptions they indeed enjoyed at common law, and that from loss by fire under 26 Geo. 3, c. 86, s. 2,) they are further protected by the last-mentioned statute from making good loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, sustained by any robbery, embezzlement, making away or secreting thereof, unless the owner or shipper has, at the time of shipping, declared the nature and value thereof in writing. 6 Geo. 4, c. 155, s. 53, exempts them from liability from damage arising from the want of a duly qualified pilot, unless incurred by their own refusal or neglect to take one on board; and sect. 55, from liability for loss incurred through the default or incompetency of a licensed pilot. Where their common law liability remains, it is much narrowed by the following acts, viz. 7 Geo. 2, c. 15, which exempts them from making good losses incurred by the misconduct of the master and mariners, without their privity, to a greater extent than the value of the ship and freight (see *Sutton v. Mitchell*, 1 T. R. 18) [*Brown v. Wilkinson*, 15 M. & W. 391]; 26 Geo. 3, cap. 86, sec. 1, which extends the above enactment to all cases of loss by robbery by whomsoever committed, and 53 Geo. 3, cap. 159, which extends it to all cases of loss occasioned without their default or privity; but this act does not extend to vessels used solely in rivers or inland navigations, nor to any ship not duly registered according to law; nor do any of the acts extend to lighters and gabbets. *Hunter v. McGown*, 1 Bligh, 573. It should also be observed, that the benefit of the three last-mentioned acts extends to owners only, not to masters, and that the last contains an express clause against relieving the master, though he may happen also to be a part-owner. See *Wilson v. Dickson*, 2 B. & A. 2.

Where goods consigned to a vendee are lost through the default of the carrier, the consignee is the proper person to sue, {if the property in the goods has passed to him,} for the consignor was his agent to retain the carrier. *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomon-*

son, 3 B. & P. 582; King v. Meredith, 2 Camp. 639; Brown v. Hodgson, lb. 36. But it is otherwise where the goods were sent merely for approval, Swain v. Shepherd, 1 M. & Rob. 224, or the consignee is the agent of the consignor, Sargent v. Morris, 3 B. & A. 277, or the carrier has [*103b] contracted to be liable to the *consignor in consideration of the latter's becoming responsible for the price of the carriage; Moore v. Wilson, 1 T. R. 659; Davis v. James, 5 Burr. 2680; [or where the property in the goods has not yet passed to the vendee, as, for instance, when there is no evidence of a contract sufficient to satisfy the statute of Frauds, and the carrier is not of the vendee's selection, Coats v. Chaplin, 2 Q. B. 483; Norman v. Phillips, 14 M. & W. 277; or, to speak generally, where the carrier is employed by the consignor, and the goods are at his risk. Dunlop v. Lambert, 6 Cl. & Fin. 600] See Freeman v. Birch, 1 Nev. & M. 420; 6 Q. B. 492, n. S. C.

In the case of an action brought against a carrier, it is sufficient prima facie evidence of a loss by his negligence to show that the goods never reached the consignee, [or a short delivery, Hawkes v. Smith, Car. & M. 72, Rolfe, B.] But where they are bailed to a booking-office keeper to be delivered to a carrier, the plaintiff must show by direct evidence, that they were not delivered to one. Gilbert v. Dale, 5 A. & E. 543; Griffith v. Lee, 1 C. & P. 110. With regard to the mode of declaring against a carrier, formerly, the practice was to set out the custom of the realm; that has been discontinued, because the custom of the realm being the law of the realm, the courts take notice of it. Afterwards the practice became to state the defendants to be *common carriers for hire, totidem verbis*; that was, however, departed from to some extent in Brotherton v. Wood, 3 B. & B. 58, and still more in Pozzi v. Shipton, 8 A. & E. 974, where a declaration stating that the plaintiff delivered and that the defendant accepted the goods in question, to be carried for reward from A. to B., was held sufficiently upon the custom of the realm to warrant a verdict against one of two defendants, upon evidence of his being a common carrier. The court, however, doubted whether it would have been good on special demurrer. [If to such a declaration the defendant pleads an acceptance of the goods on the special

terms of a carrier's notice, the plaintiff, if he means to rely upon *gross negligence* as rendering the defendants liable notwithstanding the notice, must reply or new assign such negligence. Wyld v. Pickford, 8 M. & W. 443. It is the duty of a carrier not only to carry safely, but also, if no time be stipulated, to carry within a reasonable time, and a breach of that duty may be proved under a declaration alleging the lapse of a reasonable time, and that the carrier has not delivered. Raphael v. Pickford, 5 Man. & Gr. 551, 6 Sc. N. R. 478.

Questions have arisen as to the time during which the liability of the carrier continues, and there is sometimes considerable difficulty in determining the period at which he ceases to hold the goods in his capacity of carrier, though retaining *the control or possession [*103c] of them. It is for the jury (when [*103c] there is no written contract) to determine the extent of the agreed transit, as, for instance, in the case of goods carried across a ferry, it is for the jury to determine from evidence of the practice at the ferry whether the owners of the ferry have undertaken to carry goods up a slip, or only to land them on the shore. See Walker v. Jackson, 10 M. & W. 161.

{Where a railway company employs porters, at the station, to carry luggage out to the hackney-carriages, and a porter accordingly undertakes to carry out a passenger's luggage to the carriage, the liability of the company as common carriers continues until the luggage is placed in the hackney-carriage; Richards v. Railway Co. 7 C. B. 839.}

When the goods have arrived at the end of the transit, it seems that the carrier is bound to keep them a reasonable time at his own risk for the owner, and it would seem that during the period for which he keeps them under an obligation to do so, springing out of his receipt of them as a carrier, he is subject to the same liability as during their transit. See Hyde v. Trent Navigation Company, 5 T. R. 389. After that period his extraordinary liability as a common carrier is, it would seem, at an end, and he remains liable only to the same extent as ordinary deposites. See per Lord Abinger, C. B., Cairns v. Robins, 8 M. & W. 258.

In Bourne v. Gatliff, 4 N. C. 314, 5 Scott, 667, 3 Scott, N. R. 1, 3 Man. & Gr. 613, 8 Scott, N. R. 604, 11 Clark &

Fin. 45, the duty of a carrier by sea was much considered. It was there holden by the Courts of Common Pleas and Exchequer Chamber, and by the House of Lords, that in the absence of any course of dealing or usage of the port to justify him, a carrier by sea under a bill of lading of goods to be delivered "at the Port of London, (all and every the dangers of the sea, &c., excepted,) unto Mr. Samuel Gatliff or assigns, on paying for the said goods freight," &c., was not entitled immediately on the arrival of the vessel, and without notice to the owner, to land the goods; and that, having so landed them on a wharf, where, before coming to the hands of the owner, they were destroyed by accidental fire, the carrier was responsible for their loss. In the same case, upon a plea to the second count, a question arose as to the liability of a carrier by sea, who, for an additional hire, undertakes, after the arrival of the goods, to take care of them at the wharf where they are landed, and to convey them within a reasonable time to the place of business of the customer. The Court of Common Pleas held that he was liable for a loss of the goods by accidental fire whilst on the wharf, there being no ground for supposing him to be clothed with one degree of responsibility whilst taking care of the goods at the wharf, and another and different degree whilst carrying the goods from the wharf, inasmuch as both these duties formed part of the same express contract, and were paid for by the same reward; and that Court referred to *Hyde v. Trent Navigation Company* as an authority for their [*103*d*] judgment. In *the Exchequer Chamber that part of the judgment was reversed on the ground that the second count did not state an employment of the defendants as common carriers, a point not noticed in the Common Pleas, and the principle acted upon by that Court is therefore, perhaps, untouched by the reversal.

In *Cairns v. Robins*, 8 M. & W. 258, goods were sent by a carrier, who delivered them to his customer, accompanied by a printed bill, which stated that "any goods that shall have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, will be sold to defray the carriage and other charges thereon, or the general lien, as the case may be, together with warehouse rents and expenses." The cus-

tomers sent them back to the carrier's warehouse to await his orders. They remained there more than a year, and then were lost. The customer brought an action treating the carriers as bailees for reward, and a verdict found for the plaintiff was upheld by the Court of Exchequer on the ground stated by Alderson, B., in the course of his judgment, that there was evidence from whence the jury might reasonably find, that in consideration that the parties whose goods were carried would pay a certain sum, the defendants would not only carry them, but would warehouse them for three months, the compensation so paid being a compensation not only for carrying, but for warehouse-rent also.]

The sixth and last class of bailments is (according to Lord Holt) *mandatum*, or a delivery of goods to somebody who is to carry them, or do something about them, *gratis*. And this might have been classed under the same head with *depositum*. For as the *keeping, carrying, and working upon* goods for hire are all included, both by Lord Holt and Sir W. Jones, under the same head, there seems no good reason why the *keeping, carrying, and working upon* them *gratuitously* should not have been so likewise. Certain it is, that the liabilities of the *depository* and of the *mandatary* are precisely the same; both (in the absence, at least, of a contract in special terms) are bound to *slight diligence*, and to slight diligence only, and liable for nothing short of *gross negligence*, the reason in each case being the same, namely, that neither is to receive any reward for his services. Accordingly, whenever the extent of a mandatary's liability is discussed we find the cases respecting that of depositaries cited, and relied upon, and so vice versa. The cases of *Beauchamp v. Powley*, 1 M. & Rob. 38; *Shiells v. Blackburne*, 1 H. Bl. 158; and *Dartnall v. Howard*, 4 B. & C. 345, the facts of which are respectively stated at the commencement of this note, were decisions [*104] *on the responsibility of mandataries, and from those, as well as from the general principle, it appears that such bailees are liable for *gross negligence*, and for that only.

[A gratuitous agent is, however, bound to use such skill as he possesses; for instance, a person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale, if

proved to be a person skilled in the management of horses, is held equally liable with a borrower for injury sustained by the horse whilst ridden by him. *Wilson v. Brett*, 11 M. & W. 113.]

From the above cursory view of the law of bailments, it will be seen that, besides the six classes, enumerated by Lord Holt, bailees may be distributed into three general classes varying from one another in their degrees of responsibility. The *first* of these is, where the bailment is for the benefit of the

bailor alone: this includes the cases of *mandataries* and *deposits*, and in this the bailee is liable only for *gross negligence*. The *second* is, where the bailment is for the benefit of the bailee alone; this comprises *loans*, and in this class the bailee is bound to the *very strictest diligence*. The *third* is, where the bailment is for the benefit both of bailor and bailee: this includes *locatio rei*, *vadium* and *locatio operis*, and in this class an *ordinary and average degree of diligence* is sufficient to exempt the bailee from responsibility.

IN the common law, the only sure way of ascertaining legal obligations, and the most convenient method of arranging them, is by considering the remedies by which the obligations are enforced. Rights and duties, so called, existing beyond the limits of legal remedy, may be matters of enlightened curiosity, and moral or metaphysical speculation, but are no part of the common law.

Most of the classes of persons mentioned in the preceding case and note, may be comprehended under the distinction of ordinary *paid agents* and *unpaid agents*: and as the actions by which their liability is enforced, are case, trover, and assumpsit, there can be no difficulty in determining the ground and extent of their liabilities.

But, besides these, there are at least three classes of persons, upon whom the common law has imposed a peculiar responsibility; and has allowed a special writ for the enforcement of it. It differs from the liability of the two first-mentioned classes, in this; that, whereas they are liable only for negligence, or want of diligence, this class is made responsible, as a kind of insurers, for damage arising wholly by the act of others, or by inevitable accident; by any cause, in short, except the act of God. Such is the liability at common law, of a master of a house, for damage done to his neighbour's property, by a fire arising in his house, though occasioned by the negligence of others, if they have entered the house with his consent or knowledge: of an innkeeper, for any loss or injury to goods of travellers placed *infra hospitium*; and of common carriers. The liability of these three appears to rest on the same principle, and have the same extent; being, within the range of its action, a responsibility for all damage arising by human means: and it is enforced by the same kind of special writ, upon the *law and custom of the realm of England*. It appears to be a peculiar, and native institution of the English people; very similar in its policy to the law which made the hundred liable for robberies, &c.

The common-law responsibility of a master of a house is understood to be abolished by statute 6 Ann. c. 31, s. 6; 10 Ann. c. 14, s. 1; which provides, that no action shall be maintained against any person in whose house or chamber any fire shall accidentally begin: the old cases, however, especially 2 Hen. IV. 18, pl. 6, are worth reading, on account of the close analogy to

the cases of innkeepers and carriers: and the case of *Anonymous*, Cro. El. 10, to illustrate the difference between a special action on the custom, and an action on the case for negligence. See also, *Filliter v. Phippard*, 11 Q. B. 347, 354.

The whole subject of the preceding case, and of *Calye's* (ante p. 170,) may, therefore be considered under the following heads :

1. Innkeepers.
2. Common carriers.
3. Ordinary paid agents; and unpaid agents.

1. **INNKEEPER.**—The principle, exhibited in *Calye's* case, (ante p. 170,) in regard to the liability of an innkeeper, is well established, as a part of the law, in this country. An innkeeper is answerable for all losses happening to the goods of travellers becoming his guests, except such losses as are caused by the act of God or the public enemies, or by the conduct of the guest himself, or his servant, or the companion whom he brings with him; *Mason v. Thompson*, 9 Pickering, 280, 284; *Kisten v. Hildebrand*, 9 B. Monroe, 72, 74; *Thickstun v. Howard*, 8 Blackford, 535, 537.

To become subject to this extraordinary liability, it is essential that the person should be a common innkeeper; that is to say, should exercise the calling or business of entertaining travellers, or transient persons; either, together with, or without, their horses; and should, thereby, become bound to receive and entertain all travellers demanding hospitality, unless there be a good excuse for refusing. The keeper of a boarding-house, or a coffee-house, though he may occasionally entertain travellers, does not incur the responsibility of an innkeeper; *Kisten v. Hildebrand*, 9 B. Monroe, 72, 75. And it is only in relation to the goods of travellers or wayfarers, becoming his guests, that an innkeeper incurs this liability; the goods of a permanent boarder at an inn, are not thus protected; *Manning v. Wells*, 9 Humphreys, 746; *Kisten v. Hildebrand*.

To give rise to this liability in an innkeeper, it is necessary that the traveller should have become, in point of law, his guest. If a traveller comes to an inn, and becomes its guest, and leaves his property there, and goes out for a time, intending to return, the innkeeper is liable for goods lost during the guest's absence; *McDonald v. Edgerton*, 5 Barbour's S. Ct. 560. But, upon the question, whether a traveller can become a guest, by sending his goods to an inn, without going there himself, there has been a difference of opinion. The true principle appears to be, that the business of an innkeeper is two-fold; to entertain travellers, and to entertain their horses, including the care of travelling equipage. A person will, no doubt, incur the full liability of an innkeeper, as respects goods brought to his inn by a traveller, even if such person provides entertainment for travellers only, and not for their horses. And, on the other hand, a person who provided entertainment only for the horses of travellers, and not for travellers also, would not incur an innkeeper's responsibility, as respects horses sent to him by travellers; for he would be, in law, a liveryman, and not an innkeeper. But the business of an innkeeper, in its greatest completeness, includes both services: and the law seems to be, that a traveller, by sending his horses and carriage to an inn, becomes the guest of the inn, so far as a responsibility for those objects is concerned, though the traveller himself lodges and diets elsewhere; but that, by sending to an inn his luggage, or

other effects accompanying the person, without coming himself, he does not become a guest, nor does the innkeeper become chargeable for them. That a *traveller*, by sending his horse, chaise and harness to an inn, though he himself goes to lodge with a friend, becomes the guest of the inn, so far as to cause the innkeeper to be liable for the loss of the horse or equipage, is decided in *Mason v. Thompson*, 9 Pickering, 280, 285, on the authority of *Yorke v. Grenaugh*, 2 Lord Raymond, 866, 868; and again in *Pect v. McGraw*, 25 Wendell, 653. If, however, one who is not a traveller, wayfarer, or transient person, but a resident in the town, keep his horses at an inn, the innholder is not answerable, but for negligence; being in law, as respects such horses, only a liveryman. This is the point adjudged in *Grinnell v. Cook*, 3 Hill's N. Y. 486, *Thickstun v. Howard*, 8 Blackford, 535, and *Hickman v. Thomas*, 16 Alabama, 666; and although, in all of these cases, the opinion was expressed, that to make an innkeeper liable for the horses of any one, the proprietor must become personally a guest of the inn, yet that point was not, in any of these cases, judicially before the court.

The liability of an innkeeper is for all goods of a traveller, that are *infra hospitium*, that is, intrusted to the care and keeping of the inn. An innkeeper, indeed, is bound to take into his care and keeping, the goods of all travellers coming as guests to his inn, without its being necessary that the goods should be placed in his special keeping; and, therefore, if a traveller is his guest, and the goods are brought within the inn, that is sufficient to create the responsibility; *McDonald v. Edgerton*, 5 Barbour's S. Ct. 560. But if the goods are intrusted to the keeping of the innholder, it matters not, whether or not, they are brought within the building, or even within the curtilage of the inn: the liability does not depend upon the place where the goods are deposited, but upon the question, whether they are given into the custody of the innkeeper, or kept at the risk of the guest. The inquiry always is, did the party rest on the security of the inn? If the guest leaves his horse, carriage, or other property, to the care and disposal of the innkeeper, the latter is liable, though the property is put in a stable, wagon-house, open shed, or pasture-lot; *Clute v. Wiggins*, 14 Johnson, 175; *Piper v. Manny*, 21 Wendell, 282: but if the guest requires that his horse, or other animal, should be put to pasture, and he is stolen, the innkeeper is not liable; *Hawley v. Smith*, 25 Wendell, 642. That is the principle upon which the court, in that case, professed to proceed, and it is no doubt a correct one; but, as the statement says, that the plaintiff stopped at the house with a drove of 700 sheep, which, "with his knowledge," were turned out to pasture, and, there, were injured by eating laurel, probably, the true ground of the judgment is, that a flock of sheep is not comprehended among the "*bona et catalla transeuntis*," which an innkeeper is bound to receive and protect. Upon a similar principle, that an innkeeper is liable only for such things as are put *infra hospitium*, or, under the protection of the inn, it was held in a case, where the plaintiff coming to lodge at the inn, had delivered a bag of money to the innkeeper's step-daughter, who was in the house as a relation, and not as a servant, the plaintiff being on terms of great intimacy with her, and having often before trusted money to her keeping, and then actually courting her in marriage, and she had carried the bag into the defendant's bed-room, that the true point in the case, was, whether the plaintiff did not repose his trust and confidence in the step-daughter,

without resting on the security of the inn; and the jury found for the defendant; *Sneider v. Geiss*, 1 Yeates, 34.

If any casualty befall an animal, in the possession of an innkeeper, to which his responsibility as innkeeper would not extend, he will still be liable as a bailee, for negligence; *Hill v. Owen*, 5 Blackford, 323; *Hawley v. Smith*.

2. COMMON CARRIERS.

Definition of common carriers. A common carrier is usually defined, one who undertakes for hire to carry for any who choose to employ him. See *Mershon et al. v. Hobensack*, 2 Zabriskie, 373, 377. The subject is examined by GIBSON, C. J., in *Gordon v. Hutchinson*, 1 Watts and Sergeant, 285, and the rule deduced is, that "a wagoner, who carries goods for hire, is a common carrier, whether transportation be his principal and direct business, or an occasional and incidental employment." In *Craig v. Childress*, Peck's Tennessee, 270, 271, the rule laid down, and approved of in *Turney v. Wilson*, 7 Yerger, 340, 342, is that "one who undertakes for a reward to convey produce or goods of any sort, from one place upon the river to another, becomes thereby liable as a common carrier;" and in *Moses et al. v. Norris*, 4 New Hampshire, 304, it was held to be well settled that "all persons carrying goods for hire, come under the denomination of common carriers." In *Chevallier v. Strahams*, 2 Texas, 115, 121, this subject was examined, and the rule deduced, "that all persons who transport goods from place to place for hire, for such persons as see fit to employ them, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common carriers, and incur all their responsibilities." It is reasonable, and seems to be settled, that one who undertakes, though it be only *pro hac vice*, to act as a common carrier, that is, to carry for hire without a special contract, *thereby* incurs the responsibility of a common carrier. *Powers v. Davenport*, 7 Blackford, 497. Ship-owners, and steamboat-owners, carrying goods, on rivers, lakes, or the high seas, either to foreign or domestic ports, are common carriers, with all the duties and responsibilities which belong to carriers by land. *Elliott & Stewart v. Rossell & Lewis*, 10 Johnson, 1; *Kemp & Billing v. Coughtry and others*, 11 id. 107; *McArthur & Hurlbert v. Sears*, 21 Wendell, 190, over-ruling whatever was contra in *Aymar v. Astor*, 6 Cowen, 266; *Crosby v. Fitch*, 12 Connecticut, 410; *Hastings et al. v. Pepper*, 11 Pickering, 41; *Bennett v. Filyaw*, 1 Florida, 405; *Friend, &c. v. Woods*, 6 Grattan, 189, 192; *Porterfield & Brooks v. Humphreys*, 8 Humphreys, 497, &c. &c. To constitute a common carrier, a right to compensation must exist, though a contract to pay a certain sum need not have been made; *Knox v. Rives, Battle, & Co.*, 14 Alabama, 249; see also *McGill v. Rowand*, 3 Barr, 451. What variation the bills of lading may introduce, see *infra*. In relation to passengers, stage-owners and steamboat and railroad companies, do not incur the liability of common carriers, and are responsible only for negligence in conducting the journey, or in providing the means of transportation; *Boyce v. Anderson*, 2 Peters, 150; *Stokes v. Saltonstall*, 13 id. 181; *Stockton v. Frey*, 4 Gill, 408, 423; and with regard to their liability for defects in the means of conveyance, such as coaches, harness, &c., it has lately been decided, that they are responsible for the consequences to the passengers, of all

defects which might have been discovered and remedied upon the most thorough and careful examination of the vehicle, but not for accidents happening from an internal and hidden defect, which a thorough and careful examination could not disclose, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight; *Ingalls v. Bills* and others, 9 Metcalf, 1; but of the baggage of passengers, they are common carriers, the compensation for its conveyance being in law included in the passage-money paid by the traveller; *Orange County Bank v. Brown*, 9 Wendell, 85; *Camden &c. Company v. Burke*, 13 id. 611; *Hollister v. Nowlen*, 19 id. 235; *Cole v. Goodwin*, id. 251; *Bennett v. Dutton*, 10 New Hampshire, 481, 486; see *Blanchard v. Isaacs*, 3 Barbour's S. Ct. 388; *Peixotti v. McLaughlin*, 1 Strobhart, 468; but unless notice is given, and an extra price paid, where articles of unusual character and value are carried, as in *Camden, &c. Co. v. Burke*, the implied liability for the safe carriage of baggage, created by the principal contract in relation to the passenger, will not extend beyond what is strictly and fairly baggage, that is, such articles as are usually carried by travellers for their personal accomodation and use in the journey, and will not include money or merchandise carried in trunks; *Orange County Bank v. Brown*; *Pardee v. Drew*, 25 Wendell, 459; *Hawkins v. Hoffman*, 6 Hill, 586; *Bingham v. Rogers*, 6 Watts & Sergeant, 495; *N. J. Steam Nav. Co. v. Merchant's Bank*, 6 Howard's S. C. 344, 417; *Bomar v. Maxwell*, 9 Humphreys, 621, 624. The responsibility of such persons as common carriers, attaches as soon as the baggage is delivered to the agent or conductor, and taken into keeping by him, though not intended to start till the next conveyance; *Camden, &c. v. Belknap*, 21 Wendell, 355; and mere arrival at the place of stopping, does not discharge the steamboat-owner, but he continues liable as carrier, till the usual time of delivery, and is liable if he deliver the baggage to the wrong person, upon a forged order; *Powell and others v. Myers*, 26 Wendell, 591, in the Court of Errors; See also *Logan v. The Ponchartrain Rail Road Company*, 11 Robinson's Louisiana, 24. But when goods carried upon a railway, are deposited in the railway company's warehouse, the company's liability while the goods are in their warehouse, is only that of paid depositaries; *Thomas v. B. & Pr. R. R. Corp.* 10 Metcalf, 472. See *Lewis v. Western R. R. Corporation*, 11 Id. 509. Steamboat owners, undertaking as a business to tow other boats, in possession of which the master and hands remain, are not common carriers, but liable only as paid agents for ordinary negligence. *Alexander and others v. Green and others*, 3 Hill's N. Y. 10; *Wells v. The Steam Nav. Co.* 2 Comstock, 204, 208. Ferry-men are common carriers; *Rutherford v. McGowen*, 1 Nott & McCord, 17; *Cook v. Gourdin*, id. 19; *Pomeroy v. Donaldson*, 5 Missouri, 36; *Smith v. Seward*, 3 Barr, 342, 345; *Peixotti v. McLaughlin*, 1 Strobhart, 468. In *Dwight et al. v. Brewster et al.*, 4 Pickering, 50, a common carrier is defined, "One who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place;" and it was there held, in the case of a stage-coach, whose principal business was to carry the mail and passengers, that the practice of taking parcels for hire to be conveyed in the stage-coach, constituted the proprietors common carriers; and that the notice "all baggage at the risk of the owners," related only to the baggage of passengers and not parcels; and the same points are decided in *Beckman & Johnson v. Shouse*, 5 Rawle, 179.

In *Robertson & Co. v. Kennedy*, 2 Dana, 431, where the same definition is given, it was held, that "Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition." A person may be a common carrier of money, as well as of other property: *Kemp & Billings v. Coughtry and others*, 11 Johnson, 107; *S. P. Harrington and others v. McShane*, 2 Watts, 443; and *Emery v. Hersey*, 4 Greenleaf, 407.

Where the business undertaken by the proprietors of a conveyance, is not clearly defined and known, the question often arises as to the liability of the proprietors, for articles delivered to the agent who conducts the conveyance; the stage-driver, for instance, or steamboat captain. This is not a question in the law of common carriers; but it is a question obviously belonging wholly to the law of agency. If there had been no actual authority given to the conductor of the conveyance, and yet the circumstances are such as to create a general agency as to the kind of carrying in question, the proprietors will be liable, as in *Dwight et al. v. Brewster et al.*: on the other hand, if the proprietor of a vehicle, who is not, though he formerly may have been, in the business of a common carrier, send his servant with it, on a special journey, with express orders not to carry for others, he, the proprietor, is not liable. *Satterlee and others v. Groat*, 1 Wendell, 172. The case of *Allens v. Sewall and others*, 2 Wendell, 327, S. C. 6 id. 335, turned in fact wholly upon the question of agency or no agency; and a majority of the Court of Errors were finally of opinion, that, under the special facts of the case, the parcel had been confided to the personal trust and care of the captain, and not to him as agent and representative of the proprietors, and that, therefore, the latter were not liable. The same principles, of making the liability of the ship-owner for the acts of the master, turn on the general law of agency, are acted on in *Walter v. Brewer*, 11 Mass. 99; see also *Taylor v. Wells*, 3 Watts, 65.

The liability of a carrier. A common carrier is absolutely liable for the safety of the goods; and is responsible for injuries or losses arising from the acts of others, without any neglect or fault on his part: the exceptions, according to the usual language, are, "the acts of God, the public enemies, or the fault of the party complaining." *Dusar v. Murgatroyd*, 1 Washington C. C. R. 13, 17; *Friend, &c. v. Woods*, 6 Grattan, 189, 192; see also *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 Howard's S. Ct., 344, 381.

What precisely is meant by the technical expression, Act of God, has been a point of some little difficulty. I apprehend that the true notion of the exception is, those losses that are occasioned exclusively by the *violence of nature*; by that kind of force of the elements, which human ability could not have foreseen or prevented: such as lightning, tornadoes, sudden squalls of wind, &c. If, however, it does not necessarily mean only the *violence of nature*, it certainly is restricted to the *act of nature*, and implies the entire exclusion of all human agency, whether of the carriers or of third persons. This principle is settled in *McArthur & Hurlbert v. Sears*, 21 Wendell, 190; a highly interesting and important case, to which the reader is specially referred: it is there said, "No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome be inevitable; yet if it be

the result of human means, the carrier is responsible;" p. 196. All the cases appear to agree in requiring this entire exclusion of human agency, from the cause of the injury or loss. See *Mershon et al. v. Hobensack*, 2 Zabriskie, 373, 381; and see also, *Chevallier v. Strahams*, 2 Texas, 115, 125, where it was held that a loss caused by fire, blown from some distance by the wind, was not caused by an act of God. In *Backhouse v. Sneed*, 1 Murphy, 173, it is held that, "all accidents which can occur by the intervention of human means, however irresistible they may be, the carrier is considered as insuring against." In *Ewart v. Street*, 2 Bailey, 157, it is held, that to come within the exception, the loss must result not from human agency, but immediately and directly, and not consequentially, from the act of God; and in *Smyrl v. Niolon*, id. 421, it is said, that if a freshet have so disturbed and changed the regular navigation of the river, that a snag has been lodged in the usual channel, and a vessel descending the usual channel is lost upon this snag, which was not before known to be there, this is a loss by the act of God; but it seems to be very questionable whether such a loss is not too remote a consequence of the act of God, and whether the navigator of a river, whose channel is liable to be so interrupted, is not bound to take notice of the probable results of a freshet, and to be responsible for what is in fact, an ordinary peril of the kind of navigation he has undertaken. It is true that the case of *Smyrl v. Niolon* appears to be confirmed in *Faulkner & Carns v. Wright, Coker & Tuttle, Rice*, 108. The case of *Williams and others v. Grant and others*, 1 Connecticut, 487, goes still farther than that of *Smyrl v. Niolon*, for it is said there that striking upon a rock, in the sea, not generally known to navigators, and actually not known to the master of the ship, is the act of God: but this seems to be giving rather a Mahometan extension to that phrase: and perhaps both of these cases are liable to the remark of confounding the exception of the act of God, with the exception of perils of the "navigation," in bills of lading:—between which there is a settled distinction, which may here be noted. While it is universally agreed that the liability of carriers by water, is, at common law, and in the absence of express contract, identical with that of carriers by land, it seems to be admitted by the best authorities, that the bill of lading may, in navigation by water, introduce exceptions not existing by common law; see *Elliott v. Rossell*, 10 Johnson, 1, 9: and *McArthur & Hurlbert v. Sears*: and this seems to be the point asserted in *Aymar v. Astor*. This exception of "the perils of the sea or of the river," has received a fixed construction, narrow enough, yet somewhat wider than "the act of God." In *Johnson v. Friar*, 4 Yerger, 48, it is decided that the expression "dangers of the river excepted," in bills of lading, means only such as no human skill or foresight could have guarded against; and in *Gordon v. Buchanan*, 5 Yerger, 72, 82, the distinction is expressly taken; the act of God, it is said, "means disasters with which the agency of man has nothing to do, such as lightning, tempests, and the like;" "the perils of the river," includes something more; "Many disasters which would not come within the definition of the act of God, would fall within the exception in this receipt. Such, for instance, as losses occasioned by hidden obstructions in the river newly placed there, and of a character that human skill and foresight could not have discovered and avoided." *Turney v. Wilson*, 7 Yerger, 340, confirms these cases. In *Williams v.*

Branson, 1 Murphy, 417, it is held that this exception, in the bill of lading, narrows the common-law liability: that, "dangers of the river," "signify the natural accidents incident to the navigation, not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment;" and that to ascertain whether the loss were by a "peril of the sea," it must be inquired whether the accident arose through want of proper foresight and prudence. In *Marsh & Howren v. Blithe*, 1 Nott & M'Cord, 170, the point is the same; the meaning of "the act of God" was not in question; the point decided, was that to determine whether the cause of the loss was "a peril of the sea," the existence or non-existence of negligence was to be tried by the jury: and see *S. P. Humphreys v. Reed*, 6 Wharton, 435, 442, 444; *Whitesides v. Russell*, 8 Watts & Sergeant, 44, 49. In *Jones et al. v. Pitcher & Co.*, 3 Stewart & Porter, 136, 171, &c.; confirmed 4 id. 382, there is a rambling discussion as to the meaning of "act of God" and "perils of the river," to the same effect. The case of *Williams and others v. Grant and others*, 1 Connecticut, 487, is an *authority*, as an adjudged case, only as to the meaning of "the perils of the sea;" for in that case there was a bill of lading, containing that exception: the court however supposed the two expressions to have the same meaning, and define the act of God to mean "all misfortunes and accidents arising from inevitable necessity, which human prudence could not foresee and prevent;" but this opinion that the two phrases are the same, is denied in *M'Arthur & Hurlburt v. Sears*. That there is a distinction between the two expressions is also established in *Plaisted v. Boston & Kennebec Steam Nav. Co.*, 27 Maine, 132, where it is decided that a loss by collision at sea is not an act of God to excuse a carrier, though it would be a peril of the sea. There is one other case which should be referred to, which, though it does not carry the meaning of an "act of God," beyond the meaning of "an act of nature," yet militates against its meaning a direct and *violent* act of nature: the case is that of *Colt & Colt v. M'Mechen*, 6 Johnson, 160. It was decided there, that a sudden *failure* of the wind, whereby the vessel tacking was unable to change her tack, and so was sent ashore, was an act of God: it is stated in the evidence, and the opinion, that the wind was light and variable: that they were standing for the west shore, and had approached it, as near as was usual and proper, when they put down the helm to bring her about, the jib-sail began to fill, the vessel had partly changed her tack, when the wind suddenly ceased blowing, and the head way under which the vessel was shot her on the bank. "The sudden gust, in the case of the hoyman," says SPENCER, J., alluding to the case of *Amies v. Stephens*, 1 Str. 128, "and the sudden and entire failure of the wind sufficient to enable the vessel to beat, are equally to be considered the acts of God. He caused the gust to blow in the one case; and in the other, the wind was stayed by him." This may be very fair divinity; and upon such a theological theory of causation, every thing may be the act of God; but it is the most extraordinary version of the principle on which a common carrier is discharged from liability that the books contain, and upon the authority of later cases, may confidently be pronounced to be wrong. KENT, Ch. J., in fact substantially dissented: for while he assented to the theology of SPENCER, J., that the stopping of the wind was the act of God, he thought there "was a degree of negligence imputable to the master, in

sailing so near the shore under a light variable wind, that a failure in coming about, would cast him aground. He ought to have exercised more caution, and guarded against such a probable event, in the case, as the want of wind to bring his vessel about, &c.;" in other words, he thought it not such an act of God as takes away the legal inference of negligence. The principle so clearly and carefully ascertained in *M'Arthur & Hurlbert v. Sears*, controls both this case and *Williams and others v. Grant and others*. The principle that all human agency is to be excluded from creating or entering into, the cause of mischief, in order that it may be deemed the act of God, shuts out those cases where the natural object in question is made a cause of mischief solely by the act of the captain in bringing his vessel into that particular position where alone that natural object could cause mischief; in the two cases in question, it was the act of the captain that imparted to the natural objects all the mischievous qualities that they possessed; for rocks, shores, currents, and dying breezes, are not by their own nature, and inherently, agents of mischief and causes of danger, as tempests, lightning, &c., are; the danger therefore sprang from human agency. It may be thought that in principle the distinction does not amount to much, for that the carrier is always liable for his own negligence, and it is easy to see that such accidents never can prove fatal without negligence on his part. But practically the distinction is of the first importance, *because*, it affects the burden of the proof: and the confusion of the distinction tends to thwart the wise provision of the common law, which will not allow the carrier to throw upon the employer the burden of proving or inferring negligence or defective means in the carrier, until he has shown the intervention of such an extraordinary, violent, and destructive agent, as by its very nature raises a presumption that no human means could resist its effect. Upon the whole, it would seem that an act of God signifies the *extraordinary violence of nature*.

In the late case of *Friend &c. v. Woods*, 6 Grattan, 189, the views here expressed are approved, and it is decided that the act of God which excuses the carrier must be a direct and violent act of nature. It was there held that the stranding of a boat on a bar recently formed in the ordinary channel of the river, of which the navigators of the boat had no knowledge, but which might have been ascertained by human foresight and diligence, was not a loss by the act of God, but made the carrier liable. In *Walpole v. Bridges*, 5 Blackford, 222, it was considered by the court that an exception in a bill of lading of "unavoidable dangers and accidents of the road," was equivalent to an exception of "the acts of God," and did not amount to a restriction of the common law liability; but what was meant by "unavoidable dangers and accidents of the road," was not determined in that case. Again, in *M'Call v. Brock*, 5 Strobhart, 119, 124, it was decided that the bursting of the boiler of a steamboat cannot be considered as included in the exception of the act of God, or inevitable accident; and the court there said, "The well-settled legal import of these phrases limits inevitable accidents to such as may be produced by physical causes which are irresistible, which human foresight and prudence cannot anticipate, nor human skill and diligence prevent; such as loss by lightning, storms, inundations and earthquakes, and the unknown dangers to navigation, which are suddenly produced by their violence."

It has been said above that the carrier is always liable for injuries resulting from his own negligence; including, of course, defects in the means of transportation provided by him; he is therefore liable for those injuries which the violence of nature causes in consequence of his negligence or defective means. The course of proof in regard to a common carrier appears to be thus: By proving the delivery of the thing to him to be carried by him, the burden of accounting for it is thrown upon him; and he must either show the safe delivery of the goods, or prove that the loss occurred by one of the excepted causes. *Murphey, Brown & Co. v. Staton*, 3 *Munford*, 239; *Craig v. Childress, Peck*, 270; *Turney v. Wilson*, 7 *Yerger*, 340; *Ewart v. Street*, and *Smyrl v. Niolon*, 2 *Bailey*, (So. Car.) 157, 421; *Cameron v. Rich*, 4 *Strobhart*, 168, 180. If the carrier prove that the injury or loss was occasioned by one of those occurrences which are termed the act of God, *prima facie* he discharges himself: and the onus of proving that the alleged cause or agency would not have produced the loss or injury without his negligence or defective means, is thrown upon the plaintiff: but if the plaintiff can prove such negligence or defective means, on his part, as that without their co-operation, the violence of nature might not have resulted in occasioning a loss, he shall recover. *Bell v. Reed & Beelor*, 4 *Binney*, 127; *Hart v. Allen & Hart*, 2 *Watts*, 114; *Reed v. I. & I. Dick*, 8 *id.* 479; *Williams and others v. Grant and others*, 1 *Connecticut*, 487; *Lawrence v. McGregor, Wright*, 193; *Putman v. Wood*, 3 *Massachusetts*, 481; *Faulkner & Carns v. Wright, Coker & Tuttle, Rice*, 108. The true way of looking at this is not that the carrier discharges his peculiar liability by showing an act of God, and is then made responsible as an ordinary agent, for negligence; but that the intervention of negligence breaks the carrier's line of defence by showing that the injury or loss was not directly caused by the act of God, or more correctly speaking, was not the act of God.

The liability of a carrier does not begin, until there has been a delivery of the goods to him, or his authorized servants, or agents, actually or constructively; *Tower v. The U. & S. R. R. Co.* 7 *Hill*, 47; *Blanchard v. Isaacs*, 3 *Barbour's S. Ct.* 388; *Merriam v. Hartford & New Haven R. R. Co.* 20 *Connecticut*, 354; and when his liability has attached, it does not cease, until a delivery of the goods by him, according to the usage of the business; *Graff v. Bloomer*, 9 *Barr*, 114; *T. & M. Bank v. Ch. Tr. Co.* 18 *Vermont*, 131, 140; *McHenry v. Railroad Co.* 4 *Harrington*, 448.

Exceptions to a carrier's liability.—In *Phillips v. Earle et al.*, 8 *Pickering*, 182, it is decided that a carrier is liable for the loss of a valuable package, though not informed of the value of the contents; but it is said he would not be, if deceived as to the value, for that would be a fraud. The same principle is established in *Relf v. Rapp*, 3 *Watts & Sergeant*, 21; and it is there decided, that where a fraudulent misrepresentation is made, as by marking a box of jewelry "glass," the carrier is not liable for the value of the jewelry. A principle, similar to that of these cases, is established by the fine discussions in *Hollister v. Nowlen*, and *Cole v. Goodwin and Story*, 19 *Wendell*, 235 and 252; and the points considered as settled in those cases are, agreeably to the afore-cited cases; that it is not the duty of the owner to disclose the value and nature of the contents of his parcels, but the carrier is liable, whatever they may be; but the carrier has a right to require from the owner or traveller, to be informed of the value, that he may

know what degree of care is necessary, and may make his charge according to the responsibility; and if he make such demand, and the owner is guilty of *fraud* in misrepresenting the nature and value, the common carrier's extraordinary liability is remitted; but knowledge that the carrier requires this information must be brought home directly to the employer, and general notices stuck up in public places, or advertised, however extensively, are not sufficient evidence of fraud in him; and it is strongly doubted, if not denied, in these cases, that if the employer has seen the notices, it is enough; there should be particular and special inquiry from him.

This question is a wholly different one from that of the right of the carrier to rid himself of this extraordinary liability, by notice or a special acceptance; it concerns only his right to require information of the value, that he may regulate his care and charges accordingly. And it is highly satisfactory to observe that the American cases all put this exception on the ground of *fraud* in the owner, and not on the ground of special contract or notice. There is no doubt that this is in perfect accordancy with legal principle, and the superior propriety of resting the exception on fraud, as concerns principle, and the burden of proof, is ably and abundantly vindicated by BRONSON, J., in *Hollister v. Nowlen*.

That it is possible for a common carrier, by, either, general notice, or a special acceptance, to limit his extraordinary liability, is a position which, it is believed, is not supported by the authority of any adjudged case in the United States. On the contrary, it has been determined in New York, after prolonged and repeated consideration, that a carrier cannot, by any kind of notice, nor even by express agreement, limit or vary his common-law responsibility; and it has recently been decided by the Supreme Court of the United States, that he cannot protect himself by any sort of notice, although there may be forms of express and special contract, upon which his liability may be different from that imposed by the common law.

In South Carolina, indeed, in an action brought upon a bill of lading, excepting dangers by fire, it has been held, that a carrier may, by agreement, limit his liability; *Swindler v. Hilliard & Brooks*, 2 Richardson, 286, 303. But this seems never to have been carried beyond the exemption from liability for fire, and the true ground of that exemption, in South Carolina, appears to be usage; see *Singleton v. Hilliard & Brooks*, 1 Strobhart, 203, 216.

In *Hollister v. Nowlen*, 19 Wendell, 235, the point adjudged by the court, (according to BRONSON, J.'s statement of the point in *Cole v. Goodwin & Story*, id. 254,) is, that stage-proprietors cannot limit their liability by a general notice *brought home to the employer*; and in *Camden, &c. Transportation Co. v. Belknap*, 21 Wendell, 355, the same point is again affirmed to be the settled law of the court: see also *Logan v. The Pontchartrain Rail Road Company*, 11 Robinson's Louisiana, 24. In *Hollister v. Nowlen*, and *Cole v. Goodwin & Story*, the effect of a special acceptance, or express contract, excepting certain risks from the carrier's liability, was left undecided, though Mr. Justice COWEN, in the latter case, after an elaborate investigation of the English cases, which, as he shows, have been not a little misapprehended on this point, and the principles of the rule, came to the conclusion that such agreements are invalid; and at a subsequent time, upon that point coming up in *Gould and others v. Hill and others*, 2

Hill's N. Y. 623, where, upon delivery of goods to the common carrier, a written memorandum had been received from him, engaging to deliver the goods, (danger of *fire*, &c. excepted,) which the court held "undoubted evidence of assent, on the part of the employer," and the goods were subsequently destroyed by fire, without any negligence on the carrier's part, the Supreme Court adopted the opinion of Judge COWEN, and decided that all such agreements are *void*; see Wells v. The Steam Navigation Co. 2 Comstock, 204, 209, and Slocum v. Fairchild, 7 Hill, 292, 297.

In the absence of any contradictory decision, it may well be considered that the thorough discussion the matter underwent in the cases of Hollister v. Nowlen, and Cole v. Goodwin & Story, has *settled* the principles of law for this country, in respect to the inefficacy of notices. "The rule of the common law," says BRONSON, J., "is founded upon a great principle of public policy; it has been approved by many generations of wise men, and if the courts were now at liberty to make, instead of declaring the law, it may well be questioned whether they could devise a system, which, on the whole, would operate more beneficially. I feel the more confident in this remark, from the fact, that in Great Britain, after the courts had been perplexed, for thirty years, with various modifications of the law in relation, to carriers, and when they had wandered too far to retrace their steps, the legislature finally interfered, and in its more important features restored the salutary rule of the common law;" p. 241; "The doctrine that a carrier may limit his responsibility by a notice, was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor, so far as I have observed, in any of the states. Should it now be received among us, it will be after it has been tried, condemned, and abandoned in that country to which we have been accustomed to look for light on questions of jurisprudence;" p. 248.

More recently, in New Jersey Steam Navigation Company v. Merchants' Bank, 6 Howard's S. Ct. 344, 382, the Supreme Court of the United States, though giving effect to a special agreement of a particular kind between an express agent and a steamboat company, (the character of which will be more fully stated presently), decided that a carrier cannot, by published notices, exonerate himself from the liabilities which the law has annexed to his employment. In that case, notice was published that "all goods," &c. "must be at the risk of the owners of such goods, &c." The court said, however, that admitting the right of the carrier to restrict his obligation by a previous general agreement defining the privileges and duties of both parties, "it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself, without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the court in Hollister v. Nowlen, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof

lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties."

But though the principle, that no effect is to be given to these liminary notices, has not elsewhere been decided, a kindred policy has been generally adopted, and by construing such notices with great rigor, and throwing various obstacles in the way, the matter has been so managed, that, it is believed no carrier, charged upon his common-law liability, has ever protected himself, in a court of law, by such a notice. In *Barney v. Prentiss & Carter*, 4 *Harris & Johnson*, 317, the court declined to say whether common carriers could, by any publications, exonerate themselves, but decided that, admitting that they could, the notice must be plain, explicit, and free from all ambiguity, and that, as the defendant, in his notices, had used ambiguous and doubtful language, he stood as if no notice had been published. In *Beans v. Green et al.*, 3 *Fairfield*, 422, the admission of the doctrine of notice was regretted, and it was decided that general notice that the carrier will not be liable, unless the fare is paid, and the article entered on the way-bill, was nought, unless clearly brought home to the actual knowledge of the party to be affected. The Supreme Court of Massachusetts has intimated an opinion unfavourable to the validity of notices. "The doctrine of the common law, as applied to common carriers," they have said, "is founded in practical wisdom, and has long been consistently enforced; and we are neither disposed to relax its requisitions, nor give countenance to ingenious devices, by which its provisions may be evaded;" *Thomas v. Boston & Providence R. R. Corp.*, 10 *Metcalf*, 472, 479. In Pennsylvania, there are numerous and strong dicta against the expediency of allowing any limitation of the carrier's liability; see per *ROGERS, J.*, in *Beckman & Johnson v. Shouse et al.*, 5 *Rawle*, 179, who says, that when notice is set up, "not only the notice should be brought home to the employer, but also that the terms of the notice should be clear and explicit, and not liable to the charge of ambiguity or doubt:" per the same, in *Eagle v. White*, 6 *Wharton*, 505, who says, it is a principle "which has stood the test of experience, and which we are unwilling to see frittered away, further than has been already done in those cases where carriers have been, as I think, unwisely permitted to limit their own responsibility:" per *GIBSON, C. J.*, in *Attwood v. Reliance Transportation Co.*, 9 *Watts*, 87, who says, "The maxim that any one may dispense with a rule provided for his exclusive benefit, is not without its exceptions, and notwithstanding the unfortunate direction given to the decisions at an early day, it is still almost susceptible of a doubt, whether an agreement to lessen the common-law measure of a carrier's responsibility, like an agreement to forego a fee-simple tenant's right of alienation, or a mortgagor's right of redemption, is not void by the policy of the law. That the bailor is left as much at another's mercy, by an agreement like the present, (excepting "dangers of the navigation, fire, leakage, and all other unavoidable accidents,") as a borrower would be by an agreement to turn his mortgage into a conditional sale, is entirely evident from the fact that the carrier has the exclusive custody of the goods, and that to

convict him of negligence in his function, would be as impracticable as to convict him of connivance at robbery, against which the common-law rule of his responsibility was intended, more especially, to guard. From his servants, who are usually the only persons that can speak of the matter, it would be idle to expect testimony to implicate themselves, and the owner can seldom have any other account of his property than what they may choose to give him. Such a state of things is not to be encouraged; and though it is, perhaps, too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law, requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." These remarks were relied on by the court, in *Gould and others v. Hill and others*, as encouraging them to come to the conclusion there reached. The case of *Bingham v. Rogers*, 6 Watts & Sergeant, 495, settles nothing on this point. The remark in *Laing v. Colder*, 8 Barr. 479, that the right of a carrier to limit his liability by notice was expressly decided by *Bingham v. Rogers*, and that this must now be taken as the law of that state, not only attaches far too much weight to the rambling and uncertain discourse of the judge in that case, which was an action for negligence, and not on the custom, but is itself but an extrajudicial dictum, the action in *Laing v. Colder* being case for negligence, whereby injury to the person and goods was occasioned.

The inefficacy of notices, whether general or particular, whether published at large, or brought home to the knowledge of the party concerned, in limiting the responsibility of common carriers, ought now, fairly to be considered as a settled principle in American law. It remains to inquire what principle is established by the Supreme Court in the *New Jersey Steam Navigation Company v. The Merchants' Bank*, in regard to the effect of special agreements. In that case, a formal contract had been entered into in writing, between Harnden and the Steam Navigation Company, by which in consideration of paying \$250 a month, Harnden was to have the privilege of transporting in the company's boats a wooden crate of certain dimensions, contents unknown. The agreement comprised sundry mutual stipulations, and contained a condition that the crate and its contents were always to be at the exclusive risk of Harnden, and that the company were not to be responsible to him or his employers for any losses. The contract was originally under seal for a fixed period, and, upon the expiration of that time, was renewed by writing not under seal, for another definite period. A loss by fire having occurred during the latter term, the owners of the goods, carried by Harnden, sued the company, not upon a general liability as common carriers, but upon the special agreement with Harnden, treating themselves as Harnden's principals in that agreement, which the court held that they might do. Founding their case upon the agreement, of course they were bound by all its stipulations. As the owners, said the court, "claim through it, they must affirm its provisions, so far as they may be consistent with law." Here was an executory agreement, of a general character, entered into previously to the tender of the goods to the carrier for transport, creating a more onerous liability than that imposed by the common law, because it deprived the carrier of his right to be informed of the nature and value of the goods carried; and this was set up and sued upon by the owner as the ground of his right to recover. There could not

be a doubt of the right of the carrier in such a suit to avail himself of the condition. Whether, a common carrier, when charged upon his common law responsibility, can discharge himself from it by showing a condition or agreement, verbal or written, assented to or entered into, on the part of the owner, by accepting a bill of lading, or signing a memorandum, at the time the goods are delivered to the carrier, is a totally different question, and is not touched by the decision of the Supreme Court in support of the express agreement in that case.

Policy and legal principle concur in requiring that all such restrictions, whether in the form of an exception in a bill of lading, or of a note signed by the owner on delivering the goods, should be deemed nullities. The fallacy of the argument in favour of the right of the carrier to vary his liability by introducing conditions into his acceptance of goods, lies in considering the carrier as an insurer, and thence inferring that his liability is voluntary, and arises *ex contractu*; for if it arose from contract, it might seem liable to be varied by contract. In result, his responsibility is somewhat *like* an insurer's; but it does not arise in the same way, and in its legal ground and nature, is wholly different. See *Gales v. Hallman*, 1 Jones, 516, 520. It is a responsibility attached by law to the calling or employment of common carrier: if he assumes the calling, he has no power over the duties which the law annexes to that calling. His assuming the character of a common carrier depends entirely on his own will and assent: but if he undertakes that occupation, the liabilities which come upon him in respect to goods brought to him to be carried, are imposed by the law, and not created by his assent or agreement. The law of common carriers is different from the law applicable to other classes of people. They are recognised by the law as peculiar persons, in respect to whom, in their employment, non-feasance is a mis-feasance,—a failure to carry and deliver safely is a tort,—and their liability is enforced by an action on the case. Though assumpsit will also lie, it is an assumpsit implied and defined by the law, and not created by any express contract of the carrier. The ground upon which the invalidity of all these restrictions attempted to be affixed by common carriers upon their legal duties, may confidently be affirmed, is this, that the carrier is bound to carry all goods that are tendered to him for the purpose, and is liable to an action if he refuses. He is bound to carry unconditionally, and under the full responsibility of his common law duty; and to say, then, that he has a legal right to prescribe the terms and determine the liabilities under which he will carry, is contradictory and absurd. The law which imposes a definite and absolute duty upon him, puts him under an incapacity to contract in derogation of that duty. There is no substantial difference between mere notices published by a carrier, and special agreements entered into upon the delivery of the goods to him; and to allow an important public duty to be defeated,—to suffer a great principle of policy and justice and reason to be circumvented—by an empty form of words, imposed by one man who has no right to propose them, upon another who has no power to repel them,—would be a reproach to the law. In these cases of “special agreements,” so called, there is no real assent to the new contract proposed by the carrier: the owner accepts the conditional bill of lading, or signs a memorandum discharging the carrier, because he cannot help it: he must have his goods carried, and he sees that the carrier will refuse them unless the prescribed terms are ac-

cepted. So far as policy and convenience are concerned, there is clearly no distinction between mere "notices," and these "special agreements," and in point of formal and legal reasoning, the latter are without any effective value. In the first place, if the carrier is in law bound absolutely to carry the goods under a full and entire liability, the owner's agreement to remit a part of this liability is a contract wholly without consideration. In the next place, it is an agreement made under an unlawful compulsion. In the third place, the carrier's liability is not, in any individual case, an advantage introduced for the benefit only of the party concerned in that case; it is a principle of public policy established for the convenience of society and the benefit of the community at large; and as the consent of any one person to these conditions in his own case tends to establish a custom in derogation of the interests and rights of the public, such consent should be deemed unlawful and void. A carrier's special acceptance, therefore, or a special contract proposed by him on the delivery of goods, and assented to by the owner,—whatever form or name may be given to it—ought to be considered as a mere notice, lacking the essential qualities of a valid contract: and the Supreme Court of the United States, which upon grounds of policy has condemned such notices, cannot rationally stop short of the salutary result arrived at by the Supreme Court of New York, that all such agreements are void. The point decided in the *New Jersey Steam Navigation Company v. Merchants' Bank* is no doubt accurate and safe. It amounts to this; that if a man, in advance of any tender of goods to a carrier to be transported, voluntarily enters into a special agreement as to the circumstances, conditions and terms, upon which goods shall thereafter be carried, he is, on all occasions on which he deals with him on the basis of that contract, bound by its provisions. In as far as such agreement extends, and when the parties are dealing upon the footing of it, it may truly be said, that "the carrier is not to be regarded as in the exercise of his public employment:" such contract is collateral to his ordinary character and duty; and is a source of new rights and liabilities, not inconsistent with his implied and general obligations, but apart from them. But when a person comes with goods to a carrier to be transported by him, he means to deal with him, and the other considers himself to be dealt with, as a common carrier; and whatever contracts may then be made in limitation of his liability are in direct and necessary repugance with his duty and calling as a common carrier.

But even if effect be given to notices or special acceptances, they can only operate to discharge the extraordinary liability of the carrier; and, on the authority of *Alexander and others v. Greene and others*, 3 Hill's N. Y. 9, to discharge them from the liability of a warehouseman, or other bailee for hire. He will still be liable to any losses occasioned by his own act or fraud, or by such negligence or defective means as would render an unpaid agent liable. This is the point decided in *Camden, &c., Co. v. Burke*, 13 Wendell, 611, before the doctrine of notice was wholly rejected. Such is the principle asserted in *Beckman & Johnson v. Shouse, et al.*, 5 Rawle, 179, 189. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard's S. Ct. 344, 383, the Supreme Court, recognizing this as established in regard to notices, decided upon a similar principle, that a special contract with an express agent that the goods were to be conveyed at his risk, and that the carriers were not, in any event, to be responsible to him

or his employers, for any loss, or damage, could not upon any fair and reasonable construction, be regarded as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or her management by the master and hands. It was there held, that though the carrier was exempt by his agreement from those losses against which he was a sort of insurer, yet, inasmuch as he had undertaken to carry the goods from one place to another, he incurred the same degree of responsibility as that attached to a private person, engaged casually in the like occupation, and was bound to use ordinary diligence in the custody and delivery of the goods, and to provide vehicles and means of transportation. In *Thomas v. Boston and Providence Rail-Road Corporation*, 10 Metcalf, 472, 480, the court seem, also, to have been of opinion, that the effect of notice, at the most, could only be to discharge the extraordinary liability of the carrier, and to put him on the footing of an ordinary bailee for hire, who would still be liable for loss occasioned by his negligence or want of ordinary care.

While, however, these exceptions made by those who are common carriers, are generally to be regarded as against the policy of the law, yet there seems to be some obscurity as to what persons are common carriers *in this point of view*. Without opening doubts upon this part of the law, and without going into the principle of the distinction, it seems to be settled and unquestionable, that the liability of carriers by sea, and upon the great rivers, may, by the bill of lading, be limited, at least to the extent of excepting the "perils of the navigation," the meaning of which is explained in a former part of this note. See *Putnam v. Wood*, 3 Mass. 481; *Schieffelin and another v. Harvey*, 6 Johnson, 170, 180; and *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 Howard's S. Ct. 344, 382. This is a trade in which the carrying has always been by bill of lading, and that particular exception has been used in bills of lading for ages, and old and universal usage may be considered as having established it; but the exception of fire, leakage, &c., now frequently used in bills of lading, are of modern practice, and the cases do not authorise their being deemed valid. But as to carriage by land and on canals, the principle of *Gould and others v. Hill* and others, is not opposed by any American case.

Common carriers may be sued either in case on the custom, or in *assumpsit* on their contract, and the action chosen will, as to joinder of defendants, be governed by its own rules; *McCalla v. Forsyth*, 4 Watts & Sergeant, 179; *Zell v. Arnold*, 2 Penrose and Watts, 292; *Hunt v. Wynn*, 6 Watts, 47; *Porter et al. v. Hildebrand*, 2 Harris, 129, 132; *Smith v. Seward*, 3 Barr, 342; *Mershon et al. v. Hobensack*, 2 Zabriskie, 373, 381; *Bank of Orange v. Brown and five others*, 3 Wendell, 158, where the subject is extensively examined. See, however, *Livingston v. Coxe*, 6 Barr, 360.

3. ORDINARY PAID AGENTS AND UNPAID AGENTS.

All the other cases in which property is confided to the possession of another, are distinguishable into two classes; 1. Where the employee is a paid agent: 2. Where he is not paid. The conduct of an employee of either class, after receiving possession, may be such as to render him liable *in trover* for the conversion of the goods, or in *case* or *assumpsit* for injury or loss. Before speaking of the specific liabilities of the two classes for

injuries or loss arising from their breach of duty, or from their neglect, it will be proper to consider the action of *trover*; for the same principles in respect to its use, apply to all cases in which property is lawfully in the possession of another; that is, to the case of innkeepers, carriers, ordinary paid agents and unpaid agents, finders, &c. (It has not been deemed necessary to take notice of the action of *detinue*, because the other actions cover the whole ground of the liability.)

As the original possession is rightful, trover will not lie, unless there be a conversion. If there be no proof of a positive act of conversion, there must be a demand and refusal, in order to ground the action. *Hosmer v. Clarke*, 2 Greenleaf, 308. A demand and refusal is *prima facie* evidence of conversion; but the presumption is rebutted, if it appear that the property was not in the defendant's possession or control at the time, but was lost or stolen. *Lockwood v. Bull & Eager*, 1 Cowen, 322; *Packard v. Getman*, 6 id. 757; *Hallenback v. Fish*, 8 Wendell, 547, relating to innkeepers, who stand precisely as common carriers. If the property have been *used* by the defendant, against the permission expressed or implied upon the delivery, or sold, or delivered to another, or destroyed by the defendant, this is a conversion, and trover is the remedy. *Murray v. Ogden and Burling*, 10 Johnson, 172; *Bullard v. Young*, 3 Stewart, 46; but there is no conversion, and trover will not lie, where, *without* an act of the defendant, the goods have been lost, or have been stolen, the remedy is *assumpsit* or case. *Packard v. Getman*, 4 Wendell, 613; *Moses et al. v. Norris*, 4 N. H. 304; *Hawkins v. Hoffman*, 6 Hill, 586. Nor will trover lie by the bailor, not really owning the goods, where the bailee has delivered them to the true owner. *King and another v. Richards*, 6 Wharton, 418. Where things have been loaned or hired for a definite purpose, and are used for another purpose, this is at once a *conversion*, and trover is the remedy. In *Wheelock v. Wheelright*, 5 Massachusetts, 104, it is decided that if one hire a horse to go to a certain specified distance, and he go further and elsewhere, this is a conversion; the remedy is trover, and not case; had the horse been returned, the return had gone to the reduction of the damages; being killed, the plaintiff was entitled to recover the actual value of the horse at the time of the conversion. In *Homer v. Thwing et al.*, 3 Pickering, 492, the same principles are established, and it is decided, that under the same circumstances, trover lies against an *infant*. In *Rotch et al. v. Hawes*, 12 id. 136, these principles are approved: but it is held, that if the owner ratify this extension of the original hiring, by accepting payment for the whole, this is equivalent to an original hiring for the whole, and trover will not lie; but case will lie for any injury done to the horse. In *McNeils v. Brooks*, 1 Yerger, 73, it is decided that the hirer's carrying excessive burdens with him on a riding-horse is no conversion; for any injury, the remedy must be case, and not trover; but if the animal had been appropriated to a different use, as by going elsewhere, it had been a conversion.

The liability of *paid* agents, where there has been no conversion, differs from that of *unpaid* agents. As to the former, the obligation is not, as in case of a common carrier, to *carry*, or, as in case of an innkeeper, to *keep*; but the contract is, for the *services* of the employee, for diligence and skill in the agency or work undertaken; and the liability is, for want of diligence

in the ordinary duty of a professional person of the kind in question, or, which is the same thing, for negligence in the ordinary course of the service ; doing or omitting what ought to be not done, or done, in the common routine of the profession. In the case of the latter, there is no contract at all ; there is no legal liability but for wrongful conduct ; for negligence that causes mischief, or for collusion ; for what the law denominates *fraud*. In both it is believed, that the legal principle and measure of liability, is not in any degree affected by the fact that the possession of the property is delivered to the employee ; in other words, that *bailment* is, at the present day, no necessary title in the law. As respects the former class, the duty or liability of a paid agent, to whom property is delivered, as a warehouseman, or forwarding agent, is the same as that of a person employed about property in the possession of the employer, as where there is no specific article of property in the case, as, a domestic servant or out-door servant, an attorney, a physician, a commercial agent. As respects the latter class, though the fact of delivery, and the circumstances attending it, may strongly affect the evidence, yet the legal ground and principle of liability, is the same where an unpaid person is made responsible for the injury or loss of property in possession of the owner, and where the property has been delivered into his possession.

In stating their liabilities, the two classes may be considered separately.

As to ordinary *paid agents*, having possession of goods, it has been remarked above, that the contract made, and the duty undertaken by them, is to give skill and diligence in the profession or business undertaken ; and to know the extent of this, reference must be had to the particular profession or business in hand, and the extent of labour and ability ordinarily understood to be required by it. Insufficiency of means or skill, and want of diligence, according to the ordinary demands of the business, render the party liable. Want of ordinary diligence, or, which is the same thing, ordinary negligence, is the language used by the cases in defining the liability of a paid agent : see *Knapp & Curtis v. Root*, 9 Wendell, 60 ; *Schmidt & Webb v. Blood & Green*, id. 268 ; & *Chenowith & Co. v. Dickinson & Shrewsberry*, 8 B. Monroe, 156, 159 ; and *Jones v. Hatchett & Bro.*, 14 Alabama, 743 ; *Hatchett & Bro. v. Gibson*, 13 id. 588 ; *Forsythe v. Walker*, 9 Barr, 148 ; cases of warehousemen ; *Caton v. Rumney*, 13 id. 387, the case of a steamboat towing a freight-boat ; *Brown v. Denison*, 2 id. 593, the case of a forwarding merchant ; *Ware v. Gay and others*, 11 Pickering, 106, the case of stage-owners' liability for injuries to passengers by the breaking down of the coach, where it was held that insufficiency in the coach, or carelessness in conducting it, must be proved ; and *Stokes v. Saltonstall*, 13 Peters, 181, is to the same effect ; *McCaw v. Kimbul*, 4 McCord, 220, the case of a cotton-ginner ; *Newton v. Pope*, 1 Cowen, 109, the case of one hired to drive horses. In *Foot v. Storrs*, 2 Barbour's S. C. 327, it was said that wharfingers and warehousemen were liable only for common and reasonable care.

The attempts made by some of the judges to explain to the jury what is meant by ordinary neglect, by saying that it is the degree of care which a prudent man takes in relation to his own affairs, or other similar periphrases, have not been very felicitous. It seems to be strictly right, and far more intelligible and practical, to say, as was decided in *Moore v. The Mayor, &c.*

of Mobile, 1 Stewart, 284, to be correct, that a paid agent is liable, if negligent, and not liable, if not negligent.

The action against a paid agent may be either *assumpsit* or *case*; the contract is, for performing what is the legal duty; and a breach of legal duty is a fraud: or, as stated by Tindal, C. J., in pronouncing the judgment of the Exchequer Chamber, in *Boorman v. Brown*, 3 Q. B. 511, 526, "the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort." See *McCall v. Forsyth*, 4 Watts & Sergeant, 179; *Zell v. Arnold*, 2 Penrose & Watts, 292; *McCahan v. Hirst*, 7 Watts, 175; *How v. Cook*, 21 Wendell, 29; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 Howard S. Ct. 344, 411. See also *Swigert, &c. v. Graham*, 7 B. Monroe, 661, 662.

In *Alexander and others v. Green and others*, 3 Hill's N. Y., 9, it is decided, that ordinary paid agents, or bailees for hire, may by a special agreement or acceptance, discharge themselves from their implied liability for ordinary diligence, and that a contract to tow a boat "at the risk of the master or owners thereof," did discharge them from liability for "every risk arising from a want of ordinary care and skill;" but that no man can, by any contract, discharge himself from liability for his fraudulent acts. The accuracy of this case is very doubtful; the exception seems directly to contradict and repel the contract. It has since been reversed in the Court of Errors. 7 Hill, 533.

Unpaid agents, who have possession of the property of others, are persons undertaking to keep, or carry, or perform something about the thing, without reward; borrowers, hirers,—for though a hirer pays for the use of the article, he is not paid to take care of it,—finders, pawnees, &c. In all these cases there is no contract; and if there has been no conversion, so that trover will not lie, the only remedy for loss or injury, is by *action on the case*. It is true that in the books of precedents, we find in respect to some of these persons, especially hirers, declarations, called *in assumpsit*; but a little attention to these declarations, will show, that, effectively, they are in *case*. They are mixed declarations and have a double aspect. They set out an *assumpsit* for reasonable diligence; and then say that the defendant did not perform his promise, but, on the contrary, was so negligent, &c., that by reason of his negligence, &c., the damage or loss ensued,—a clause purely in *case*. Now, even if any court would, for convenience, sustain such a count as *assumpsit*,—which even the laxest, it is believed, if attention were called to the point, could not do,—still it is certain that the latter clause, charging negligence as to the cause of damage *must* be proved; and, therefore, even under this lax style of declaring, we are still bound to say, that no conduct will render the defendant liable, but such as will sustain a count, or clause of a count, in *case*. The late case, indeed, of *Garland v. Davis*, 4 Howard's S. Ct. 131, 143, 144, appears to decide that all such declarations are really in *case*, and that non-*assumpsit* is a bad plea; and see also, *Smith v. Seward*, 3 Barr, 342, 345. We may, therefore, affirm, almost with the certainty of fact, and with a confidence which no dicta, or even decisions, unless those decisions have first altered the pleadings, which they have not done, ought to disturb, that the principle, and legal ground and extent, of an unpaid bailee, or person to whom goods are delivered, for injury or loss to the goods, is the same as that of one to whom goods have not been deli-

vered, but from whose negligence or carelessness, injury or loss has ensued, while the goods were in the plaintiff's possession. Here, then, is a *legal* definition—plain, precise, and practical—of the liability of one who is in possession of another's property, and is not paid for his services; and the particular question respecting unpaid bailees, resolves itself, legally, into the more general inquiry, What is, in any case, necessary to sustain an action on the case? In the notes to *Scott v. Shepperd*, *Ashby v. White*, and *Pasley v. Freeman*, (*infra*,) the reader will find some illustrations of this action. It appears that case will lie for any injury resulting from the fraudulent conduct of another, and any conduct is fraudulent, within the scope of this remedy, which is necessarily or reasonably the cause of damage, and is not requisite to the enjoyment of the defendant's own rights. The real point of inquiry then is, whether upon the whole state of the case, from the beginning to the end of it, the defendant is fairly responsible as the *legal cause* of the injury. It is impossible to lay down any general rule as to the requisite proximity and directness of the defendant's agency in the mischief. In *Essex Bank v. Gloucester Bank*, 17 Massachusetts, 1, 30, there is an able investigation of the degree of directness necessary to make a defendant's negligence the legal and actionable cause of mischief. It may be observed, that the law, when it is led on by the scent of bad faith or unfair dealing, will go extremely far in fixing the responsibility of causation upon a defendant; and any one who will familiarize his mind with the principles of law, and evidence, and reasoning, embodied in such cases as *Pasley v. Freeman*, will have no difficulty in understanding what circumstances will make an unpaid bailee liable. We learn from that case, and those which have followed it, that if a defendant has knowingly made false representations about the circumstances of another, and the plaintiff acting upon them, has suffered a loss, the defendant is in law responsible, as the *legal cause* of that loss. If the representations or promises of a defendant have caused or induced the plaintiff to put his property into the defendant's possession, it is easy to see, that if his subsequent conduct falsifies those promises and expectations, and if the trusting of the property to his possession, is, upon a fair view of the whole case, to be regarded as the cause of an injury that befalls it, though proceeding from the agency of nature, or the acts of third persons, the defendant's false representations and bad faith, may justly be considered the *legal and fraudulent cause* of the injury; but, as before remarked, everything must depend on the particular circumstances. Again, if, after the property is in the defendant's possession, he, by positive act, exposes it in such a way as to invite and bring on injury from third persons, he will, in many cases, be properly considered as the *cause* of the injury; but, here, also, the special facts and motives must determine whether the third person is to be made wholly responsible, or whether the defendant's conduct has so far induced the injurious agency, as to be fairly the cause of it. Finally, if the negligent acts of the defendant have directly produced the damage, and a fortiori, if actual fraud on his part, has done the mischief, he is liable in an action on the case.

We find it frequently laid down, that an unpaid bailee is liable only for *gross negligence*. This, it will be observed, is not a legal term; the declaration charging only *fraud*, or *careless* and *negligent* conduct, producing damage: it is an expression used by judges and text-writers, to explain

what is meant by the legal terms used in the declaration. If actual fraud, and malignity of design, is the point of the case, then gross negligence must mean, such wanton carelessness as satisfies the jury of such corrupt design; but if—as is more frequently the case,—actual fraud in fact cannot be inferred, then negligence must be considered gross or not, according to the degree in which it is *the cause* of the injury. Nearly all the confusion and obscurity which belong to the subject of bailments, have been occasioned by the unfortunate introduction of the words *gross* and *slight negligence*, which do not belong to our law, and which convey no precise idea. The civil-law distribution and classification of these liabilities, is entirely different from ours: our law has conceived of the legal obligations and duties of men, in relation to their neighbour's property, and has, by this *action on the case* defined them, with so much comprehension and precision, that the same principle applies irrespectively of the seat of the possession.

The late case of *Wilson v. Brett*, 11 Meeson & Welsby, 113, forcibly illustrates the inapplicability of the distinctions, recited by Lord Holt from the civil law, between the cases where the bailment is exclusively for the benefit of the bailor, and where it is exclusively for the benefit of the bailee, or where it is for the joint benefit of both; and shows that in regard to an unpaid bailee, the liability is simply for *negligence* under the circumstances of the case, which will vary with the skill and knowledge which the bailee is shown to possess; and ROLFE, B., observes that he could see no difference between *negligence* and *gross negligence*,—that it was the same thing, with the addition of a vituperative epithet. See also the remarks of PARKE, B., in *Wyld v. Pickford*, 8 id. 443, 461, 462, and of Lord DENMAN, C. J., in *Hinton v. Dibbin*, 2 Q. B., 646, 661, as to the want of an intelligible distinction between negligence and gross negligence.

It may be proper to note, that where *money* is the subject of bailment, or delivery to an agent, paid or unpaid, *assumpsit* is the proper remedy; *assumpsit* in the form of *money had and received*, usually being in case of *money*, a substitute alike for trespass, trover and case; though, as a substitute for trover, there need be no previous demand. See *Graves et al. v. Ticknor*, 6 New Hampshire, 537, and *Gordon and wife v. Camp*, 2 Florida, 422, 428.

It has been stated above, that, in trover, proof of demand and refusal, throws upon the defendant the burden of proving that the property was lost or stolen. In case, the burden of proving negligence is on the plaintiff. *Harrington v. Snyder*, 3 Barbour's S. Ct. 380, 383; *Foote v. Storrs*, 2 id. 327; *Runyan v. Caldwell*, 7 Humphreys, 134; *Mims v. Mitchell*, 1 Texas, 440, 453. Where the goods have not been returned or delivered by the defendant, the most convenient way for the plaintiff to proceed, appears to be, first, to make a demand, and then to bring trover and case: the demand and refusal will cause a recovery on the former count, unless the defendant prove a loss or theft; and then upon the latter, the plaintiff will recover if he prove that negligence caused the loss; but the burden of this is upon him. In *Beckman & Johnson v. Shouse et al.*, 5 Rawle, 179, 190, in *assumpsit*, against one liable as a paid agent, it is said, that the course of proof is similar; that proof of the contract and delivery, puts the defendant to prove loss, and then the plaintiff must show negligence; and in *Clark & Co. v. Spence*, 10 Watts, 335, 337, the same thing is said, in what the book calls an action on the case. This disregard of the forms of actions, is an

elegancy believed to be peculiar to Pennsylvania practice. If a hired article is returned in a damaged state, and the hirer will give no explanation or account of the injury, there is an implication of negligence, and the burden of disproving it is on him; *Logan v. Mathew*, 6 Barr, 417.

The practical deduction from this consideration of the remedies which the law has given against an unpaid bailee is this:—For a conversion of the goods, he is liable in trover; for an injury or loss he is liable in case: and when the latter action is brought, the first inquiry is, whether upon the whole state of the case between the parties, the defendant's conduct can be regarded as having been the legal cause of the injury or loss; and where there is evidence of a bad intention, the chain of causation ought to be carried back very far: the next inquiry is, whether the defendant can be regarded as fraudulently the cause; and any conduct is fraudulent in law, which the defendant might reasonably have foreseen would produce injury and which is not necessary to the defendant's enjoyment of his own rights; a fortiori, conduct is fraudulent which springs from a bad design.

But, lest this view of principles should be erroneous, and mislead the reader, the American cases are here briefly appended.

In the great case of *Foster and another, Executors, &c. v. The Essex Bank*, 17 Massachusetts, 479, the court say, that in case of a deposit to be kept without reward, "the bailee will be answerable only for gross negligence, which is considered as equivalent to a breach of faith," p. 498; the bailor "shall be the loser, unless the person in whom he confided, has shown bad faith, in exposing the goods to hazards, to which he would not expose his own," p. 501; "the depository is answerable, in case of loss, for gross negligence only, or fraud, which will make a bailee of any character answerable," p. 507: and it might be added, would make any body liable, whether a bailee or not. The late case of *Whitney and Wife v. Lee*, 8 Metcalfe, 91, establishes the same rule. *Stanton and Little v. Bell & Joiner*, 2 Hawks, 145, was the case of a mandatory, gratuitously undertaking to act about certain goods for the benefit of the bailor; the court below charged, "that the defendants were bound to use that care and diligence which a prudent and discreet man would use relative to his affairs;" and a majority of the court held this to be erroneous, and said, that this rule applied to a mandatory who acts for a reward, and that the jury should have been instructed, "that the defendants were only liable for fraud or gross neglect;" and on that account alone, granted a new trial. In *Beardslee v. Richardson*, 14 Wendell, 25, the court said that a mandatory carrying gratuitously a sealed letter, containing money, was liable, in case only for gross neglect: "The plaintiff," (per SAVAGE, C. J.) "was bound to show that the money was lost by the defendant's negligence, or could not be obtained upon request. Had he shown a demand and refusal, the defendant, I think, would have been bound to account for the loss, and to indemnify the plaintiff, unless he could show the property lost without fault on his part, that is, without gross negligence:" the meaning of the learned chief justice appears to have been, that if the plaintiff could prove a *conversion*, of which a demand and refusal would be prima facie evidence, he should recover the value in damages; (but, then, according to *Wheelock v. Wheelright*, 5 Massachusetts, 104, the action should be trover;) but that if there were no conversion, then, in an action on the case, gross neglect must be proved. *Tompkins v. Saltmarsh*,

14 Sergeant & Rawle, 275, was assumpsit, against one who had gratuitously undertaken to carry a letter containing money, which he never delivered; the court, per DUNCAN, J., said, that in such a case, "the bailee is only liable for *gross negligence*, *dolo proximus*, a practice equal to a fraud. It is that omission of care, which even the most inattentive and thoughtless men, never fail to take of their own concerns." In *Millon v. Salisbury*, 13 Johnson, 211, it was held, that the hirer of a horse was not liable, when not proved guilty of ill treatment, or conversion to another use; "as to all accidents naturally incident to the use of the horse, in the manner contracted for, the law imposes the risk on the bailor;" and this is confirmed in *Harrington v. Snyder*, 3 Barbour's S. Ct. 380, 382. In *Hawkins v. Phythian*, 8 B. Monroe, 515, 518, the court said, that a hirer would be responsible only for want of ordinary care, which is, such care as a man of ordinary prudence would take of his own property. In *Swigert, &c. v. Graham*, 7 Id. 661, the court investigated the ground upon which the hirer of a slave was liable for accidents happening to him, and laid down the following general principles; that a bailee on hire is bound to ordinary diligence, and responsible for ordinary neglect; but ordinary diligence varies not only with the circumstances of the case, but with the nature of the subject; and what, in respect to one species of property, might be gross neglect, might, in respect to another, be extraordinary care; and under peculiar circumstances of danger, extraordinary exertions may be required of one who is bound only to ordinary diligence; or, in other words, the circumstances may be such that extraordinary exertions are nothing more than ordinary diligence; that ordinary diligence means that degree of care, attention, or exertion, which under the actual circumstances, a man of ordinary prudence and discretion would use in reference to the particular thing, were it his own property, or in doing the particular thing were it his own concern. See, also, *Mims v. Mitchell*, 1 Texas, 443, 453. *Todd v. Figley*, 7 Watts, 542, is reported in too vague a manner, to enable us to judge what principle as to the liability of a borrower is decided: the court say, he is liable for "an injury happening to the mare even from slight neglect" on his part; and afterwards they appear to approve of the liability being rested on the principle that any neglect occasioning the injury, would render him answerable: and upon the whole, the decision seems to be rested on the question, whether or not the neglect of the defendant, was the cause of the injury. In *Anderson v. Foresman*, Wright's Ohio, 598, the judge told the jury, that one carrying money without reward, is bound to take the same care of it that he does of his own; but in *Monteith v. Bissell's Adm'r*, id. 411, the same judge said, that a bailee of money without reward, is not liable for slight neglect but only *gross neglect*; and that if he kept the money where he kept his own, he was not liable. See also *McLean v. Rutherford*, 8 Missouri, 109. In *Fellowes & Co. v. Gordon & Barnett*, 8 B. Monroe, 415, 416, the court said that gratuitous bailees, having undertaken the commission and proceeded in its execution, were "bound to proceed with reasonable care and diligence, according to the terms of the mandate." In *Tracy et al. v. Wood*, 3 Mason, 132, the case of one gratuitously carrying two bags of money, Mr. Justice STORY, in charging the jury said: "I agree, that in cases of bailees without reward, they are liable only for gross negligence. The language of the books as to what constitutes gross negligence, or not, is sometimes loose

and inaccurate, from the general manner in which propositions are stated. When it is said, that gross negligence is equivalent to fraud, it is not meant, that it cannot exist without fraud. There may be very gross negligence, in cases where there is no pretence that the party has been guilty of fraud; though certainly such negligence is often presumptive of fraud. It appears to me, that the true way of considering cases of this nature, is, to consider whether the party has omitted that care which bailees, without hire, or mandataries of ordinary prudence, usually take of property of this nature. If he has, then it constitutes a case of gross negligence. The question is not, whether he has omitted that care, which very prudent persons usually take of their own property, for the omission of that would be but slight negligence; nor whether he has omitted that care which prudent persons ordinarily take of their own property, for that would be but ordinary negligence. But whether there be a want of that care, which men of common sense, however inattentive, usually take, or ought to be presumed to take, of their property, for that is gross negligence. The contract of bailees without reward, is not merely for good faith, but for such care as persons of common prudence in their situation usually bestow on such property.—If they omit such care, it is gross negligence.” This was a bailment of money, of which, said the learned judge, much greater care is always taken, than of other things. “He kept his own money in the same valise, and took no better care of it than of the plaintiff’s. Still if the jury are of opinion, that he omitted to take that reasonable care of the gold, which bailees without reward in his situation usually take, or which he himself usually took of such property, under such circumstances, he has been guilty of gross negligence.” See other cases cited in note to *Wilson v. Brett*, 11 M. & W. 113, 116.

It was observed before, that the phrases gross negligence, and slight negligence, are not legal terms, but are used by judges to explain the legal language in the declaration; and it would seem, that unless they do express the common law notion of actionable negligence, more clearly and without error, they had better be disused. Now it is clear from the above cases, especially *Tracy et al. v. Wood*, that the term *gross negligence*, is not to be taken in its ordinary and every-day meaning: it appears from *Tracy et al. v. Wood*, that it is a technical and artificial phrase, the meaning of which it is almost impossible to define with precision. *Tracy et al. v. Wood*, implies that the definition of gross negligence, given in the cases from *Wright’s Reports*, and one of the definitions given in *Foster, &c. v. The Essex Bank*, that gross negligence is, the exposing the property to hazards, to which the defendant would not expose his own, is erroneous. But, so difficult and perplexing is this phrase, that the learned judge in *Tracey et al. v. Wood*, has given not less than five clearly different explanations, or rules to guide the jury. He first defines it, the want of that care which unpaid bailees, of ordinary prudence, usually take of bailed property: then, of that care, which men of common sense, however inattentive, usually take of their own property: next, the care which such men ought to be presumed to take of their own property: then it is, the reasonable care which unpaid bailees usually take of bailed property: and then, that reasonable care which he himself usually took of bailed property. Without being too critical, it may certainly be said, that in each of these sentences, a different rule is given:

and that all of them are too vague and general, to be capable of application by a jury. It is believed, that the common law principle set out in the nature of the action, that any negligent conduct which causes injury or loss, or which satisfies the jury that there has been fraud and collusion, is actionable, explains itself more clearly, than these various definitions explain it. The expressions convey so indefinite a meaning, that we find Lord HOLT saying, that a hirer and borrower, are both liable for slight negligence, and Sir W. JONES, and Mr. Justice STORY, maintaining, that a borrower is liable for slight negligence, and a hirer only for gross negligence. To what test are these differences to be submitted, and by what arbiter decided? There is none but the form of the pleadings. The action against both is the same, and charges negligent conduct occasioning injury or loss: from which it appears, that the older judge is right, in saying that the same degree of negligence will make both liable (with which BLACKSTONE agrees): and also in saying, that slight negligence, or any negligence, if it be the legal cause of the injury or loss, will make them liable.

H. B. W.

[*105] *ASHBY v. WHITE ET ALIOS.

TRINITY.—2 ANNÆ.

[REPORTED, LORD RAYMOND, 938.]

A man who has a right to vote at an election for members of parliament may maintain an action against the returning officer for refusing to admit his vote, though his right was never determined in parliament, and though the persons for whom he offered to vote were elected.(a)

BUCKINGHAMSHIRE, to wit. Matthias Ashby complains of William White, Richard Talbois, William Bell, and Richard Heydon, being in the custody of the marshal of the Marshalsea of the lord the king, before the king himself, for that, to wit, That whereas on the 26th day of November, in the 12th year of the reign of the lord the now king, a certain writ of the said lord the now king, issued out of the Court of Chancery of him the said

(a) [S. C. Salk. 19. 3 Salk. 17. Holt, 524. 6 Mod. 45. Vide 1 Bro. Parl. Cas. 47. 8 St. Tr. 89. Somewhat similar to this action is that of Peering v. Harris, 2 Moo. & Rob. 5, against an overseer for maliciously omitting a parishioner's name from the rate, per quod she was unable to obtain a beer license. So, against a sheriff for delaying to execute a writ, per quod the plaintiff incurred unnecessary costs. Mason v. Paynter, 1 Q. B. 974. So, against an officer of customs, for refusing to sign a bill of entry, without payment of an excessive duty, Barry v. Arnaud, 10 Ad. & El. 646. See as to an action against a clergyman for refusing to marry, Davis v. Black, 1 Q. B. 900.]

lord the now king, at Westminster, in the county of Middlesex, directed to the then sheriff of Buckinghamshire aforesaid, reciting that the said lord the king, by the advice and assent of his council, for certain arduous and urgent business concerning him the said lord the king, the state, and the defence of his realm of England, and of the church of England, had ordained his certain parliament to be holden at his city of Westminster, on the 6th day of February, then next coming, and there with the prelates, nobles, and peers of his said kingdom, to have discourse and treaty, the said lord the now king commanded the then sheriff of Buckinghamshire, by the said writ firmly enjoining, that, having made proclamation in his next said county court after the receipt of the same writ to be holden, of the day and place aforesaid, two knights, girded with swords, the most fitting and discreet of the county aforesaid, and of every city of that county *two citizens, and of every borough two burgesses of the more discreet [*106] and most sufficient, should be freely and indifferently chosen by those whom such proclamation should concern, according to the form of the statute thereupon made and provided, and the names of the said knights, citizens, and burgesses, so to be chosen, to be inserted in certain indentures thereof, to be made between him, the then sheriff, and those who should be concerned at such election (although such persons to be chosen should be present or absent), and should cause them to come at the said day and place; so that they the said knights, citizens, and burgesses, might severally have full and sufficient power for themselves and the commonalty of the county, cities, and borough aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm of him the said lord the now king (by God's assistance), upon the business aforesaid; so that for want of such power, or because of an improvident election of the knights, citizens, and burgesses aforesaid, the said businesses might not in any wise remain undone; and should certify, without delay, that election made in the full county of him the then sheriff, distinctly and openly, under his seal, and the seals of those who should be concerned at that election, to the said lord the now king, in his Chancery, at the said day and place; sending to him the said lord the king, the counterpart of the indenture aforesaid, sewed to the same writ, together with that writ; which said writ, afterwards, and before the 6th day of February in the writ aforesaid mentioned, to wit, on the 29th day of December, in the twelfth year abovesaid, at the borough of Aylesbury, in the said county of Bucks, was delivered to one Robert Weedon, Esq., then sheriff of the same county of Bucks, to be executed in form of law; by virtue of which said writ, the aforesaid Robert Weedon, being then and there sheriff of the county of Bucks aforesaid, as before is set forth, afterwards and before the aforesaid 6th day of February, to wit, on the 30th day of December, in the 12th year abovesaid, at the borough of Aylesbury aforesaid, in the said county of Bucks, made his certain precept in writing, under the seal of him the said Robert Weedon, of his office of sheriff of the county of Bucks aforesaid, directed to the constables of the borough of Aylesbury aforesaid, reciting *the day and place of the parliament aforesaid to be holden, thereby requiring them and giving to them in command, that having [*107] made proclamation within the borough aforesaid of the day and place in the same precept recited, they should cause to be freely and indifferently chosen

two burgesses of that borough, of the more discreet and most sufficient, by those whom such proclamation should concern, according to the form of the statutes in such cases made and provided, and the names of the said burgesses so elected (although they should be present or absent) to be inserted in certain indentures between the said sheriff and those who should have interest in such election; and that he should cause them to come at the day and place in the same precept recited, so that the said burgesses might have full and sufficient power for themselves and the commonalty of the borough aforesaid, to do and consent to those things which should then happen to be ordained there of the common council of the said realm (by God's assistance) upon the business aforesaid; so that for want of such power, or because of an improvident election of the burgesses aforesaid, the said businesses might not remain undone; and that they should, without delay, certify the election to him the said then sheriff, sending to the same sheriff the counterpart of the indenture aforesaid annexed to the said precept, that he the said sheriff might certify the same to the said lord the king in his Chancery at the day and place aforesaid, which said precept afterwards and before the said 6th day of February, to wit, on the same 30th day of December in the year abovesaid, at the borough of Aylesbury aforesaid, in the said county of Bucks, was delivered to them the said William White, Richard Talbois, William Bell, and Richard Heydon, then, and until after the return of the same writ, being constables of the borough of Aylesbury aforesaid, to be executed in form of law; to which said William White, Richard Talbois, William Bell, and Richard Heydon, by reason of their office of constables of the borough aforesaid, the execution of that precept of right did then and there belong: by virtue of which said precept, and by force of the writ aforesaid, they the said burgesses of the borough of Aylesbury, being in that behalf duly forewarned, afterwards and before the 6th day of February, [*108] to wit, on the 6th day of January in the 12th year aforesaid, at the borough of Aylesbury aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the constables aforesaid, were assembled to elect two burgesses for the borough, according to the exigency of the writ and precept aforesaid, and during that assembly, to that intention, and before such two burgesses, by virtue of the writ and precept aforesaid, were elected, to wit, on the day and year last abovesaid, at the borough of Aylesbury aforesaid, in the county aforesaid, he, the said Matthias Ashby, then and there, being a burgess and an inhabitant of the borough aforesaid, and not receiving alms there or any where else, then or before, but being duly qualified and entitled to give his vote for the choosing of two burgesses for the borough aforesaid, according to the exigency of the writ and precept aforesaid, before them the said William White, Richard Talbois, William Bell, and Richard Heydon, the four constables of that borough, to whom then and there it did duly belong to take and allow the vote of him the said Matthias Ashby, of and in the premises, was ready and offered to give his vote for choosing Thomas Lee, bart. and Simon Mayne, Esq., two burgesses for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and the vote of him, the said Matthias, then and there of right ought to have been admitted; and the aforesaid William White, Richard Talbois, William Bell, and Richard Heydon, so being then and there constables of the borough aforesaid, were then and there

requested to receive and allow the vote of him the said Matthias Ashby, in the premises; nevertheless they, the said William White, Richard Talbois, William Bell, and Richard Heydon, being then and there constables of the borough aforesaid, well knowing the premises, but contriving, and fraudulently and maliciously intending to damnify him the said Matthias Ashby, in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him, the said Matthias Ashby, to give his vote in that behalf, and did then and there absolutely refuse to permit him, the said Matthias Ashby, to give his vote for choosing two burgesses for that borough to the parliament aforesaid, and did not receive, nor did they allow the vote of him, the said Matthias Ashby, for that election: and two burgesses of *that borough were elected for the parliament aforesaid (he, the said Matthias Ashby, being [*109] excluded, as before is set forth) without any vote of him, the said Matthias Ashby, then and there, by virtue of the writ, and precept aforesaid, to the enervation of the aforesaid privilege of him, the said Matthias Ashby, of and in the premises aforesaid: whereupon the said Matthias Ashby saith that he is injured, and hath sustained damage to the value of 200*l.*, and thereupon he brings suit, &c. Not guilty. Verdict for the plaintiff.

Note.—Judgment was arrested in B. R. by three judges against Holt. But on the 14th of January, 1703, this judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen.

After a verdict for the plaintiff on not guilty pleaded, it was moved in arrest of judgment by Serjeant Whitaker, that this action was not maintainable. And for the difficulty, it was ordered to stand in the paper, and was argued Trin. 1 Q. Anne by Mr. Weld and Mr. Montague for the defendants, and this term judgment was given against the plaintiff, by the opinion of Powell, Powys, and Gould, justices, Holt, chief justice, being of opinion for the plaintiff.

Gould, J.—I am of opinion, that judgment ought to be given in this case for the defendants, and I cannot by any means be reconciled to give my judgment for the plaintiff, for there are no footsteps to warrant such an opinion, but only a single case. I am of opinion, that this action is not maintainable for these four reasons: first, because the defendants are judges of the thing, and act herein as judges: secondly, because it is a parliamentary matter, with which we have nothing to do: thirdly, the plaintiff's privilege of voting is not a matter of property or profit, so that the hindrance of it is merely *damnum sine injuria*: fourthly, it relates to the public, and is a popular offence.

As to the first, the king's writ constitutes the defendant a judge in this case, and gives him power to allow or disallow the plaintiff's vote. For this reason it is, that no action lies against a sheriff for taking insufficient bail, because he is the judge of their sufficiency. So is the case of *Medcalf v. Hodgson*, Hutt. 120, and their sufficiency is not traversable, 1 Lev. 86, *Bentley v. Hore*. Upon the same reason the resolution of the court is founded in the case of *Hammond v. Howell*, 2 Mod. 218, that no(*a*) action lies *against a man for what he does as a judge. 9 Hen. 6, 60, p. 9. [*110]

2. This is a parliamentary matter, and the parliament is to judge whether the plaintiff had a right of electing or not; for it may be a dispute, whether

the right of election be in a select number or in the populace; and this is proper for the parliament to determine, and not for us: and if we should take upon us to determine that he has a right to vote, and the parliament be of opinion that he has none, an inconvenience would follow from contrary judgments. So in 2 Vent. 37, *Onslow's case*, it is adjudged that no (b) action lies for a double return of members to serve in parliament. The resolution of the King's Bench in the case of *Barnardiston v. Soame*, 2 Lev. 114, was given on this particular reason, that there had been a determination before in parliament in favour of the plaintiff. And Hale said, we pursue the judgment of the parliament; but the plaintiff would have been too early, if he had come before; and yet that judgment was reversed.

3. It is not any matter of profit, either *in presenti* or *in futuro*. To raise an action upon the case, both damage and injury must concur, as is the case of 19 Hen. 6, 44, cited Hob. 267. If a man forge a bond in another's name no action upon the case lies, till the bond be put in suit against the party; so here, it may be this refusal of the plaintiff's vote may be no injury to him according as the parliament shall decide the matter: for they may adjudge, that he had no right to vote, whereby it will appear, the plaintiff was mistaken in his opinion as to his right of election, and consequently has sustained no injury by the defendant's denying to take his vote.

4. It is a matter which relates to the public, and is a kind of popular offence, and therefore no action is given to the party; for by the same reason one man may bring an action, a hundred may, and so actions infinite for one default; which the law will not allow, as is agreed in *William's case*, 5 Co. 73 a, and 104 b. *Boulton's case*. Perhaps, in this case, after the parliament have adjudged the plaintiff has a right of voting, an information may lie against the sheriff for his refusal to receive it. So the case of *Ford v. Hoskins*, 2 Cro. 368. 2 Brownl. 194. Such an action as this was never [*111] brought before, and therefore shall *be taken not to lie, though that be not a conclusive reason. As to the case of *Sterling v. Turner*, 2 Lev. 50, 2 Vent. 50, where an action was brought by the plaintiff, who was candidate for the place of bridge-master of London, for refusing him a poll, and adjudged maintainable, there is a loss of a profitable place. So the case of *Herring v. Finch*, 2 Lev. 250, where the plaintiff brought an action on the case against the defendant, for that the plaintiff being a freeman, who had a voice in the election of mayor, the defendant being the present mayor, refused to admit his voice; in that case the defendant is guilty of a breach of his faith: and in both these cases the plaintiff has no other remedy, either in parliament or any where else, as the plaintiff in our case has. So that I am of opinion, that judgment ought to be given for the defendant upon the merits. But upon this declaration the plaintiff cannot maintain any action, for the plaintiff does not allege in his count, that the two burgesses elected were returned, and if they were never returned, there is no damage to the plaintiff. See 2 Bulstr. 265. But I do not rely upon this fault in the declaration.

Powys, J.—I am of the same opinion, that no action lies against the defendant, 1. Because the defendant as bailiff is *quasi* a judge, and has a distinguishing power either to receive or refuse the votes of such as come to vote, and does preside in this affair at the time of election: though his

determination be not conclusive, but subject to the judgment of the parliament, where the plaintiff must take his remedy.

2. If the defendant misbehave himself in his office by making a false or double return, an action lies against him for it on the late statute, 7 & 8 W. 3, c. 7, and therein all this matter of refusing the plaintiff's vote is comprised, and all the special matter is scanned in that action. And if you allow the plaintiff to maintain an action for this matter, then every elector may bring his action, and so the officer shall be loaded with a number of actions, that may ruin him; and he may follow one law suit, though he may not be able to follow many. These actions proceed from heat, I will not call it revenge; and it is not like splitting of actions, *scilicet*, of one cause of action into many, but the causes of action are several, and the court cannot unite them, but *A., B., C., D., E., and a hundred more, may at this rate bring actions. [*112]

3. There is a vast intricacy in determining the right of electors, and there is a variety, and a different manner and right of election in every borough almost. As in some boroughs every potwaller has a right to vote, in some residents only vote, and in others the outlying burgesses that live a hundred miles off; nay, I know *Ludlow* a borough, where all the burgesses' daughters' husbands have a right to vote. But now all this matter is comprised in an action against the officer for a false return. But it is objected, that by the law of *England* every one who suffers a wrong has a remedy; and here is a privilege lost, and shall not the plaintiff have a remedy? To that I answer, first, it is not an injury, properly speaking; it is not *damnum*, for the plaintiff does not lose his privilege by this refusal, for when the matter comes before the committee of elections, the plaintiff's vote will be allowed as a good vote; and so in an action upon the case by one of the candidates for a false return, this tender of his vote by the plaintiff shall be allowed as much as if it had been given actually and received. And if this refusal of the plaintiff's vote be an injury, it is of so small and little consideration in the law, that no action will lie for it; it is one of those things within the maxim, *de minimis non curat lex*. In the case of *Ford v. Hoskins*, 2 Cro. 368. Mod. 833. 2 Bulstr. 336, 1 Roll. Rep. 125, where an action is brought against the lord of a copyhold manor, for refusing to accept one named as successor for life by the preceding tenant for life, according to the custom, there the plaintiff suffers an injury, and yet it is adjudged that no action lies. The late statute 7 & 8 W. 3, c. 7, gives an action against the officer for a misfeasance to the party grieved, *i. e.* to the candidate, who is to have his vote; so that by the judgment of the parliament he cannot have any action. Before the statute of 23 Hen. 6, no action^(b) lay for the candidate, who was the party aggrieved, against the officer, for a false return, because it related to parliamentary matters, as is adjudged 3 Lev. 29, 30, *Onslow v. Raply*, and yet he had an injury; and till the 7 & 8 W. 3, no action^(c) lay for the candidate against the officer for a double return, as is adjudged in the same *case, 3 Lev. 29, 2 Ventr. 37, and yet he suffered an injury thereby; à fortiori no action shall lie for the plaintiff in this case. [*113]

4. This action is not maintainable for another reason, which I think is a

(b) D. cont. 1 Wils. 127.

(c) D. cont. 1 Wils. 127.

weighty one, viz. this action is *primæ impressionis*; never the like action was brought before, and therefore as (d) Littleton, s. 108, uses it to prove that no action lay on the statute of Merton, 20 Hen. 3, c. 6, *si parentes conquerantur*, for if it had lain, it would have sometimes been put in use: so here. So in the case of Lord Say and Seale v. Stephens, Cro. 142, for the law is not apt to catch at actions. It is agreed by the consent of all ages, that no (e) action lay at common law against the officer for a double return; and yet in one year, viz. 1641, there was no less than seventy double returns, and yet they made no act to help it, though the parliament could not be misconusant of the matter.

5. Another reason against the action is, that the determination of this matter is particularly reserved to the parliament, as a matter properly consusable by them; and to them it belongs to determine the fundamental rights of their house, and of the constituent parts of it, the members; and the courts of Westminster shall not tell them who shall sit there. Besides we are not acquainted with the learning of elections; and there is a particular cunning in it not known to us, nor do we go by the same rules, and they often determine contrary to our opinion without doors. The late statute, which enacts that the last determination of the house as to the right of election shall be a rule to the judges in the trial of any cause, is a declaration of their power; and the paths the judges are to walk in are chalked out to them, so that they are not left to use their own judgment; but the determination of the house is to be the rule of law to us, and we are not to examine beyond that. Suppose in this action we should adjudge one way, and after in parliament it should be determined another way; or suppose a judge of nisi prius, before whom the cause comes to be tried, should say, "I am not bound by the rule of the last determination in parliament in this action, for this is another sort of action, not within the meaning of the statute;" these things would be of ill consequence.

[*114] 6. Another reason against this action is, that if we should *allow this action to lie for the plaintiff, à fortiori we must allow an action to be maintainable for the candidates against the defendant for the same refusal; for the candidates have both *damnum et injuriam*, and are the parties aggrieved; and if we should allow that, we shall multiply actions upon the officers, at the suit of the candidates, and every particular elector too; so that men will be thereby deterred from venturing to act in such offices, when the acting therein becomes so perilous to them and their families. I will not insist upon the exceptions to the declaration, but give my opinion upon the merits. I think there is a sufficient allegation in the count of the return of the election, especially after a verdict. Nor shall I insist that it does not appear in the declaration how near the party was to be chosen; nor that this action is brought merely for a possibility; for this is an action for a personal injury; and the plaintiff might give his vote for which he pleased, either the candidate that had fewer or more voices; or he might give his vote for one who had no other burgess's voice but the plaintiff's own; for the plaintiff, in those cases, is deprived as much of his privilege as if the person for whom he voted was nearest to be chosen. But it has been objected, that the defendant should not have absolutely refused

(d) Vide Co. Litt. 81, b. 13 Ed. n. 2.

(e) D. Cont. 1 Wils. 127.

to receive the plaintiff's vote, but should have reserved it for scrutiny, and should have admitted it *de bene esse*. To that I answer: he might indeed have done so; but he was not obliged to do it, for the officer is supposed to know every man's right and pretence of election, and commonly the weaker party are for bringing in new votes, and devising new contrivances; but the officer ought to disallow them at first, and not to give so much countenance to such a practice as to reserve it for a scrutiny. As here in Westminster-hall, when a matter of law comes before us, if it be a clear case, we may give judgment in it on the first argument, and it will be a good judgment, although it be usual to hear several arguments. The objection of weight is the resolution between Sterling and Turner, 2 Lev. 50. Hale said that it was a good precedent: and the case of Herring and Finch, 2 Lev. 250, though as to that case it was not adjudged upon the matter of law, but went off upon a point of evidence, yet I will admit the action to lie for the plaintiff in those cases, but they do not at all relate to the parliament, but are matters of custom merely relating to the government of the city, *and are properly determinable at common law. And although it may be said, that this case also relates to the government [*115] of the town, so does a public nuisance in a highway; but if a particular person receive an injury, he may have his action; but that does not relate to the parliament as this matter does; and the whole case here turns upon that, viz. its being a parliamentary matter. If we should admit this action to lie, we shall have work enough in Westminster-hall, brought in by a side-wind; nay, so much, that we shall even be glad to petition the parliament to take this power away from us. Besides, the judgment here cannot be called properly a determination; it will only be a litigation; for our judgment cannot be cited as an authority in parliament, nor will the parliament mind it, or be bound up by it, for they(*f*) themselves are not bound even by their own determination, but may determine contrary to it, though that be a rule upon the courts of Westminster. But it has been objected, that this is no determination of the election in this judgment, but only of a particular injury. To that I answer, It will be in consequence of a determination of the election; for if the plaintiff had a right to vote, then this action is maintainable; if he has no right, then he can have no action; and by consequence, twenty others may have a right to vote, and the election may turn upon this single vote; and his right of voting is as much parliamentary as the whole election, and may as much entangle the case. It is said in Onslow's case, 2 Vent. 37, that the courts at Westminster must not enlarge their jurisdiction in these matters, further than the statute gives them; and indeed it is a happiness to us, that we are so far disengaged from the heats which attend elections. Our business is, to determine of *meum* and *tuum*, where the heats do not run so high as in things belonging to the legislature: therefore, this being an unprecedented case, I shall conclude with a saying of my lord Coke, 2 Bulst. 338: *Omnis innovatio plus novitate perturbat quam utilitate prodest.*

Powell, J.—I am of the same opinion, that the judgment ought to be arrested. As to the novelty of this action, I think it no argument against

(*f*) Vide 2 G. 2, c. 24, s. 4. 1 Doug. on Elections, 18.

the action; for there have been actions on the case brought that had never been brought before, but had there beginning of late years; and *we [*116] must judge upon the same reason as other cases have been determined by. I do not agree with my brothers upon their first reason, that the defendant is a judge. I do not understand what my brother Powys means by saying he is *quasi* a judge: surely he must be a judge or no judge. The bailiff is not a judge, but only an officer or minister to execute the precept. But I agree with them in their other reasons to give judgment against the plaintiff; and chiefly, because in this action there does not appear such an injury or damage as is necessary to maintain an action on the case. An injury must have relation to some privilege the party has. The case of *Turner and Sterling*, 2 Lev. 50, is adjudged upon a particular reason; for the defendant by refusing him the poll, deprived him of the means of knowing whether he had a right or not. If cestuy que use desires the feoffees to make a feoffment over to another, and they refuse, no action upon the case lies against them for this refusal. And in the case of *Ford against Hoskins*, 2 Bulstr. 337; 2 Cro. 368, it is resolved, that no action lies for the nominee against the lord, for refusing to keep a court, and to admit him†; yet this is a hard case, for the party is thereby deprived of the means of coming to his right. But that case differs from the case of *Sterling v. Turner*; for the party hath a known remedy in Chancery, to compel the lord to hold a court and admit him, but the other hath no remedy against the mayor but an action. Here is no injury to the plaintiff; for though he has alleged, in his declaration, that he has a right to vote, and was hindered of it by the defendant, yet that does not give him a right, unless the finding thereof by the jury do confer such right; but that cannot be so, for the jury cannot judge of this right in the first instance, because it is a right properly determinable in parliament. The parliament have a peculiar right to examine the due election of their members, which is to determine whether they are elected by proper electors, such as have a right to elect; for the right of voting is the great difficulty in the determination of the due election, and belongs to the parliament to decide. But it is objected, admitting the plaintiff had a right to vote, and was deprived of it, shall he have no remedy? To that I answer, he shall have a remedy in proper [*117] time; but the plaintiff here comes too soon; he shall have a remedy by *action after the parliament have determined that he had a right, but not before. This is not such a right, the deprivation whereof will make an injury, till it be determined in parliament. But the plaintiff has a proper remedy, by petition to the parliament setting forth his case; and after the parliament have adjudged that he had a right of voting, he shall have

† But he may have a mandamus. *Rex v. Lord of the Manor of Hendon*, 2 T. R. 484; *Rex v. Coggan*, 6 East, 431. And so may the heir. *Rex v. Masters of Brewers' Co.* 3 B. & C. 172; though in *Rex v. Rennett*, 2 T. R. 197, it had been held otherwise. [So may the surrenderee of the heir, although the heir was not admitted, upon payment of the proper fine, including the fine payable upon the descent to the heir. *R. v. Dullingham*, 8 Ad. & E. 858; 1 P. & D. 172, S. C.] But where the heir's title is clearly barred by lapse of time, a mandamus will not be granted to admit him, for he may bring ejectment without. *R. v. Agardsley*, 5 Dowl. 17. [And in cases involving questions of equity, e. g. that of the surrenderee of a trustee appointed under 11 Geo. 4, and 1 Will. 4, c. 60, s. 8, the Court of Queen's Bench will not interfere by mandamus. *R. v. Pitt*, 10 A. & E. 272. Also, inasmuch as the lord must be included in the writ, no mandamus lies to admit to a copyhold held of the crown. *R. v. Powell*, 1 Q. B. 352.]

an action at law to recover damages, when his right is so fixed and settled. The opinion of my lord Hobart in the case of Sir William Elvis and the archbishop of York, Hob. 317, 318, and the reason of that opinion, comes very near to the present case; That if the church be litigious, and two clerks be presented to the ordinary, and he award a *jure patronatus** to inquire which patron has the right, and the inquest find for one, and yet the ordinary receive the clerk of the other, contrary to the finding of the jury, in that case if the other patron bring his *quare impedit* against the usurper and his incumbent, not naming the bishop, and proves his title, he may afterwards have an action upon the case against the ordinary, for that wilful wrong, delay, and trouble, that he hath put him to; and he shall recover costs and damages, not in respect of the value of the church (for there are no damages for that by the common law, but by West. 2, 13 Edw. 1 st. 1, c. 5, s. 3), but for the other respects before mentioned. But if he name the ordinary in the *quare impedit*, he can have no other action of the case; neither shall he have such action upon the case before he hath tried his title in a proper action, and against the proper parties. So that in that case, though the patron's right, being found by the jury on the *jure patronatus*, is in some measure determined, yet he shall not maintain an action upon the case against the ordinary, but he must first prove his title in a proper manner by a *quare impedit*, and thereby prove the ordinary a disturber; and after that he may bring his action on the case, against the ordinary for his damages. Where the party has no possibility of settling his right, as in the case of Sterling and Turner, there he shall maintain his action for the disturbance before his right be settled; but where he has a proper method, as in our case, he shall not maintain an action till his right be determined; and the reason of this difference is very strong, because of the inconveniences of contrary determinations upon the several *actions, or [*118] of the different judgments by the House of Commons, and the judges at common law: for the house may be of opinion that the plaintiff has a right to vote, and yet the judges may be of opinion upon the action that he hath none, and give judgment against him; and even though he has a right, he will have no remedy; *et e converso*. But this difference of opinions will be prevented by such previous application to the house before any action brought. Besides, in this case, here is not a damage, upon which this action is maintainable; for, to maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion, or consequence of law. For a possibility of a damage, as an action upon the case, lies for the owner of an ancient market, for erecting a new market near his; and yet perhaps the cattle that come to the old market might not be sold, and so no toll due; and consequently no real damage, but there is a possibility of damage. But in our case there is no possibility of a damage. It is laid in the declaration, that the defendant obstructed him from giving his vote; but that is too general, without showing the manner how he obstructed him, as that the defendant kept him out of the usual place where the votes are taken. The plaintiff shows no damage in his count, and the verdict will not supply it, for the plaintiff ought always allege a damage, as in an action upon the case brought against the lessee by him in the reversion, for refusing to permit him to enter to view waste, it would not be suf-

* See the nature of this proceeding explained, 3 Bl. Comm. 246.

ficient to allege thus generally, the defendant obstructed him, &c. It is laid here, that the defendants ipsum the plaintiff *ad suffragium suum dare obstruxerunt, et penitus recusaverunt*: I do not know what that means in this case. Indeed, it is a sufficient description of a disseisin of a rent seek; but if the plaintiff gives his vote for a candidate, that is as effectual as if the officer writ it down, for it is his vote by the giving of it, and the officer cannot hinder him of it, and on a poll it will be a good vote, and must be allowed, and so there is no wrong done to the plaintiff, for his vote was a good vote notwithstanding what the defendant did. Besides, the plaintiff can make no profit of his vote; and it is like the case of a quare impedit, in which the plaintiff at common law recovered no damages, because he [*119] ought not to sell the presentation, and *so could make no profit of it. So here, for it would be criminal for the plaintiff to sell his vote. Perhaps the putting the plaintiff to trouble and charge, to maintain and vindicate his right of voting, might be sufficient damage to maintain an action on the case; but as our case is, I cannot see that the plaintiff has received any damage. Great inconveniences do attend the allowance of this action, as my brothers have said; as that it will occasion multiplicity of actions, and for that reason it is, that the law gives no action to a private person for a public nuisance, for there is a remedy by indictment to redress it. So here the plaintiff has a remedy in parliament. As to the case of *Westbury v. Powell, Co. Lit. 50, a*, where the inhabitants of Southwark had a watering-place for their cattle by custom, which was stopped up, there any inhabitant might have an action, because there was no other remedy by presentment or the like; but if it had been a nuisance presentable, no action (a) would have lain. So in the case of *Sterling and Turner*, the party had no other remedy. So in the case of *Herring and Finch*, which is a strong case; and I do not know whether an action will lie in that case, for refusing to admit his voice to the election of a mayor; but there the plaintiff has no other remedy, nor other way to settle his right. If we should adjudge that this action lies, it will be dangerous to execute any office of this nature, and will deter men from undertaking public offices, which will be a thing of ill consequence. I am of opinion upon the whole matter, that after a determination in the parliament for the plaintiff's right, the trouble and charge of vindicating it will maintain an action, but in this case no action lies, and therefore the judgment ought to be arrested.

Holt, Chief Justice.—The single question in this case is, Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer, if an action on the case will lie against such officer?

I am of opinion that judgment ought to be given in this case for the plaintiff. My brothers differ from me in opinion; and they all differ from one another in the reasons of their opinion; but notwithstanding their opinion, I think the plaintiff ought to recover, and that this action is well maintainable *and ought to lie. I will consider their reasons. My brother [*120] Gould thinks no action will lie against the defendant, because, as he says, he is a judge; my brother Powys indeed says, he is no judge, but *quasi* a judge; but my brother Powell is of opinion, that the defendant neither is a

judge, nor any thing like a judge, and that is true: for the defendant is only an officer to execute the precept, *i. e.* only to give notice to the electors of the time and place of election, and to assemble them together in order to elect, and upon the conclusion to cast up the poll, and declare which candidate has the majority.

But to proceed, I will do these two things: First, I will maintain that the plaintiff has a right and privilege to give his vote: Secondly, in consequence thereof, that if he be hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber, and that this is the proper action given by the law.

I did not at first think it would be any difficulty to prove that the plaintiff has a right to vote, nor necessary to maintain it, but from what my brothers have said in their arguments I find it will be necessary to prove it. It is not to be doubted, but that the Commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them: and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all the Commons of England. The election of knights belongs to the freeholders of the counties, and it is an original right vested in and inseparable from the freehold, and can no more be severed from their freehold, than the freehold itself can be taken away. Before the statute of 8 Hen. 6, c. 7, any man that had a freehold, though never so small, had a right of voting, but by that statute the right of election is confined to such persons as have lands or tenements to the yearly value of forty shillings at least, because as the statute says, of the tumults and disorders which happened *at elections, by the excessive and outrageous number of electors; but still the right of election is as an original right, incident to, and inseparable from the freehold. As for citizens and burgesses, they depend on the same right as the knights of shires, and differ only as to the tenure, but the right and manner of their election is on the same foundation. Now, boroughs are of two sorts; first, where the electors give their voices by reason of their burgership; or, secondly, by reason of their being members of the corporation. Littleton, in his chapter of tenure in burgage, 162, C. L. 108, b. 109, says, "Tenure in burgage is, where an ancient borough is, of the which the king is lord, of whom the tenants hold by certain rent, and it is but a tenure in socage:" and sect. 164, he says, "and it is to wit, that the ancient towns called boroughs be the most ancient towns that be within England, and are called boroughs, because of them come the burgesses to parliament." So that the tenure of burgage is from the antiquity, and their tenure in socage is the reason of their estate, and the right of election is annexed to their estate. So that it is part of the constitution of England, that these boroughs shall elect members to serve in parliament, whether they be boroughs corporate or not corporate; and in that case the right of election is a privilege annexed to the burgage land, and is, as I may properly call it, a real privilege. But the second sort is, where a corporation is created by charter, or by prescrip-

tion, and the members of the corporation as such choose burgesses to serve in parliament. The first sort have a right of choosing burgesses as a real right, but here in this last case it is a personal right, and not a real one, and is exercised in such a manner as the charter or custom prescribes; and the inheritance of this right, or the right of election itself, is in the whole body politic, but the exercise and enjoyment of this right is in the particular members. And when this right of election is granted within time of memory, it is a franchise that can be given only to a corporation: as is resolved by all the judges against my Lord Hobart, in the case of Dungannon in Ireland, 12 Co. 120, 121, that if the king grant to the inhabitants of Islington to be a free borough, and that the burgesses of the same town may elect two burgesses to serve in parliament, that^(a) such a grant of such [*122] privilege to burgesses not *incorporated is void, for the inhabitants have not capacity to take an inheritance. See Hob. 15. The principal case there was, the king constituted the town of Dungannon to be a free borough, and that the inhabitants thereof shall be a body politic and corporate, consisting of one provost, twelve free burgesses and commonalty; and in the same name may sue and be sued; *et quod ipse præfatus præpositus et liberi burgenses burgi prædicti et successores sui in perpetuum habeant plenam potestatem et auctoritatem eligendi, mittendi, et retornandi duos discretos et idoneos viros ad inserviendum et attendendum in quolibet parlamento, in dicto regno nostro Hiberniæ in posterum tenendo*, and so proceeds to give them power to treat, and give voice in parliament, as other burgesses of any other ancient borough, either in Ireland or England, have used to do. And upon this grant it was adjudged, by all the judges of England, that this power to elect burgesses is an inheritance of which the provost and burgesses were not capable, for that it ought to be vested in the entire corporation, viz. provost, burgesses, and commonalty, and that therefore the law in this case did vest that privilege in the whole corporation in point of interest, though the execution of it was committed to some persons, members of the same corporation. 12 Co. 120, 121. Hob. 14, 15. As to the manner of election, every borough subsists on its own foundation, and where this privilege of election is used by particular persons, it is a particular right vested in every particular man; for if we consider the matter, it will appear, that the particular members and electors, their persons, their estates, and their liberties, are concerned in the laws that are made, and they are represented as particular persons, and not *quatenus* a body politic; therefore, when their particular rights and properties are to be bound (which are much more valuable perhaps than those of the corporation) by the act of the representative, he ought to represent the private persons. And this is evident from all the writs, which were anciently issued for levying the wages of the knights and burgesses that served in parliament. As 46 Edw. 3, Rot. Parl. memb. 4, in dorso. For when wages were paid to the members, they were not assessed upon the corporation, but upon the commonalty as private persons, as the writ shows, which indeed is directed to the sheriff, or to the mayor, &c., yet the command is '*quod de* [*123] *communitate *comitatus civitatis, vel burgi, habere faciat militibus civibus aut burgensibus 10l. pro expensis suis.*' But now, if the cor-

(a) Vide Co. Lit. 3 a.

poration were only to be represented, and not the particular members of it, then the corporation only ought to be at the charge; but it is plain that the particular members are at the charge. And this is no new thing, but agreeable to reason and the rules of law, that a franchise should be vested in the corporation aggregate, and yet the benefit of it to redound to the particular members, and to be enjoyed by them in their private capacity. As is the case of Waller and Hanger, Mo. 832, 833, where the king granted to the mayor and citizens of London, *quod nulla prisagia sint soluta de vinis civium et liberorum hominum de London, &c.* And there it was resolved, that although the grant be to the corporation, yet it should not enure to the body politic of the city, but to the particular persons of the corporation who should have the fruit and execution of the grant for their private wines, and it should not extend to the wines belonging to the body politic; and so is the constant experience at this day. So in the case of Mellor v. Spateman, 1 Saund. 343, where the corporation of *Derby* claim common by prescription, and though the inheritance of the common be in the body politic, yet the particular members enjoy the fruit and benefit of it, and put in their own cattle to feed on the common, and not the cattle belonging to the corporation; but that is not indeed our case. But from hence it appears that every man, that is to give his vote on the election of members to serve in parliament, has a several and a particular right in his private capacity, as a citizen or burgess. And surely it cannot be said, that this is so inconsiderable a right, as to apply that maxim to it, *de minimis non curat lex*. A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes: as in the statute of 34 & 35 Hen. 8. c. 13, intituled an act for making of knights and burgesses within the county and city of Chester; where in the preamble it is said, that whereas the said county palatine of Chester is and hath been always hitherto exempt, excluded, and separated, out, and from, the King's *court, by reason whereof the said inhabitants have hitherto [*124] sustained manifold disherisons, losses, and damages, as well in their lands, goods, and bodies, as in the good, civil, and politic governance and maintenance of the commonwealth of their said county, &c. So that the opinion of the parliament is, that the want of this privilege occasions great loss and damage. And the same farther appears from the 25 Car. 2. c. 9, an act to enable the county palatine of Durham to send knights and burgesses to serve in parliament, which recites, 'whereas the inhabitants of the county palatine of Durham have not hitherto had the liberty and privilege of electing and sending any knights and burgesses to the high court of parliament,' &c. The right of voting at the election of burgesses is a thing of the highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it. These reasons have satisfied me to the first point.

2. If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; (i) for want of right and want of remedy are reciprocal. As if a

(i) D. acc. 6. Co. 58, b.

purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he(k) has lost his right to the advowson, because he has lost his *quare impedit*, which was his only remedy; for he(l) could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet(m) the heir cannot be remitted, but the advowson is lost for ever without recovery. 6 Co. 50. Where a man has but one remedy to come at his right, if he loses that he loses his right. It would look very strange, when the Commons of England are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff or other officer to deprive them of that right, and yet that they should have no remedy; it is a thing to be admired at by all mankind. Supposing then that the plaintiff had a right of voting, and so it appears on the record, and the defendant has excluded him from it, nobody can say, that the defendant has done well; then he must have done ill, for he has deprived the plaintiff of his right; so that the *plain-[*125] tiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff. Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him. How else comes an action to be maintainable by the party on the statute of 2 Ric. 2, *de scandalis magnatum*, 12 Co. 134, but in consequence of law? For the statute was made for the preservation of the public peace, and that is the reason that no writ of error lies in the Exchequer Chamber by force of the statute of 27 Eliz. in a judgment in the King's Bench on an action *de scandalis*, for it is not included within the words of the statute; for though the statute says, such writ shall lie upon judgments in actions on the case, yet it does not extend to that action, although it be an action on the case, because(n) it is an action of a far higher degree, being founded specially upon a statute, 1 Cro. 142. If then, when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible when a man has his right by the common law? This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. But there wants not a statute too in this case, for by West. 1, 3 Edw. 1, c. 5, it is enacted, "that forasmuch as elections ought to be free, the king forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or menaces, shall disturb to make free election." 2 Inst. 168, 169. And this statute, as my Lord Coke observes, is only an enforcement of the common law; and if the parliament thought the freedom of election to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute to disturb the plaintiff in this case in giving his vote at an election, and consequently actionable.

And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and

(k) Sed nunc vide 7 Ann. c. 18.

(m) Vide 6 Co. 58.

(l) Vide H. Bl. 1 Lit. s. 514. Co. Lit. 293. a.

(n) Vide 1 Bl. Com. 88.

it is impossible to prove the contrary; for a *damage* is not merely *pecuniary*, but an *injury* imports a *damage*,* when a man is thereby hindered of his right. As in an action for slanderous words, though a man [*126] does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage: for it is an invasion of his property, and the other has no right to come there; and in these cases the action is brought *vi et armis*. But for invasion of another's franchise trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say, that it will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense. Suppose the defendant had beat forty or fifty men, the damage done to each one is peculiar to himself, and he shall have his action. So if many persons receive a private injury by a public nuisance, every man shall have his action, as is agreed in Williams' case, 5 Co. 73, a.; and Westbury and Powell, Co. Lit. 56, a. *Indeed, where many men are offended by one particular act, there they must proceed by way of indictment, and not of action; for in that case the law will not multiply actions.* But it is otherwise, when one man only is offended by that act, he shall have his action; as if a man dig a pit in a common, every commoner shall have an action on the case *per quod communiam suam in tam amplo modo habere non potuit*; for every commoner has a several right. But it would be otherwise if a man dig a pit in a highway; every passenger shall not bring his action, but the(o) party shall be punished by indictment, because the injury is general and common to all that pass. But when the injury is particular and peculiar to every man, each man shall have his action. In the case of Turner v. Sterling, the plaintiff was not elected; he could not give in evidence the loss of his place as a damage, for he was never in it; but the *gist* of the action is, that the plaintiff having a right to stand for *the place, and it being difficult to determine who had the majority, he had there- [*127] fore a right to demand a poll, and the defendant, by denying it, was liable to an action. If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences. So the case of Hunt and Dowman, 2 Cro. 478, where an action on the case is brought by him in reversion against lessee for years, for refusing to let him enter into the house, to see whether any waste was committed. In that case the action is not founded on the damage, for it did not appear that any waste was done, but because the plaintiff was hindered in the enjoyment of his right, and surely no other reason for the action can be supposed.

But in the principal case, my brother says we cannot judge of this matter, because it is a parliamentary thing. O! by all means, be very tender

(o) Vide ante, 486.

of that. Besides, it is intricate, that there may be contrariety of opinions. But this matter can never come in question in parliament, for it is agreed that the persons for whom the plaintiff voted were elected, so that the action is brought for being deprived of his vote; and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make public officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to encroach or enlarge our jurisdiction; by so doing we usurp both on the right of the queen and the people; but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us, without encroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament [*128] undoubtedly would say, take your remedy at law. It is not like the *case of determining the right of election between the candidates.

My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament, and to that purpose cites the opinion of my Lord Hobart, 318, that the patron may bring his action upon the case against the ordinary after a judgment for him in a *quare impedit*, but not before. It is indeed a fine opinion, but I do not know whether it will bear debating, and how it will prove, when it comes to be handled. For at common law the patron had no remedy for damages against the disturber, but the statute 13 Ed. 1, st. 1, c. 5, s. 3, gives him damages; but if he will not make the bishop a party to the suit, he has lost his remedy which the statute gives him. But in our case the plaintiff has no opportunity to have remedy elsewhere. My brother Powys has cited the opinion of Littleton on the statute of Merton, that no action lay upon the words, "*si parentes conquerantur*," because none had ever been brought, yet he cannot depend upon it. Indeed, that is an argument, when it is founded upon reason, but it is none when it is against reason. But I will consider the opinion. Some question had arisen on the opening of that statute on those words, "*si parentes conquerantur*," &c., what was the meaning of them, whether they meant a complaint in a court in a judicial manner.† But it(p) is plain the word "*conquerantur*" means only "*si parentes lamententur*," that is, only a complaint *in pais*, and not in a court: for the guardian in socage shall enter in that case, and shall have a special writ *de ejectione custodiæ terræ et hæredis*. But this saying has no great force; if it had, it would have been destructive of many new actions, which are at

† That usage may explain the meaning of an ancient statute, see *Rex v. Scot*, 3 T. R. 604; *Sheppard v. Gosnold*, Vaugh. 169. [*Dunbar v. Roxburgh*, 3 Cl. & Fin. 335.] In *Bank of England v. Anderson*, 3 Bing. N.C. 666, per Tindal, C. J.—"We attribute great weight to that maxim of law, *contemporanea expositio fortissima est in lege*." And this is said with reference to a statute no older than 5 & 6 W. & M.

(p) Vide Litt. 108.

this day held to be good law. The case of Hunt and Dowman, before mentioned, was the first action of that nature; but it was grounded on the common reason and the ancient justice of the law. So the case of Turner and Sterling. Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, ibi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the House of Commons do determine this matter, it is not that they have an original *right, but as incident to elections. But we do not deny them their right of [*129] examining elections; but we must not be frightened when a matter of property comes before us, by saying it belongs to the parliament; we must exert the queen's jurisdiction. My opinion is founded on the law of England. The case of Mors and Slue, 1 Vent. 190, 238, was the first action of that nature: but the novelty of it was no objection to it. So the case of Smith and Grashaw, 1 Cro. 15, W. Jones, 93, that an action of the case lay for falsely and maliciously indicting the plaintiff for treason, though the objections were strong against it, yet it was adjudged, that if the prosecution were without probable cause, there was as much reason the action should be maintained as in other cases. So 15 Car. 2, C. B., between Bodily and Long, it was adjudged by Bridgman, chief justice, &c., that an action on the case lay for a riding whenever the plaintiff and his wife fought, for it was a scandalous and reproachful thing. So in the case of Herring and Finch, 2 Lev. 250, nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right. And if an action is maintainable against an officer for hindering the plaintiff from voting for a mayor of a corporation, who cannot bind him in his liberty nor estate, to say that yet this action will not lie in our case, for hindering the plaintiff to vote at an election of his representative in parliament, is inconsistent. Therefore, my opinion is, that the plaintiff ought to have judgment.

Friday, the 14th of January, 1703, this(a) judgment was reversed in the House of Lords, and judgment given for the plaintiff by fifty lords against sixteen. Trevor, chief justice, and baron Price were of opinion with the three judges of the King's Bench. Ward, C. B., and Bury and Smith, barons, were of opinion with the Lord Chief Justice Holt, Tracy dubitante, Nevill and Blencowe, absent.

(Note.—I had it from good hands, that Tracy agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration.)

Upon the arguments of this case, Holt, chief justice, said, the plaintiff has a particular right vested in him to vote. Is it not then a wrong, and an injury to that right, to refuse to receive his vote? So if a borough [*130] has a right *of common, and the freemen are hindered from enjoying it by inclosure and the like, every freeman may maintain his action. This action is brought by the plaintiff, for the infringement of his franchise. You would have nothing to be a damage, but what is pecuniary, and a damage to property. If a man has *retorna brevium*, although no fees were due to him at common law, yet if the sheriff enters within his liberty, and executes process there, it is an invasion of his franchise, and he may bring his action; and there is the same reason in this case. Although this matter

(a) Vide 1 Bro. Parl. Cas. 45.

relates to the parliament, yet it is an injury precedaneous to the parliament, as my Lord Hale said in the case of *Bernardiston v. Soame*, 2 Lev. 114, 116. The parliament cannot judge of this injury, nor give damage to the plaintiff for it: they cannot make him a recompense. Let all people come in, and vote fairly: it is to support one or the other party to deny any man's vote. By my consent, if such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right: and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to choose such persons as are to bind a man's life and property by the laws they make.

Ashby v. White is usually cited to exemplify that maxim of the law, *ubi jus ibi remedium*; a maxim which has at all times been considered so valuable, that it gave occasion to the first invention of that form of action called an action on the case. For the statute of Westminster 2, 13 Ewd. 1, c. 24, which is only in affirmance of the common law on this subject, and was passed to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, enacts, that "whosoever from thenceforth a writ shall be found in the chancery, and in a like case falling under the same right, and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and if they cannot agree, it shall be adjourned till the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord the king be deficient in doing justice to the suitors." Accordingly the courts have always held that the novelty of the particular complaint alleged in an action on the case, is no objection, provided an injury cognizable by law be shown to have been inflicted on the plaintiff. Thus, in *Chapman v. Pickersgill*, 2 Wilson, 146, which was an action for falsely and maliciously suing out a commission of bankruptcy, Pratt, C. J., in answer to the objection that the action was of a novel description, said, that "this had been urged in *Ashby v. White*, but he did not wish ever to hear it again. This was an action for *tort*; *torts* were infinitely various, for there was not [131] *any thing in nature that might not be converted into an instrument of mischief." So in *Pasley v. Freeman*, 3

T. R. 63, per Ashhurst, J.: "Another argument which has been made use of, is, that this is a new case, and that there is no precedent of such an action. Where cases are new *in their principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new *in the instance*, and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one fourth part of the cases that are to be found in them." In *Winsmore v. Greenbank*, Willes, 577, the declaration stated that the plaintiff's wife unlawfully, and against his consent, went away and absented herself from him, and that during her absence a large estate was devised to her separate use; that she thereupon became desirous of being reconciled and cohabiting with her husband, but that the defendant persuaded and enticed her to continue apart till her death, which she did; whereby the plaintiff lost the comfort and society of his wife, and her assistance in his domestic affairs, and the profit and advantage of her fortune. On motion in arrest of judgment it was objected that the action was unprecedented; but Willes, C. J., said "that the form of action on the case was introduced for this reason, that the law would never suffer an injury and a damage without a remedy, and that there must be new facts in every special action on the case." Numerous other instances might here be cited, but this in so clear a matter seems unnecessary. See the judgment in

Langridge v. Levy, 2 Mee. & Welsby, 519.

The class of cases from which it is important to distinguish *Ashby v. White*, &c., are those in which a damage is incurred by the plaintiff, but a damage not occasioned by anything which the law esteems an injury. In such cases as these he is said to suffer *damnum sine injuria*, and can maintain no action. [Thus, in the case of *Pryce v. Belcher*, [*131*a*] *reported on demurrer, 3 C. B. 58, and afterwards on a motion to enter a verdict for the plaintiff, 4 C. B. 866, which presents some features of resemblance to *Ashby v. White*, it appeared that Mr. Pryce, who was registered as a voter for the borough of Abingdon, but who in consequence of non-residence, had by the effect of 6 & 7 V. c. 18, s. 79, in fact lost the right to vote, had notwithstanding tendered his vote at an election for the borough; whereupon Mr. Belcher, the returning officer, exceeding the limits of his duty, which, by 6 & 7 V. c. 18, s. 79, was confined to putting the questions as to the identity of the voter, and whether he had voted before at the election, wilfully, but not maliciously, instituted an inquiry into Mr. Pryce's right to vote, and upon his appearing not to be duly qualified in point of residence, refused to receive the vote except as *tendered*, and did not include or reckon it amongst the votes given for the candidate for whom Mr. Pryce desired to vote. An action upon the case was thereupon brought by Mr. Pryce, in which he declared in one count for the refusal to permit him to vote, in another for the omission of his vote in the account of the poll, and in a third for the unauthorised scrutiny and decision upon his right to vote, whereby, as he alleged, he was delayed and hindered in the exercise of his right, all which counts were holden to present good *prima facie* causes of action, 3 C. B. 58. But it was finally decided that the plaintiff could not maintain his action, on the ground stated in the judgment, "that although a party in the situation of the plaintiff has the *power* to compel the returning officer, under the apprehension of a prosecution, to put his name upon the poll, he has not the *right* to do so; that in doing so he is acting in direct contravention of the act of parliament, the terms of which are express 'that he shall not be entitled to vote;' and that the rejection of his vote

cannot amount to a violation of anything which the law can consider as his right. The foundation of the plaintiff's action is the injury to his right; but we are of opinion, for the reason above given, that he has *no right*, and, consequently, that he has suffered *no injury*." More striking instances of *damnum absque injuria* occur in legal proceedings, instituted for the bona fide purpose of asserting some supposed right, or prosecuting a criminal charge, which however in the event proves groundless. In such cases, in order, it would seem, to facilitate the administration of justice, it is established that unless there be both malice *and* an absence of reasonable and probable cause, the person against whom the proceedings are taken has no legal ground of action. See the note(c) to **Skinner v. Gunton*, 1 Wm. Saund., 230*a*; and [*131*b*] for modern instances see *Gibbs v. Pike*, 9 M. & W. 351, where one, who, without malice, had registered under 1 & 2 Vict. c. 110, an order which, as he contended, had the effect of a judgment, was holden justified, without regard to whether it had that effect, or was properly registered or not; *Davies v. Jenkins*, 11 M. & W. 745, where an attorney, by mistake, sued to judgment and execution a person of the same name as the intended defendant; *De Medina v. Grove*, 10 Q. B. 152 (since affirmed), where a judgment debtor was taken in execution for more than was due on the judgment (secus where the amount is agreed, *Wentworth v. Bullen*, 9 B. & C. 840); *Roret v. Lewis*, Exch., 19 Jan. 1848, 17 L. J. 99, where a person privileged from arrest was nevertheless arrested through malice, but not without reasonable or probable cause. The immunity of certain privileged or confidential statements, defamatory of third persons, on the ground that they are made bona fide in the assertion of a right, or the performance of a duty, or that they are fair criticism upon matter of public interest, furnishes another head of *damnum absque injuria*. In such cases, generally speaking, however harsh, hasty, or untrue may be the language employed, so long as it is honestly believed by the speaker or writer to be true, it does not furnish a legal ground of action. See *Dodd v. Hawkins*, 8 C. & P. 88, per Alderson, B. The extent and application of this doctrine have lately been the subject of much discussion and difference of opinion. See *Coxhead v. Richards*, 2 C.

B. 569; *Blackburn v. Pugh*, *ibid.* 611; *Bennett v. Deacon*, *ibid.* 625; *Gathercole v. Miall*, 15 M. & W. 319. Acts done by way of self-defence against a common enemy, such as the erection of banks to prevent the inroads of the sea, fall within the same rule, and damage resulting therefrom is not actionable, *Rex v. Pagham*, 8 B. & C. 355; 2 Man. & R. 468, S. C.; per curiam, *Scott v. Shepherd*, 2 Blackstone, 892, post 210. Instances might be multiplied in which wrongs the most grievous are without legal redress. The seduction of a daughter not in her father's service actual or constructive, *Blaymire v. Haley*, 6 M. & W. 55; *Davies v. Williams*, 10 Q. B. 725; even though the father be thereby forced to maintain her, *Grinnell v. Wells*, 8 Scott, N. R. 741; the seduction of a daughter in her father's service, unless an actual loss of service accrue, *Eager v. Grimwood*, 1 Exch. 61 (*quod mirum*) are *damna absque injuria*. So before the recent act of parliament, 9 & 10 Vict. c. 93, "for compensating the families of persons killed by accidents," no action at law was maintainable against a person, who, by his wrongful act, neglect, or default, may have caused the death of

[*131c] *another, though under circumstances which would have given the sufferer a right of action had he survived; and the husband, wife, parent, or children of the deceased were without remedy against the wrong doer, by whom they had been deprived of comfort and support. The case of the school set up near another school, reported II. 11 H. 4, fo. 47, pl. 21, is one of the earliest on the subject of damage without legal cause of action, and possesses much interest; and others are referred to in Comyns's Digest, titles *Action upon the Case* (B), and *Action upon the Case for a Nuisance* (C), in which serious damages, even actual nuisances, have under the circumstances, been holden not actionable, as being either not temporal injuries, or only such as must be expected to result from the reasonable exercise of legal rights.] Thus, if a man establish an offensive trade near my dwelling-house, so as to render it uncomfortable, I may maintain an action on the case against him for a nuisance, for here is *damnum* coupled with *injuria*. But if I build my house near his premises, at all events if they have been so used for twenty years, the case is altered; and, although I have *damnum*,

yet I shall maintain no action, since it is not coupled with what the law considers *injuria*. Such, too, it was once thought, might be the law, even if the new comer had built within the twenty years, since otherwise a man setting up an offensive trade even in the remotest spot might be ruined by the first person who chose to come and dwell near him within twenty years. In *Bliss v. Hall*, 4 Bing. N. C. 185, some expressions however dropped from the court from which it may be thought that their lordships' opinion was that nothing but a twenty years' user will entitle a man to carry on an offensive trade without interruption. The point was not however necessary for the decision of that case or that of *Elliotson v. Feetham*, on the authority of which it was decided. In those cases to an action for a nuisance to plaintiff's dwelling-house, a plea that the noisome trade was established *before the plaintiff became possessed of the dwelling-house* was held bad. Non constat however what would have been the decision had the plea alleged that the defendant carried on the trade there *before the building of the plaintiff's house*. [See *Flight v. Thomas*, 10 Ad. & El. 590.] On the same principle—viz. that *damage*, to sustain an action, must be coupled with *injury*—if A. build a house on the edge of his land, and the proprietor of the adjoining land, after twenty years, dig so near it that it fall down, an action on the case lies, because the plaintiff has, by twenty years' use, acquired a prescriptive right to the support, and to infringe that right was an injury. *Stansell v. Jollard*, S. N. P. 444. See *Harris v. Ryding*, 5 M. & W. 60; *Hide v. Thornborough*, 2 Car. & K. 250.]

*But it is otherwise if the [*131d] owner of land adjoining a newly-built house dig in a similar manner, and produce similar results, for there, though there is *damage*, yet, as there is no right to support, there is no *injury* committed by withdrawing it, and therefore no action maintainable. *Partridge v. Scott*, 3 Mee. & W. 220. *Wyatt v. Harrison*, 3 B. & Ad. 871. But then the person digging must not do so *negligently*, otherwise he is liable to action. See *Dodd v. Holme*, 1 A. & E. 493; *Grocers' Co. v. Donne*, 3 Bing. N. C. 54; *Trower v. Chadwick*, 3 Bing. N. C. 334, and the same case reversed in C. S. 6 Bing. N. C. 1. [*Davis v. London and Blackwall Railway*, 1 M. & Gr.

799, 2 Sc. N. R. 72, S. C.; Bradbee v. Mayor of London, 5 S. C. N. R. 79, 4 M. & Gr. 714, 2 Dowl. N. S. 161, S. C.] The maxim which governs these cases is *Sic utere tuo ut alienum ne lædas*. Therefore A. may be sued for so negligently erecting a hay-rick on the edge of his land that it ignites and burns his neighbour's house, Vaughan v. Menlove, 3 Bing. N. C. 463; [notwithstanding 6 Anne, c. 31, and 14 Geo. 3, c. 78, which do not, it seems, apply to fires traceable to negligence. See the observations of Lord Lyndhurst in Viscount Canterbury v. The Attorney General, 1 Phillips, 306, and Filliter v. Phippard, 11 Q. B. 347, where the subject of liability for damage by fire was discussed. For examples of the general rule in cases of fire caused by railway engines, see Aldridge v. The Great Western Railway, 3 M. & Gr. 515, 4 Scott, N. R. 156, 1 Dowl. N. S. 247, S. C.; Piggott v. The Eastern Counties' Railway, 3 C. B. 229. And as to the liability of a gas company for an explosion caused by the escape of gas through a stop-cock over which they had no control, see Holden v. The Liverpool Gas Company, 3 C. B. 1]. But it is settled by Chadwick v. Trower, in Cam. Scacc. 6 Bingh. N. C. 1, that even supposing that an action could be brought for the mere omission to take care while pulling down one's own property that a neighbour's property should not be injured, still the duty to take such care does not extend to cases where the defendant is not shown to have had notice of the existence or nature of the property injured, as where it was a vault. In consequence of this decision it will probably become usual in actions of this sort to traverse notice of the nature or existence of the property. [Very similar to the case of a man digging on the extremity of his own land is that of one digging on his own close, so as to divert the under-ground stream, or drain the well of a neighbour. This, in the absence of some special right to such stream or well, is *damnum absque injuriâ*, Acton v. Blundell, 12 M. & W. 324.]

The mode of determining whether damage have or have not been occasioned by what the law esteems an *injury*, is to consider *whether any right existing in the party damaged have been infringed upon; for if so, the infringement thereof is an injury; and if an injury be shown, the law will presume*

that some damage resulted from it. See Barker v. Green, 2 Bing. 317. To use Lord Holt's words in the present case:—"Every injury to a right imports a damage in the nature of it, though there be no pecuniary loss;" for instance, a creditor who is ascertained to be such by a judgment and has charged his debtor in execution has a right to the body of his debtor every hour till the debt is paid. Per Buller, J., 5 T. R. 40. He has a *right to have the body in gaol*, and the escape of a debtor for ever so short a time is necessarily a damage to him, and an action for an escape lies." Per Parke, B., 4 Mee. & W. 153. [Clifton v. Hooper, 6 Q. B. 463]. But where a defendant is in custody on mesne process and after the return of the writ by which he was captured, the plaintiff's right is "*to have the defendant in custody whenever he chooses to remove or declare against him*;" and, therefore, although an escape which delayed the execution of a habeas corpus or the delivery of a declaration would be actionable, yet an escape involving neither of those consequences is not so. Williams v. Mostyn, 4 M. & Wels. 145. Planck v. Anderson, 5 T. R. 37. [So, again, if a landlord distrain for more rent than is due, an action lies against him, though the goods he take be of less value than the rent actually due, and though he correct the mistake before sale. Taylor v. Henniker, 12 A. & E. 488. And an action is maintainable against one who makes a projection over the land of another, before any rain falls so as to cause damage. Fay v. Prentice, 1 C. B. 825.]

There are, indeed, certain cases in which an act may be in law an *injury*, and may produce damage to an individual, and yet in which the law affords no remedy, or, at least, no immediate one. These are, cases in which the act done is a grievance to the entire community, no one of whom is injured by it more than another. In such a case the mode of punishing the wrong-doer is by indictment, and by indictment only. 1 Inst. 56, a. Still, if any person have sustained a particular damage therefrom, beyond that of his fellow-citizens, he may maintain an action in respect of that particular damnification. Thus, to use the familiar instance put by the text writers, if A. dig a trench across the highway, this is the subject of an indictment; but if B. fall into it, then the par-

ticular damage thus sustained by him will support an action. *Still, [*132] this exception is subject to qualification, for the damage must not be occasioned by want of ordinary skill and care on the part of the plaintiff. *Butterfield v. Forester*, 11 East, 60; *Flower v. Adam*, *2 Taunt. 314; [*132a] *Bridge v. Grand Junction Co.*, 3 Mee & Welsb. 244, (which see as to the form of plea in such a case). *Hawkins v. Cooper*, 8 C. & P. 473; [*Coles v. Bank of England*, 10 A. & E. 437; *Morrill v. Stanley*, 1 M. & G. 563. However, where a man carelessly left his cart and horse unattended in the street, and a young child climbed into it and received a severe fall the horse being led forward by a boy, the owner was held responsible in case, seemingly on the ground that having thrown temptation in the child's way he could not be allowed to object that it had yielded to it. *Lynch v. Nurdun*, 1 Q. B. 29: and the rule is not that *any* negligence on the plaintiff's part will preclude him from recovering; but, that though there has been negligence on the plaintiff's part, still he may recover, unless he could by ordinary care have avoided the consequence of the defendant's negligence. Therefore, a man who had improperly left an ass fettered on the highway, was nevertheless held entitled to recover against one who negligently drove against it. *Davies v. Mann*, 10 M. & W. 546. See *Smith v. Dobson*, 3 M. & Gr 59; and *Mayor of Colchester v. Brooke*, 7 Q. B. 339, where oysters were placed in the channel of a public navigable river so as to create a public nuisance, yet, a person navigating the river was holden not justified in running his vessel against them, when he had room to pass without so doing. In *Bridge v. Grand Junction Railway*, supra, in an action at the suit of a passenger by the train of a railway company against another railway company with a train of which a collision had taken place, whereby the passenger had sustained injury, the defendants pleaded that the injury was caused in part by the negligence of the person who had the management of the train in which the plaintiff was riding. The plea was holden bad in substance, for not showing that by ordinary care on the part of the person managing the train in which the plaintiff was, the collision might have been avoided. A hasty perusal of the

report of that case might lead to the supposition that, according to the opinion of the court, the plea might have been good in substance, though not in form, by an averment that the plaintiff's driver could by ordinary care have avoided the accident; but that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may, perhaps, safely be asserted, that the plea was at all events bad in substance, for not alleging that *the passenger* who brought the action was guilty of negligence. If two drunken stage-coachmen were to drive their respective carriages against each other and injure the passengers, each would have to pay for his own carriage, no doubt, but it is inconceivable that *each set of passengers [*132b] should, by a fiction, be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer.]

And though the damage and wrong be excessive, and peculiarly concern an individual, still, if it amount to a felony, the private remedy is suspended until public justice shall have been satisfied; a very wholesome rule, and tending to prevent the composition of felonies under the pretence of seeking the remedy by action. [This rule, however, does not apply to actions against others than the person guilty of the felony. *White v. Spettigue*, 13 M. & W. 603. And the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, whilst it recognises the general rule, expressly enacts that it shall not apply to actions brought pursuant to its provisions. See Com. Dig. Action on the Case (B. 5.)]

Again, there are some cases in which a damage is sustained by one man in consequence of the act of another, which act would be considered tortious by the law if the damage incurred could be properly deduced from it; but which, nevertheless, is dispensable, because the damage actually incurred is, to use the legal phrase, too *remote* to be the subject matter of an action; in other words, because it is not the natural consequence of the act committed by the defendant; see Com. Dig. Action on Case for Defamation; and *Kelly v. Partington*, 5 B. & Ad. 645; and it has been thought that damage must be always considered too *remote* when it pro-

ceeds from the illegal act of a third person, for that the law will not esteem it natural that an illegal act should be induced by any consideration. Thus, if A. falsely assert that B. has spoken in disparagement of C., in consequence of which C. ceased to befriend and invite B., an action would be maintainable; see *Moore v. Meagher*, 1 Taunt. 39; but if C. were in consequence to beat B. no action could be maintained by him against A. on account of the damage sustained from the beating. So in *Vicars v. Wilcox*, 8 East, 1, where the defendant accused the plaintiff of unlawfully cutting his (the defendant's) cord, in consequence of which J. O. dismissed plaintiff from his service before the expiration of his year, Lord Ellenborough said, "that the special damage must be the *legal and natural* consequence of the words spoken; and here it was an *illegal* consequence, a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had seized the plaintiff and thrown him into a horsepond for his supposed transgression." See *Morris v. Langdale*, 2 B. & P. 284; *Knight v. Gibbs*, 1 Ad. & Ell. 43; *Ashley v. Harrison*, 1 Esp. 48; *Ward v. Weeks*, 4 M. & P. 796. This doctrine, however, has been questioned; see *Green v. Button*, 2 C. M. & R. 707; [*Kendillon v. Maltby*, 1 Car. & M. 402, Lord Denman, C. J.,] and 1 Stark. on Libel, 205, and the notes to *Vicars v. Wilcox*, post, vol. ii.

The decision in this particular case of *Ashby v. White*, occasioned one of the most furious controversies between the Houses of Lords and Commons of which there is any example in English history. A full account, setting forth at large the parliamentary documents respecting it, will be found in the notes to Mr. Gale's excellent edition of Lord Raymond, pp. 597 to 608. It arose from an idea entertained by the Commons that the attempt to bring a case involving the right to the elective franchise before a court of law, was a high breach of the privileges of their House; and they proceeded so far as to order that Mr. Mead (Ashby's attorney), and the plaintiffs in several similar actions, should be taken into custody. Paty, one of these plaintiffs, sued out a habeas corpus to the keeper of Newgate, who returned the Speaker's warrant of com-

mitment. On argument upon this return, Powell, Powys, and Gould, JJ., held, against the opinion of Lord Chief Justice Holt, that they had no authority to discharge the prisoner. On this decision Paty proposed to bring a writ of error, for which he applied, and the judges being summoned to deliver their opinion, whether a writ of error was a writ of right or of grace, ten of them were of opinion that it was of right, except in treason and felony. The parliament was, however, prorogued before the writs were issued, but not before the House of Commons, who appear to have been actuated by great indignation, had committed Mr. Cæsar, the cursor, for neglecting to inform them what writs of error were applied for, and had also directed the Serjeant-at-arms to take into custody Mr. Montagu, Mr. Letchmere, Mr. Denton, and Mr. Page, who had been counsel for the prisoners on the return of the habeas corpus. Mr. Montagu and Mr. Denton were accordingly apprehended, and the Serjeant-at-Arms informed the House "that he had also like to have taken Mr. Nicholas Letchmere, but that he had got out of his chambers in the Temple, two pair of stairs high, at the back window, by the *help of his sheets and a [*133] rope." This gentleman was afterwards Attorney-General. Writs of habeas corpus were served on the Serjeant-at-Arms on behalf of Mr. Montagu and Mr. Denton, but the House forbid him to make any return thereto. At last, after two conferences between the Houses, which served only to widen the breach, the Queen put an end to the dispute by proroguing parliament.

In the course of these discussions the Lords appointed a committee for the purpose of preparing an argument in the shape of a report upon the proceedings in the case of *Ashby v. White*. This argument was principally drawn up by the Lord Chief Justice, and contains a masterly disquisition upon all the subjects connected with the case. It is printed entire in the note by Mr. Gale above referred to, and consists of three parts; *first*, it is argued that the plaintiff had a right to vote; *secondly*, that if so, he must, as a necessary consequence, as an inseparable incident to his right, have a *remedy* to assert and maintain it; *thirdly*, that his proper remedy was that which he had pursued, viz., by action.

[For some particulars of a recent memorable conflict between the House of Commons and the Court of Queen's Bench, which cannot be stated within the limits of a note, see *Stockdale v. Hansard*, 7 C. & P. 731; 9 Ad. & El. 1; 11 Ad. & El. 253. The case of the

Sheriff of Middlesex, 11 Ad. & El. 273. The statute of 3 & 4 Vict. c. 9; *Stockdale v. Hansard*, 11 Ad. & El. 297; *Howard v. Gosset*, 1 Car. & K. 380; *Howard v. Gossett*, 10 Q. B. 359; *Gosset v. Howard*, 10 Q. B. 411; and *May's Law of Parliament*, 125.

Case is maintainable whenever the plaintiff's *right* has been injured, (more accurately, where the exercise or enjoyment of his right has been, hindered,) by the act of another, and that act was not necessary to the defendant's full enjoyment of his own rights, or the legal pursuit of them.

The principle, that where the injury is general, or common to many, no action lies, seems, when properly understood, not to form an exception; as, in case of a nuisance in a highway: the individual here has not an interest or vested right; the easement is legally in the king, or the public generally, and these are the parties to sue, which is by indictment; but if any individual's right of person or property are injured, directly or consequentially, by reason of the nuisance, an action lies for him. See *Proprietors of Quincy Canal v. Newcomb*, 7 Metcalf, 277, 283. Thus it was decided in *Hughes v. Heiser*, 1 Binney, 463, that where one dams a river that is a public highway, and the plaintiff coming down with rafts, is prevented by the dam from descending the river, the interruption is actionable, for it is a consequential injury to his interests or rights of property. See *Pittsburgh v. Scott*, 1 Barr, 309, 319, and *Hart v. Evans*, 8 id. 14, 21. It would seem that the legal notion of an injury, general, or common to many, such as is not actionable, is that the thing injured or interrupted is a privilege open generally, or to many, and not a particular vested right. In *Owen v. Henman*, 1 Watts & Sergeant, 548, an action was brought for disturbing the plaintiff in the enjoyment and exercise of public worship, by making loud noises, reading, talking, &c., and it was decided that the action was not maintainable, for here was no right of the plaintiff's of person or property injured, and the injury was of a spiritual and not temporal nature, and besides, was general or common to everybody. See also *First Baptist Church, &c. v. The U. & S. R. R. Co.* 6 Barbour's S. Ct. 313; and 5 id. 80.

The proprietors of lands adjoining streams, have a right to use reasonably the water, subject to a similar right in other riparian owners; and therefore, if one by erecting a mill, and using reasonably the water, leave less for one below him, though the latter be a prior occupant, this is not actionable, for no right of the plaintiff is invaded, and the act is necessary to the defendant's enjoyment of his own rights; *Palmer and others v. Mulligan and others*, 3 Caines, 307; *Platt v. Johnson & Root*, 15 Johnson, 213; *Weston v. Alden*, 8 Massachusetts, 136; *Beissell v. Sholl*, 4 Dallas, 211. See *Cary v. Daniels*, 8 Metcalf, 467, and *Pitts & Others v. Lancaster Mills*, 13 id. 156, 158. The reasonableness of the detention of the water by the upper owner, depends on the circumstances, and is to be judged of by the jury; *Hetrick v. Deachler*, 6 Barr, 32; and if the diminution be material, it is held in Pennsylvania that the upper proprietor is liable to the one below;

Miller v. Miller, 9 id. 74. So, in those rivers where the right of fishing is public, the erection of a dam, which prevents the fish from coming up, is not actionable by a private proprietor of the adjoining soil, for "he had no property either in the fish or the river." See *Shrunk v. The President, &c. of the Schuylkill Navigation Company*, 14 Sergeant and Rawle, 71, 84. But if one, by erecting a dam, overflows his neighbour's land, he injures a particular vested right of that person, and does what is not necessary to the enjoyment of his own limited and specific right; and however small the damage, it is actionable; *Alexander and another v. Kerr*, 2 Rawle, 83; and see *Sackrider v. Beers*, 10 Johnson, 24, and *Merritt v. Parker, Cox*, 460: nay, as the injury is to a right, which is property, and there is, necessarily, legal damage, the plaintiff may recover judgment, though no special damage at all be shown; *Pastorius v. Fisher*, 1 Rawle, 27; *Alexander v. Kerr*, 2 Rawle, 83; *Ripka v. Sergeant*, 7 Watts & Sergeant, 11; *Woodman et al. v. Tufts et al.*, 9 New Hampshire, 88; *Plumleigh v. Dawson*, 1 Gilman, 544, 551. So, an action on the case lies for one who has a right of way against an intruder, without evidence of actual damage; *Williams v. Esling*, 4 Barr, 486. The maxim *de minimis non curat lex*, is never applied to the positive and wrongful invasion of another's property; *The Seneca Road Company v. The Auburn, &c. Rail Road Company*, 8 Hill, 171, 175.

To corrupt and poison a stream by a tannery, is actionable by those whose right to the use of the stream is injured; *Howell and others v. M'Coy*, 3 Rawle, 256; and it is said in this case, that the plaintiff's right of action is gone, if there have been an appropriation for twenty years, or a contract; and it is held in *M'Kellip v. M'Ilhenny*, 4 Watts, 317, that if there has been a valid contract, or a parol license by the same, or a former owner, which has been acted on, so that the revocation of it would be a fraud, it confers a right.

With regard to all these rights in streams, though prior occupancy gives no right at all, yet it seems to be settled that uninterrupted, exclusive occupancy, under claim of right, for twenty or twenty-one years, amounts to a binding presumption of a right; *Ingraham v. Hutchinson*, 2 Connecticut, 584; *Bullen v. Runnels*, 2 New Hampshire, 255; *Tyler and others v. Wilkinson and others*, 4 Mason, 397; *Cowell v. Thayer*, 5 Metcalf, 253, 256; *Wood v. Kelley*, 30 Maine, 47, 57; *Strickler and another v. Todd*, 10 Sergeant & Rawle, 63; *Hoy v. Sterrett*, 2 Watts, 327, where the cases are collected; but see *Cooper and another v. Smith*, 9 Sergeant & Rawle, 26. In *Parker & Edgerton v. Foote*, 19 Wendell, 309, the nature of the presumption in these cases of incorporeal interests, is very ably explained by BRONSON, J.; and as to the nature of the occupancy, he says, "To authorise the presumption, the enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favour, but under a claim or assertion of right; and it must be with the knowledge and acquiescence of the owner." See also, *Esling v. Williams*, 10 Barr, 126, 128.

That there may be a right to have lights opening on another's ground, is decided in *Story v. Odin*, 12 Massachusetts, 157. That this exclusive right, invading the property of another, may be acquired by uninterrupted user for a sufficiently long period, was said by DUNCAN, J., in *Strickler and another v. Todd*; but strong doubts were opened upon this subject by

GOULD, J., in *Ingraham v. Hutchinson*; and ROGERS, J., in *Hoy v. Sterrett*: and in *Parker & Edgerton, v. Foote*, 19 Wendell, 309, it was decided by a majority of the Supreme Court of New York, that the English doctrine of a right to lights, overlooking another's ground, acquired by long user, upon a presumption of a grant or otherwise, is inapplicable to this country, and does not exist in our law. See *Atkins v. Chilson* and others, 7 Metcalf, 398.

H. B. W.

BIRKMYR v. DARNELL.

MICH.—3 ANNIE, B. R.

[REPORTED SALKELD, 27.(a)]

A promise to answer for the debt, default, or miscarriage of another, for which that other remains liable, must be in writing to satisfy the Statute of Frauds. Contra, where the other does not remain liable.

DECLARATION. That in consideration the plaintiff would deliver his gelding to A., the defendant promised that A. should re-deliver him safe, and evidence was, that the defendant undertook, that A. should redeliver him safe; and this was held a collateral undertaking for another; for, where the undertaker comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but, where the whole credit is given to the undertaker, so that the other party is but as his servant, *and there is no remedy against him*, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as an *assumpsit* upon the promise against this defendant.

Et per cur. If two come to a shop, (†) and one buys, and the other, to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, *Let him have the goods, I will be your paymaster, or I will*

(a) Mod. Cases, 248. S. C. by name of *Bour Kamire v. Darnell*.

(†) In such a case the question to which of the two was credit given, is generally left to the determination of the jury, who, in deciding it, must take into their consideration all the circumstances of the case. *Keate v. Temple*, 1 B. & P. 158; *Darnell v. Trott*, 1 C. & P. 82; *Storr v. Scott*, 6 C. & P. 241. If, on production of the plaintiff's books, it appear the defendant was not originally debited there, that is strong evidence that he is but a surety, but it is not conclusive. *Keate v. Temple*, *Croft v. Smalwood*, 1 Esp. 121. [As to the employment of an attorney by a person really interested in the event of a suit, though not a party to the record, see *Howes v. Martin*, 1 Esp. 162, *Noel v. Hart*, 3 C. & P. 230.]

see you paid, (§) this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.

THE fourth section of the *Statute of Frauds* enacts, that "No action shall be brought whereby to charge any executor or administrator upon any special promise *to answer damages out of [135] his own estate; or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The present case turned as we have just seen, on the meaning of the words "upon any special promise to answer for the debt, default, or miscarriage of another person; and the distinction here taken has ever since been held the true one, and is clearly explained, and all the subsequent cases discussed, in the notes to *Forth v. Stanton*, 1 Wms. Saunders, 211, to which the reader is referred; and where the following rule, which is in substance the very same with that in *Birkmyr v. Darnell*, is laid down for the purpose of distinguishing between the cases which do and those which do not fall within the statute. "The question is, *What is the promise?*—is it a promise to answer for the debt, default, or miscarriage of another, *for which that other remains liable?*—not what the consideration for that promise is; for it is plain that the nature of the consideration cannot effect the terms of the promise itself, unless, as in the case of *Goodman v. Chase*, 1 B. & A. 297, it be an extinguishment of the liability of the original party." In that case the defendant

in consideration that the plaintiff would discharge A. B., whom he had taken under a *capias ad satisfaciendum*, promised to pay A. B.'s debt. It was held unnecessary that the promise should be in writing, for the defendant's liability on his promise could not begin till the plaintiff had discharged A. B. out of custody, since that discharge was made a condition precedent; but the moment A. B. was discharged, *his* liability was at an end, so that the defendant was never liable for a debt of A. B.: the debt had ceased to be due from A. B. before the defendant became liable to pay it. [The same point occurred in *Butcher v. Stewart*, 11 M. & W. 857]. So also in *Bird v. Gammon*, 3 Bing. N. C. 889, the defendant, in consideration that plaintiff would with Lloyd's other creditors gave up their claims against Lloyd, and that Lloyd's farm *should be assigned to the defendant, under- [135a] took to pay the plaintiff, this was held not to be a promise to pay the debt of a third party, for Lloyd ceased to be liable. (See *Good v. Cheeseman*, 2 B. & Ad. 328, and the notes to *Cumber v. Wane*, post.) But where A. as attorney for B. sued C. and it was agreed that the suit should be put an end to, and that C. should pay A. the costs due by B., this was held within the statute, *Tomlinson Crewell*, 1 A. & E. 453, where the rule *v. Gell*, 6 A. & E. 564, [Accord. *Green v.* above cited was approved of by the Court, and *Thomas v. Cook*, 8 B. & C. 728, where it had been generally stated that promises to indemnify were not within the statute, reflected upon. In *Eastwood v. Kenyon*, 11 A. & E. 446, the Court of Queen's Bench held that the promise would not require a writing if made to the debtor himself, and they expressed an opinion that the statute applies only to promises made to the person to whom another is answerable. This view, which would limit the generality of the rule laid down by *Serjeant Williams*, and seems not altogether re-

(†) [This form of words can make no difference if the undertaking be really collateral, for in *Matson v. Wharam*, 2 T. R. 80, where the words were "If you do not know him you know me, and *I will see you paid*," the statute was considered to apply.]

conciliable with the doctrine in *Green v. Cresswell*, supra, has been recognised and acted upon by the Court of Exchequer, in *Hargreaves v. Parsons*, 13 M. & W. 561, where it is laid down, that "the statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee*."]

When it is settled that the promise is one to answer *for the debt, default, or miscarriage of another*, within the meaning of the statute; or, to use Lord Holt's expression in the text, that it is a *collateral*, not an *original* promise; the next question that occurs is; what must, in order to satisfy the act, appear in the writing thereby required? Now, the act, in terms, requires that the *agreement, or some memorandum or note thereof*, shall be in writing; and it is held that the word *agreement* comprehends both a *consideration* and a *promise*; and that both these must, therefore, appear in the writing. This was determined in the celebrated case of *Wain v. Warlters*, 5 East, 10, in which an action of *assumpsit* was brought on the following guaranty:—

"Messrs. Wain & Co.

"*I will engage to pay you by half-past four this day, fifty-six pounds and expenses on bill, that amount on Hall.*

"*John Warlters.*

"2, Cornhill, April 30, 1803."

The Court of King's Bench held that this was not sufficient, inasmuch as it did not state the consideration for Warlters's promise. "The words of the statute," said Mr. J. Grose, "are, that no action shall be brought, whereby to charge the defendant on any special promise to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, &c. What is required to be in writing, therefore, is the *agreement*, not the promise as mentioned in the first clause, or some note or memorandum of the *agreement*. Now the *agreement* is, that which is to show what *each party* is to do or perform, and by which *both parties* are to be bound, and this is required to be *in writing*. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise

made by the defendant who was to be charged with it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to *prevent, for, without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it. The effect of the parol evidence then is to make him liable: and thus he would be charged with the debt of another by parol testimony, when the statute was passed with the very intent of avoiding such a charge, by requiring that the *agreement*, by which must be understood the *whole agreement*, should be in writing."

This case having been frequently doubted, was at last confirmed by *Saunders v. Wakefield*, 4 B. & A. 596. The guaranty on which that action was brought was as follows:—

"*Mr. Wakefield will engage to pay the bill drawn by Pitman in favour of Stephen Saunders.*"

This instrument being set out in the replication to a plea of the statute, was held upon demurrer to be insufficient. The doctrine of *Wain v. Warlters* was on that occasion affirmed, and has never since been doubted. See *Jenkins v. Reynolds*, 3 B. & B. 14; *Morley v. Boothby*, 3 Bing. 107; *Whitcombe v. Lees*, 5 Bing. 34; *Cole v. Dyer*, 1 C. & J. 461, 1 Tyrwh. 307; *Wood v. Benson*, 2 Tyrwh. 98; *Bushell v. Beavan*, 1 Bing. N. C. 103; *Hawes v. Armstrong*, *Ibid.* 761; *Ellis v. Levi*, *Ibid.* 767; *James v. Williams*, 5 B. & Ad. 1109; *Clancy v. Piggott*, 2 Ad. & Ell. 473; [*Raikes v. Todd*, 8 A. & E. 448; *Semple v. Pink*, 1 Exch. 74; *Price v. Richardson*, 15 M. & W. 539, where the guarantee holden invalid was—

"1843, June 28.—*Mr. Price, I will see you paid for £5 or £10 worth of leather, on the 6th of December, for Thomas Lewis, shoemaker.*

Robert Richardson."]

But it is sufficient if the consideration can be gathered by a fair intendment from the whole tenor of the writing, not that a mere *conjecture*, however plausible, would be sufficient to satisfy the statute, but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum. *See the judgments [*136a] of *Tindal, C. J.*, in *Hawes v. Armstrong*, and of *Patteson, J.*, in *James*

v. Williams, 5 B. and Ad. 1109; Bentham v. Cooper, 5 M. & W. 628; Jarvis v. Wilkins, 7 M. & W. 410.] And it is observable, that when an agreement is in its nature *prospective*, such an inference is much more easily arrived at than when it is in its nature *retrospective*. For instance, in Stapp v. Lill, 1 Camp. 242, 9 East, 348, the following guaranty was held, first by Lord Ellenborough at *nisi prius*, and afterwards by the Court of King's Bench, *in banc*, to be sufficient:

"I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nicholls, of Bricklane.

"John Lill."

It was thought sufficiently to appear from the instrument that the promise of Lill, the defendant, was intended to operate as an inducement to Stapp, the plaintiff, to deliver goods to Nicholls; and if so, the delivery of them to Nicholls, at the defendant's request, would, of course, be a good consideration for the defendant's undertaking to guarantee. See Newbury v. Armstrong, 6 Bing. 201; Russell v. Moseley, 3 B. & B. 211; Morris v. Stacey, Holt, N. P. C. 153; Ryde v. Curtis, 8 D. & R. 62; Ex parte Gardom, 15 Ves. 287; Combe v. Woolf, 8 Bing. 157. [Kennaway v. Treleavan, 5 M. & W. Exp. Little John, 3 M. D. & D. 182; Johnstone v. Nicholls, 1 C. B. 251; Chapman v. Sutton, 2 C. B. 634; Emmett v. Kearns, 5 N. C. 599; Dutchman v. Tooth, 5 N. C. 577, where the guaranty was "in consideration of 2s. 6d. paid me," without saying by whom, and held good.]

In Shortrede v. Cheek, 1 Ad. & E. 59, where a guaranty was expressed to be in consideration that the plaintiff "would withdraw the promissory note," the Court of King's Bench held that it was sufficiently certain, and that parol evidence was admissible to show what promissory note was meant. [And, as in the case of a will or other written instrument, parol evidence is admissible, not to alter or vary the meaning or construction of a guaranty, but to interpret and explain it; not to import a consideration which does not appear upon the guaranty, either expressly or by necessary inference; nor to make that appear to be a consideration which upon the face of the guaranty appears not to be so; nor, in a case of patent ambiguity, when the language of the instrument

renders it uncertain as to which of two or more matters, severally mentioned therein, was the consideration upon which it was given, to shew by parol which was in fact the consideration; but, either (as in Shortrede v. Cheek,) to fix the particular subject-matter to which the guaranty relates, or even to shew, by reference to time or other circumstances, that matter indicated by the guaranty, but which, as described therein, may be a good, *and [*136b] does not appear to be a bad, is, by reason of such circumstances, in fact a good consideration. Thus, in Haigh v. Brooks, 10 A. & E. 309, parol evidence was holden admissible to show that in a guaranty worded—

"In consideration of your being in advance to L. in the sum of £10,000 for the purchase of cotton, I do hereby give you my guaranty for that amount, on their behalf"—future advances were referred to, and so that it was valid. And, in Goldshede v. Swan, 1 Exch. 154, a guaranty as follows:—

"In consideration of your having this day advanced to our client, Mr. S. D., £750, secured, &c., we hereby jointly and severally undertake, &c."—was held to be "*sufficiently ambiguous*" "that is, not ambiguous as to what was the matter intended to be the consideration, for that was sufficiently *identified*, but as to whether that matter, when its *circumstances* were ascertained, would furnish a sufficient consideration in point of law)—to admit of evidence to show that the advance was not a past one, but made simultaneously with the execution of the guaranty; and a declaration stating the promise to have been made in consideration that the plaintiff "would" lend, &c., was sustained. In each of those cases the subject-matter of the consideration was identified by the writing, and its circumstances only added by parol, which being known, there was no longer any doubt, that that which by the writing appeared to be the consideration, was a valid consideration in point of law. But in Price v. Richardson, *supra*, it was doubtful, upon the face of the guaranty, whether the consideration was the supply of the leather, or forbearance until the 6th of December. Parol evidence, if admitted to cure the ambiguity in that case, must not merely have shown that a consideration specified was sufficient, but further, what the consideration was; which

would have violated the statute as explained in *Wain v. Warlters*.

No objection can be taken to the adequacy of the consideration, provided it sufficiently appear, according to the rules above laid down, what the consideration is. In *Raikes v. Todd*, 8 Ad. & El. 846, a guaranty thus:—

"Oct. 19th, 1832.—I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance to D., on his account with you commencing 1st Nov. 1831, not exceeding £2000"—was considered invalid on the ground that it was doubtful whether the consideration consisted of forbearance to sue for the past advances, or partly that and partly the making of further advances, and the Court decided that, at all events, it did not sustain a declaration alleging the advances to be the consideration. There can, however, be no doubt that, as suggested by Parke, B., in *Kennaway v. Treleavan*, 5 M. & W. 498, the *future [*136c] advances would form a sufficient consideration for a guaranty of their own amount, and also of the past advances; and accordingly, in *Johnstone v. Nicholls*, 1 C. B. 251, and *Chapman v. Sutton*, 2 C. B. 634, guaranties of past and future debts given in consideration of a continuance of dealings with the principal debtor were sustained.]

Provided that the agreement be reduced to writing according to the above rules, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense. *Jackson v. Lowe*, 1 Bing. 9; *Phillimore v. Barry*, 1 Camp. 513; *Saunderson v. Jackson*, 2 B. & P. 398; *Allen v. Bennett*, 3 Taunt. 169; *Dobell v. Hutchinson*, 3 Ad. & Ell. 355. See *Johnson v. Dodgson*, 2 Mee. & Welsb. 653. [De Bert v. Thompson, 3 Beav. 471; *Coldham v. Showler*, 3 C. B. 312; *Saunders v. Cremer*, 3 Dru. & War. 87; *Green v. Cramer*, 2 Con. & L. 54; *Hammersley v. Baron de Biel*, 12 Cl. & F. 45.] But this connexion in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them.

That was one of the principal points decided in *Boydell v. Drummond*, 11 East, 142, which arose upon this section of the act, although the instrument there sued upon was not a guaranty. In that case the plaintiff proposed to publish a

magnificent edition of Shakspeare, illustrated by seventy-two engravings, which were to come out in numbers, at three guineas per number, two of which were to be paid in advance; each number was to contain four engravings; "*one number at least was to be published annually*, and the proprietors were confident that they should be able to produce two numbers in the course of every year." These proposals were *printed in a prospectus, and lay in the plaintiff's [*137] shop. The plaintiff also kept a book, which had for its title "*Shakspeare subscribers, their signatures*;" but did not refer to the prospectus. The defendant determining to become a subscriber to the work, signed his name in the book containing the list of subscribers, but afterwards refusing to continue to take it in, though he had received and paid for some few numbers, this action was brought against him to compel him to complete his contract. The Court decided, 1st, That the agreement was one not to be performed within the space of a year from the making thereof; that it was therefore within the 4th section of the Statute of Frauds, and it was necessary that there should be a note or memorandum of it in writing, signed by the defendant. See the notes to *Peter v. Compton*, post, 143. 2ndly, They held that though the prospectus contained the terms of the agreement, and would be sufficient memorandum thereof if it could be coupled with the book in which the defendant signed his name; still, as it contained no reference to the book, nor the book to it, there was no connexion in sense between them which would enable the court to couple them together and treat them as one document. And 3dly, they held that such connexion could not be introduced by parol evidence, but must, in order to satisfy the statute, appear upon the face of the documents themselves. They also held that the part performance which had taken place made no difference. It does not signify to whom the memorandum containing the agreement is addressed. It may be contained in a letter to a third person. Per Lord Hardwicke, 3 Atk. 503, 2 Cha. Rep. 147, 1 Vernon, 110; *Bateman v. Phillips*, 15 East, 272; *Longfellow v. Williams*, Peake's Add. Ca. 225. The reason of this is, that the memorandum is necessary only to evidence the contract, not to constitute it. The contract, as was observed by Tin-

dal, C. J., in *Laythoarp v. Bryant*, 2 Bing. N. C. 744, is made before any signature thereof by the parties.

With respect to the signature, it is only necessary that the memorandum should be signed by the party against whom it is sought to enforce the contract. *Laythoarp v. Bryant*, 2 Bing. N. C. 744. [See *Aveline v. Whisson*, 4 Man. & Gr. 801; *Cooch v. Goodman*, 2 Q. B. 580.] It was objected in that case, [*Laythoarp v. Bryant*], which arose on a contract to sell lands, that, unless the agreement were signed by both parties, there would be a want of mutuality, as the party who signed would be bound, and the party who had not signed would be loose, and so that there would be no consideration for his agreement. "But," said the Lord Chief Justice, "whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs, 'for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury,' and the whole object of the legislature is answered, when we put this construction on the statute. Here, when this party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and mutuality of claims. It is true the consideration must appear upon the face of the agreement. *Wain v. Warlters*, was decided on the express ground that an *agreement* under the fourth section imports more than a *bargain* under the seventeenth; but I find no case, nor any reason for saying that the signature of both parties is that which makes the agreement. The agreement is in truth made before any signature."

The words attributed in the text of the principal case to the court, who are made to say that a collateral undertaking is *void*, without writing, by the statute of frauds, are too strong, if literally understood; for the act does not direct that the promise shall be *void*, but that "no action shall be brought" upon it; and *Bosanquet, J.*, remarks, in *Laythoarp v. Bryan*, that the seventeenth section is in this respect stronger than the fourth, for the seventeenth avoids contracts not made in the manner there prescribed. Accordingly, though no *action* can be brought upon a parol guaranty, the courts have been known to enforce one

against an attorney, by virtue of their summary jurisdiction over their own officers, see **Evans v. Duncan*, 1 Tyrwh. 253; *Senior v. Butt*; [*138] and *Payne v. Johnson* there recited. [And this jurisdiction has been recently asserted by *Coleridge, J.*, in *re Hilliard*, 2 D. & L. 919. It is hardly necessary to add, that an agreement invalid for want of writing to satisfy the statute, has no tinge of *illegality*, and may be given in evidence with the same effect as any other promise binding in honour and conscience, though not in law; for instance, in *Cresswell v. Wood*, 10 A. & E. 460, where A. drew a bill of exchange on B., who accepted it, and A. discounted it, and applied the money in liquidation of a demand on C., made on him as surety for the debt of D., against which A. had promised to indemnify him, the agreement to indemnify, although by parol (being in fact the same which had in *Green v. Cresswell* been held to require a writing) was allowed to be given in evidence on behalf of B., for the purpose of supporting a plea that the bill was for A.'s own accommodation. And, in *Sweet v. Lee*, 4 Scott, N. R. 77, a memorandum by which an annuity was payable by the plaintiff to the defendant having been put in suit by the plaintiff, and appearing to be invalid for want of stating a consideration, the plaintiff sought to recover, as upon a failure of consideration, payments which he had made for several years on account of the annuity; but the Court of Common Pleas distinguished the case from those in which the contract is one that the law has declared to be void, *Tindal, C. J.*, saying, "The contract is not void; there is simply a failure of evidence;" and they held that the plaintiff was neither entitled to damages upon the contract, nor to recover back the payments made under it as upon a failure of consideration."] However, it is not necessary in order that the statute should apply that the action should be brought on the agreement; it is enough if the effect of the action is to "charge" the defendant by means of the agreement. Thus in *Carrington v. Roots*, 2 M. & W. 248, trespass for asportavit of a cart, plea removal of it damage feasant, replication that defendant had sold a crop of grass to plaintiff with liberty to take it, *quare*, &c., traverse of agreement; parol evidence of such a sale was held inadmissible, and plaintiff non-

suited. [And where a question arises between either of the contracting parties and a stranger, whether a contract has passed an interest in services or other property, the stranger may, equally with a party to the contract, insist upon the statute. Thus, where a contract of service is void, as between the parties to it, for want of a writing to satisfy the statute, the master can maintain no action for enticing away the servant, *Sykes v. Dixon*, 9 A. & E. 693; and a vendor cannot, where the contract of sale is invalid by the statute, effect an insurance upon the goods, *Stockdale v. Dunlop*, 6 M. & W. 224; nor, it seems, could he bring an action against the carrier, treating the vendor as his agent to forward, see *Coates v. Chaplin*, 3 Q. B. 483. Also it is observable that the written memorandum must exist before action, and in that respect differs from mere evidence. *Bill v. Bament*, 9 M. & W. 36; see *Fricker v. Tomlinson*, 1 Man. & Gr. 773. And, indeed, attending to the distinction pointed out by the Lord Chancellor Cottenham in *Dalé v. Hamilton*, 2 Phillips, 266, between agreements and declarations of trust; "that, in the one it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition,

and not the origin of the transaction, that must be in writing," it may be found difficult to impute any *retroactive* effect to the subsequent written memorandum of an agreement within the statute, not originally reduced into writing.]

When to an action brought upon a guaranty or other instrument falling within the fourth section of the Statute of Frauds, the defendant pleads that there is no such note or memorandum in writing as that act requires, it is unnecessary to set out the memorandum in the replication, though once it was considered unsafe not to do so. *Wakeman v. Sutton*, 2 Ad. & Ell. 78; *Lysaught v. Walker*, 2 Bligh, N. S. 1. Nor is it necessary, in declaring on such an instrument, to state it to have been in writing. *Anon.*, Sal. 519; per *Yates, J.*, 3 Burr. 1890. For it is a general rule in pleading, that when a statute regulates the mode of performing an act which was valid at common law, the same certainty of allegation is sufficient after the statute as before; but it has been said to be otherwise in a plea. *Case v. Barber*, T. Raym. 450; *sed quære*, and see *Peacock v. Purvis*, 2 B. & B. 362, where a sale of growing crops was pleaded, without any averment that it was in writing, and held sufficient, though *Case v. Barber* was cited and relied on.

The common law provided a safeguard against the uncertainty of parol testimony, in ordinary cases, by requiring that proof of a consideration should concur with that of a promise, to establish a contract. For, under this rule, the evidence must usually extend to facts as well as words, and a recovery cannot be based upon a false or mistaken relation of expressions, apparently showing a promise, which has not really been given, without going further, and satisfying the jury of the existence of some transaction, in which the alleged promise originated, and which forms a sufficient consideration for its support. Sufficient protection is thus afforded against perjury where the defendant has received the benefit of the contract, for, in this case, his liability is in great measure independent of the promise, which would be implied by the law, if not given expressly. But the protection is not so complete, when a promise by one man is sought to be founded upon a consideration moving to another, because there the liability grows out of the promise, and would not exist without it.

Thus when suit is brought on an alleged contract of sale, the fact of the sale, and the consequent transfer of the right of property in the thing sold,

must be satisfactorily proved, to charge the purchaser and his liability is a necessary legal inference from these facts when once established. But when the question arises on a contract of guaranty and not of sale, the liability of the guarantor, is founded wholly on his alleged promise, and may be made out by simply showing that he consented to be answerable for the purchase-money, at or before the time of the sale. He cannot, therefore, defend himself against a misrepresentation of his language, by an appeal to facts. Thus any number of persons may be made collaterally liable for the price of goods, without proof of any new or additional consideration, by adducing testimony that they consented to be answerable for its payment, when the goods were sold. And the danger of fraud or misrepresentation, is scarcely less, when the guaranty is alleged to have been given after the sale was effected, for although in this case, a new consideration is necessary, yet it may consist in a real or pretended promise of forbearance on the part of the vendor. All that is necessary, therefore, to charge one man on an alleged guaranty of the antecedent debt of another, is to prove a conversation between the guarantor and the creditor, from which the jury can infer the assumption of the debt by the former, in consideration of a promise of forbearance given by the latter.

The provision of the fourth section of the statute of frauds, which declares that no action shall be brought upon a promise to answer for the debt, default, or miscarriage of another; unless the agreement or some memorandum, or note of it is in writing, was manifestly intended to make a special provision, for the points which had thus been left unguarded, by the more general rule of the common law, and to obviate the injustice which may arise, from making men liable upon the uncertain testimony of witnesses as to their words, in those cases where they would not be liable upon the facts. It has recently been found necessary in England, to carry out the policy of this celebrated statute, with reference to a class of cases which had grown up since its enactment, by providing that debts barred by the statute of limitations, shall not be revived without written evidence of a new promise. The uncertainty attendant upon the administration of justice, in all cases where the liability of the defendant is dependent solely upon the language which he has held, sufficiently proves the reality and extent of the dangers against which this course of enactment is intended to guard, but the difficulties which it has introduced are hardly less than those which it has abated. Notwithstanding the length of time which has elapsed since the passage of the statute of frauds, its true construction is still undetermined, and the courts have fluctuated between the sense of the hardship which would result from construing it rigidly, and the fear of rendering it inoperative by a more liberal construction. This is true in a great degree of the whole statute, and of no part of it more than of the section under consideration. It is still uncertain whether the receipt of a new, and distinct consideration, will take a promise to pay the antecedent debt of another, out of the provisions of the statute when the debt itself remains in force, and it is equally uncertain whether a direct contract for the payment of a cotemporaneous debt, can be brought within them, by showing that it is one of suretyship, although not of guaranty.

At common law any number of persons, may be bound by a joint or joint and several promise, even where the consideration of it moves only

to one, and it is important to determine whether this rule has been varied by the provisions of the statute of frauds. It would seem that as the obligation imposed by such a contract, is common to all the parties, it can hardly be said that the promise of any of them, is to answer for the default or miscarriage of another, and not for their own. And this appears to be true, even where one or more of the parties to the contract, are sureties, if they have bound themselves directly for its performance, and not merely that it shall be performed by the principal, for the undertaking is not the less theirs, because he has received the benefit of the consideration. But when the contract in question is merely one of guaranty, that is, when it does not impose any direct liability, and consists solely in an engagement for performance by the principal, it is manifestly within the terms of the statute, and will not be valid unless in writing. Whether, therefore, the engagement of a party, who intervenes in a contract for the benefit of another, at the time when it is made, is within the statute, might be thought to depend on the nature of his liability, and not on that of the person in whose behalf he has made himself liable. If he has assumed to be the paymaster, and has thus made himself directly and unconditionally, although jointly, answerable for the debt, the statute would seem to be inapplicable, but if his engagement be merely to pay if the other does not, that is, if it be one of guaranty and not merely of suretyship, it will be within the direct terms of the statute, and must be expressed in writing.

If this construction of the statute be correct, it must follow that the question, whether a promise by one man founded on a consideration moving to another is within the statute, is not necessarily dependent, on whether credit was given to the principal debtor; and whether he is liable for the payment of the debt. This would seem obvious, in the ordinary case of a joint and several promise by a principal and surety, for as under these circumstances, both the promisors are primarily liable, the undertaking of each, is directly for himself and not for the other. Thus it was decided in *Wainright v. Straw*, 15 Vermont, 215, that where a stove was sold to two for the use of one, no writing was necessary to render both liable. The relation of the purchasers would appear to have been manifestly that of principal and surety, although it seems not to have been so understood by the court. In like manner it was held by the Court of Appeals, in *Durham v. Marrow*, 2 Comstock, 533, affirming the judgment of the court below, that when a surety bound himself directly and immediately for the price of a horse, sold to his principal, the engagement was his own, and a guaranty of a note transferred to the vendor to secure its performance not within the statute. And even when the promises in question, are several and collateral, instead of joint, it does not necessarily follow that either will be within the statute, for if both promisors have bound themselves to a direct and immediate performance, the contract of each is clearly original, although the consideration may have moved only to one. It was said by STORY, J., in *D'Wolff v. Rabaud*, 1 Peters, 476, that under these circumstances "the contract is tri-lateral, and that both promisors must be regarded not as joint contractors on the same contract, but as separate contractors upon co-existing contracts forming part of the same original transaction." And he intimated a strong opinion, that where this is the case, both promises are original, and therefore binding, although not in writing. This doctrine was applied in the subsequent case of *Townslley v. Sumral*, 2 Peters, 170, to a promise by the

defendant to accept bills to be drawn on him by a third person, in favour of the plaintiff, which was held not to be within the statute of frauds, although given in consideration of advances made to the drawer, for which he was liable. A verbal promise by A., if C. would advance money to B., to repay it to C., was said not to be within the statute, although B.'s liability might be co-extensive with A.'s. And in the recent case of *The Proprietors v. Abbott*, 14 New Hampshire, 157, where the defendant had promised, that if the plaintiffs would permit lumber, belonging to a third person, to pass through their locks, he would pay the tolls: the engagement thus given was held not to require a writing, although there would seem to be little doubt, that it did not supersede the implied liability of the owner of the lumber.

But this construction of the statute, must be admitted to be inconsistent with the rule laid down by Serjeant Williams, in his note to *Firth v. Stanton*, on the authority of *Matson v. Wharam*, 2 Term, 80, (*supra*), that where the party who receives the consideration is liable, a promise by another to pay for it, must be in writing. If this rule be taken literally, it must necessarily invalidate every verbal contract of suretyship, in which the liability of the principal is co-extensive with that of the surety. But it may be doubted whether any decision has yet gone so far, as to refuse to give effect to a direct contract for the purchase of goods, merely because one of the purchasers was a surety, and on referring to the principal case, and to that of *Matson v. Wharam*, which are cited by Serjeant Williams, as sustaining this position, it will be seen that the promise in question, was manifestly that the contract should be performed by the principal, and not that the defendant would perform it himself. In other words it was a promise of guaranty, and not merely of suretyship, and as such, unquestionably within the statute.

It must, however, be admitted, that the weight of authority is in favour of the rule as laid down by Serjeant Williams, which is sustained by innumerable dicta, if not by many actual decisions; *Elder v. Warfield*, 7 Harris & Johnson, 391; *Kurlock v. Brown*, 1 Richardson, 223; *Connelly v. Kettlewell*, 1 Gill & Johnson, 260; *Zeland v. Crayon*, 1 M'Cord, 100; *Taylor v. Drake*, 4 Strobbart, 437; *Rhoads v. Leeds*, 3 Stuart & Porter, 212; *Faires v. Lodoane*, 10 Alabama, 50; *Blake v. Perlin*, 22 Maine, 395; *Matthews v. Milton*, 4 Yerger, 576; *Rogers v. Kneeland*, 13 Wend. 114, 121; *Doyle v. White*, 26 Id. 341; *Brady v. Sackrider*, 1 Sandford, S. C. 514; *House v. Wagner*, 1 M'Cord, 395; *Leonard v. Vredenburg*, 8 Johnson, 29; *Gallager v. Brunel*, 6 Cowen, 346; *Tileston v. Nettleton*, 6 Pick. 509; *Aldrich v. Jewell*, 12 Vermont, 125; *Ware v. Stephenson*, 10 Leigh, 145. I apprehend, said Chancellor WALWORTH, in delivering his opinion in the Court of Appeals, in *Rogers v. Kneeland*, "that the object of the statute was to reach every case of mere suretyship; whether the agreement of the surety was collateral to a previous promise or liability on the part of the principal debtor, or only collateral to a promise or agreement, made at the same time with the promise of the surety, to indemnify against a future default or liability, of such principal debtor. Where the whole credit is not given to the person who comes in to answer for another, the promise is collateral; and in all such cases there must be an agreement in writing, containing a sufficient consideration to support it—in other words, it is a case within the statute."

It was said, in like manner, in *Faires v. Lodoñac*, that where credit is given, not to the party who receives the benefit of the contract, but to a third person who has verbally promised to pay for it, the latter will be liable, because the former is not; while in *Cahill v. Bigelow*, 18 Pick. 369, it was said, that where the promise is made at the time when the debt originates, "the test to decide, whether the party promising is an original debtor, or merely a guarantor, is whether credit was given to the party receiving the goods?" "If it was, then such promisor is a guarantor only, undertaking to pay another's debt. But if no credit was given to the person receiving the goods, then as the promisor is himself debtor for goods sold to him and delivered to another person, by his order, his promise is not to pay the debt of another, and a parol promise, being made upon a good consideration, is a good contract at common law, and binds him, and is not within the statute of frauds."

It will be observed, that the dictum last cited, fails to draw a distinction between a direct contract of suretyship and one of mere guaranty, and thus leaves it doubtful, whether the general principle which it declares, is applicable in the former case, or only in the latter. And this ambiguity, will be found to pervade most of the judicial opinions which have been delivered on this subject, either in this country or in England.

It may undoubtedly be admitted, that the object of the statute of frauds, which is to protect the defendant against a mistaken or fraudulent statement of his language, seems to require that when the suit cannot be sustained on an implied promise, it shall not be so on one which is express. And there would consequently seem to be much reason for holding with *BUCHANAN, C. J.*, in *Elder v. Warfield*, that when the promise in question cannot be given in evidence under the money counts, it is within the statute, and must be in writing. But it does not necessarily follow, that the application of this test will invalidate every verbal promise made by a surety. On the contrary, it appears to be well settled, that when goods are sold and delivered to two, the vendor may recover in *indebitatus assumpsit* against both, even if it be shown that one is a mere surety, and was known to be such at the time of the sale. And the general rule which applies in this case, that when the consideration of an express promise has been fully executed, and nothing remains open, under the contract, except a debt, the law will raise an implied promise for its payment, would seem also to apply, where goods are sold or money advanced to the principal at the request of the surety, and on the faith of a direct promise of payment given by the latter. However rare a count in *indebitatus assumpsit* against one man, for goods sold at his request to another, may be in practice, there appears to be nothing which forbids its being resorted to in principle. For the sale of the goods, in pursuance of the request of the promisor, and on the faith of his promise, would undoubtedly make it his duty to pay for them, and the law would imply a promise on his part to perform it. If this be so, it follows, that the distinction taken in *Elder v. Warfield*, sustains instead of opposing the position, that a recovery may be had against a surety on parol testimony, and without the production of a contract in writing. When, however, a promise to answer for a consideration moving to another, is one of guaranty, and not for direct payment or performance, the case will be within the statute, and the plain-

tiff can only recover, by resorting to a special count, and sustaining it by written evidence.

The recent case of *Carville v. Crane*, 5 Hill, 483, is clearly within this distinction in point of fact, whatever may be thought of the language held by the court. The suit was there brought on a promise by the defendant, to endorse a promissory note given for the price of goods sold to the maker on the faith of the promise. The agreement, therefore, was manifestly in its remote, if not in its immediate operation, one merely of guaranty, and the liability which it would have imposed, if fulfilled, contingent upon the failure of the maker of the note, to pay it at maturity. And this was no doubt enough to bring the case within the statute. In *Bushell v. Beavan*, 1 Bing. N. C. 103, it was, however, held, that a promise by an attorney to procure the signature of a third person, to a guaranty of the debt of his client, in consideration of which, the plaintiffs consented that a ship which the latter had chartered, should put to sea, was a new and original undertaking, and not within the statute.

Where the avowed motive for a promise to pay for goods furnished, or advances made to a third person, is one of gift or charity, the promisor will be bound without a writing, because no suit can be brought against the beneficiary; *Loomis v. Newhall*, 15 Pick. 166. This principle does not apply where the intention of the parties is, that the beneficiary shall be primarily and directly answerable for the debt, although he may have escaped from liability, in consequence of some legal or technical obstacle or disability. A promise to guaranty the payment of goods sold to a minor, can hardly be regarded as out of the statute, because the purchaser may plead infancy to an action brought for the price. But there is no doubt, that the minority of a party who appears *prima facie* as a principal debtor, may be a strong reason for believing that he is not so in fact, and that credit has been really given, not to him, but to a third person, who has promised to be answerable for the payment of the debt. *Chapin v. Lapham*, 20 Pick. 457.

It has been frequently held, that a promise of indemnity against any loss which may be sustained, in consequence of becoming surety or guarantor for a third person, does not require a writing to give it validity. For as such a promise, is not that another will perform that which he has undertaken, but that the promisee shall not lose by an engagement into which he has entered at the request of the promisor, it has been said to be direct and original, and therefore not within the terms of the statute. *Chapin v. Merrill*, 4 Wend. 657; *Harrison v. Sawtel*, 10 Johnson, 242; *Chapin v. Lapham*, 20 Pick. 467; *Peck v. Thompson*, 15 Vermont, 637; *Holmes v. Knight*, 10 New Hampshire, 175; *Doane v. Newcomb*, 10 Missouri, 69; *Lucas v. Chamberlain*, 8 B. Monroe, 276. And as the nature of such a promise, cannot vary, merely because the promisor is jointly or severally liable for the debt to which it relates; a promise by one surety, to indemnify another against the consequences of his suretyship, by taking the whole ultimate responsibility on himself, comes under the same reasoning. *Thomas v. Cook*, 8 B. & C. 728; *Jones v. Shorter*, 1 Kelly, 294.

The distinction relied on in these cases is somewhat subtle in its nature, and has recently been overruled both in New York and England. In *Greene v. Creswell*, 10 A. & E. 453, the plaintiff relied on *Thomas v. Cook*, to sustain a recovery on a promise to indemnify him for becoming bail for a third

person, but the authority of that case was denied, and it was held, that every promise to pay the debt of another, is a promise of indemnity, and that the circumstances under which the engagement of the defendant had been given, neither put it beyond the words of the statute, nor the mischief against which it was intended to guard. In *Staats v. Howland*, 4 Denio, 559, a promise to indemnify the plaintiff, for such endorsements as he might make for the accommodation of another person, was treated as indisputably within the provisions of the statute. And in the recent case of *Kingsley v. Balcome*, 4 Barbour, S. C. 131; *Chapin v. Merrill* was overruled, and it was decided, that a promise to indemnify one man for assuming the debt of another, is substantially the same thing as a direct and immediate assumption of the debt, and, consequently, requires a writing to give it validity.

It was held, in like manner, in *Wing v. Terry*, 5 Hill, 160, that when a bill was accepted for the accommodation of one of the drawers, a parol agreement by the other, who was merely a surety, to indemnify the acceptor, was within the statute, as being substantially an undertaking for the default of the principal debtor. And as a promise to indemnify an agent, for the expense which he may incur in defending a suit on behalf of his principal, falls within the principle of these decisions, it will be invalid unless expressed in writing. *Rogers v. Kneeland*, 10 Wend. 248; 13 id. 114.

The question in dispute in these cases, seems to depend on, whether a direct engagement is within the statute, merely because it will not take effect unless a default be made by a third person, in the performance of a contract into which he has entered, with reference to the same subject-matter. If this be so, it necessarily follows, that the promises given in *Wing v. Terry*, and *Chapin v. Merrill*, were within the statute, for although the engagement of the defendant was unconditional in both cases, there could have been no recovery upon it in either, unless the principal debtor had failed in the performance of his undertaking.

Where a party has once been legally liable for a debt, a promise to pay it will not be within the statute, merely because it is primarily the debt of another, or because his legal liability has ceased at the time of the promise. Thus an indorsee who has been discharged by a want of demand or notice, will be bound by a verbal promise of payment, if given with full knowledge, that he is so discharged. *Hopkins v. Liswell*, 12 Mass. 52; *Tibbetts v. Dowd*, 23 Wend. 379. And it is equally well settled, that when a debt due by another, is assigned as security or satisfaction of a debt due by the assignor, a guaranty of its payment will not be within the statute, because it is merely subsidiary to the purpose, for which the assignment is made. This is sufficiently evident in ordinary cases, where the debt does not pass at law, nor become legally due to the assignee, and he acquires a more equitable right to the proceeds. *Johnson v. Gilbert*, 4 Hill, 178; *Hargreaves v. Parsons*, 13 M. & W. 561. And the principle is the same, when the debt thus transferred, is negotiable in its character, and the assignee is entitled to enforce it by a suit in his own name. *Curtis v. Brown*, 2 Barbour's S. C. 31; *Brown v. Curtis*, 2 Comstock, 225; *Manrow v. Durham*, 3 Hill, 284; *Durham v. Manrow*, 2 Comstock, 533; *Jones v. Palmer*, 1 Douglass, Michigan R. 379.

It is equally well settled, that the contract of a factor, who sells under a *del credere* commission, is not within the statute, and does not require a

writing to give it validity. For although such a contract may be nominally one of guaranty, it is essentially original, and is in effect an agreement, that the parties to whom the sales are made, are solvent, and able to meet their engagements. *Wolf v. Koppell*, 5 Hill, 748.

The most natural division of the cases, which arise under the statute of frauds, is into those in which the engagement of the promise is given at or before the creation of the debt, and those in which it is given subsequently. The second class has again been subdivided into two others; those in which the promise is given upon a consideration growing out of the debt itself, and those in which the consideration is new and distinct in its nature. And it has been held, that this latter class is not within the statute, which is limited in its operation to the others. This view was taken by KENT, C. J., in *Leonard v. Vredenburg*, 8 Johnson, 29, where he held the following language. "There are three distinct classes of cases on this subject, which require to be discriminated; 1. Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration, than that moving between the creditor and original debtor. 2. Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here there must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of *Fish v. Hutchinson*, (2 Wils. 94,) of *Charter v. Beckett*, (7 Term Rep. 201,) and of *Wain v. Warlters*, are samples of this class of cases. 3. A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another, arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds, but the last is not. (1 Saund. 211, note 2.)"

The distinctions thus taken, are sustained although with some discrepancies in point of theory and application, by the prior and subsequent course of decision. It seems reasonably well settled, that a verbal promise to be answerable for the antecedent debt of another will be valid, where it is made upon a new and independent consideration, although the debt itself still remain in full force, but that where the consideration grows out of the original contract, the promise will be within the terms of the statute. "When," said Savage, C. J., in *Farley v. Cleveland*, 4 Cowen, 432, 439, "there is a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, the subsisting liability of the original debtor is no objection to the recovery." Thus a promise to pay an antecedent debt, in consideration of property placed in the hands of the promisor by the debtor, has been held not to require a writing to give it validity. *Olmstead v. Greely*, 18 Johnson, 12; *Farley v. Cleveland*, 4 Cowen, 432; 9 id. 639; *Ellwood v. Monk*, 5 Wend. 235; *Myers v. Morse*, 13 Johnson, 425; *Smith v. French*, 2 Scammon, 321; *Scott v. Thomas*, 1 id. 58; *Chandler v. Davidson*, 6 Blackford, 367; *Kershaw v. Whittaker*, 1 Brevard, 9; *Hilton v. Dawson*, 21 Maine, 410; *McKridell v. Jackson*, 4 Alabama, 230; *Lee's ad'r v. Fontaine*, 10 id. 755. The

effect will be the same, when the consideration consists in the relinquishment of a lien held by the promisee, although merely for the security of the debt itself. *Marcein v. Mack*, 10 Wend. 461; *Castling v. Aubert*, 2 East, 325; *Dunlap v. Thorne*, 1 Richardson, 213; *Henderson v. Langford*, 3 Strobhart, 407. Thus in *Williams v. Leper*, 3 Burrow, 1886, the abandonment by a landlord of a distress levied on the goods of the tenant, was held sufficient to take a promise to pay the rent given by a broker in whose hands the goods had been placed for sale, out of the statute. The point was held the same way in *Slungerland v. Morse*, 7 Johnson, 463, under similar circumstances, save that the party who gave the promise, had no right or interest whatever in the property distrained by the landlord. And in *Tindall v. Touchberry*, 3 Strobhart, 177, the withdrawal of a levy on the goods of a debtor, was held to give validity to an oral promise by a third person to pay the debt.

But when the consideration, instead of being some new and distinct matter, is a mere continuation or performance of the obligation imposed by the antecedent contract, the promise will require a writing to give it validity. Although, therefore, forbearance to bring suit against the original debtor, or the discontinuance of a suit already commenced, be as good a consideration at common law, as the relinquishment of a hold upon his goods, it has been held to be insufficient, to give a right of recovery on a verbal promise for the payment of the debt. *Fish v. Hutchinson*, 2 Wilson, 94; *Simpson v. Patten*, 4 Johnson, 422; *Larson v. Wyman*, 14 Wend. 246; *Watson v. Randall*, 20 id. 201; *Bennett v. Pratt*, 4 Denio, 275; *Durham v. Arlidge*, 1 Strobhart, 5; *Hilton v. Dawson*, 21 Maine, 410; *Caperton v. Gray*, 4 Yerger, 563. Thus in *Nelson v. Boynton*, 3 Metcalf, 396, forbearance to levy an attachment on the real estate of the father, was held insufficient to sustain a parol promise to pay the debt by his son. In like manner it is well settled, that an assent by one of the parties to a contract to go on and perform it, on the faith of a promise of payment, given by a third person, is a sufficient consideration to support the promise. *Carroll v. Nixon*, 4 Watts & Sergeant, 517. But as such a consideration, consists wholly in the performance of the antecedent contract, and does not arise out of a new and distinct transaction, the promise will not be valid without a writing. *Tompkins v. Smith*, 3 Stewart & Porter, 54; *Puckett v. Bates*, 4 Alabama, 390. Thus where the plaintiff who had been employed by a contractor to put up the walls of a house, which the contractor had undertaken to build for the defendant, refused to go on with the work, unless the latter would promise to pay him, which he finally did; it was held that this promise was within the provisions of the statute, because the consideration consisted simply, in the performance of the original contract to which the promise related. It was admitted, that if the evidence had shown that the agreement with the contractor was rescinded, and that with the defendant substituted in its stead, the case would have been taken out of the statute, for the promise given by the latter, would then have been simply on his own account and not collateral to a third person. The same principle was applied in another form in *Loomis v. Newhall*, 15 Pick. 146, where a promise by a father to pay for the board of his son, was held to be within the statute, because the only consideration consisted in the benefit conferred on the son, and not in a distinct and independent transaction. And this doctrine is

fully sustained by other cases in Vermont and Massachusetts. *Stone v. Symmes*, 18 Pick. 467; *Newell v. Ingraham*, 15 Vermont, 422; *Smith v. Hyde*, 19 id. 54; *Anderson v. Davis*, 9 Vermont, 136.

The distinction thus taken, unquestionably accords with the policy of the statute, and protects men from being made liable for the contracts of others, on the allegation of a verbal promise, and without proof of some new and distinct transaction of a nature to render them liable, apart from the promise. The *res gestæ* alone, said Lord Mansfield, in *Williams v. Leper*, entitle the plaintiff to a recovery; and whenever this is the case, the defendant is not charged solely on his promise, and the mischief which the statute was intended to obviate does not exist. But as the distinction, with respect to the nature of the consideration, on which these decisions proceed, was unknown to the common law and is not susceptible of an exact definition, it is not surprising that there should be some inconsistency and difficulty in its practical application. Thus it is admitted on all hands, that a promise to pay the debt of another, in consideration of forbearance to pursue the debtor, is within the statute. But it was held in *Slingerland v. Morse*, and *Mercein v. Mack*, that when the remedy of the creditor has ceased to be merely personal, and has taken the shape of a lien on the goods or property of the debtor, an abandonment of the hold thus acquired, will be such a new and distinct consideration, as to take a promise by a third person to pay the debt, out of the statute. And in *Russell v. Babcock*, 14 Maine, 140, this view of the law was carried to the extent of deciding, that a verbal promise by the defendant to be answerable for a debt, if the plaintiff would refrain from putting an execution against the debtor in the hands of the sheriff, was binding, although the consideration was manifestly one of forbearance, and was so alleged in the declaration. There are, on the other hand, cases which treat the suspension or abandonment, of a levy or distress on the goods of the debtor, as being, a mere forbearance to enforce the antecedent contract, and not such a new and distinct transaction as will, in the language of Lord Mansfield, in *Williams v. Leper*, bind the defendant by force of the facts and not of his promise. Thus it was held in *Nelson v. Boynton*, 3 Metcalf, 396, that the dissolution of an attachment and consequent loss of a lien on the real estate of a father, on the faith of a promise of payment given by his son, would not take the promise out of the provisions of the statute. The court took the distinction, between the case before them, and that of *Williams v. Leper* that while in the one, the relinquishment of the lien was beneficial to the promisor, who had been employed to sell the goods, in the other the benefit accrued solely to the original debtor. But this distinction, which makes the effect of a consideration, depend on the benefit to the promisor, instead of the loss to the promisee, is one unknown to the common law, and of questionable validity as measured by the standard of general reason. Nor can it serve to reconcile the decision in *Nelson v. Boynton*, with those in *Slingerland v. Morse*, and *Mercein v. Mack*, where the relinquishment of the lien, seems to have enured solely to the debtor.

In *Barker v. Bucklin*, 2 Denio, 45, the general opinion that a new consideration as between promisor and promisee, will take a promise to pay the antecedent debt of a third person, out of the statute, was denied to be law, and the novel ground taken, that no recovery can be had in such cases, unless the consideration, for the promise moves from the debtor or from a

third person, and not from the creditor. And the cases of *Farley v. Cleveland*, and *Mercein v. Mack*, as well as the case actually before the court, were put on the ground, that where the promise is given upon a consideration moving from the debtor himself, the contract is really with him, and the creditor only entitled to enforce it as being the party beneficially interested in its performance. But the position thus assumed, which denies a recovery to the creditor in the only case, when he could have enforced it at common law, is inconsistent, both with the language of the court and the facts in *Slugerland v. Morse*, and *Mercein v. Mack*, and with the language held by the court, if not with the facts in *Williams v. Leper*, and *Farley v. Cleveland*. It was, notwithstanding, treated as sound in the subsequent case of *Kingsley v. Balcombe*, 4 *Barbour's S. C.*, 131, where the court denied the accuracy of the rule laid down by *SAVAGE, C. J.*, in *Farley v. Cleveland*, and held that as a new consideration was requisite at common law, to give validity to a promise for the payment of an antecedent debt, the statute is inoperative unless it goes further, and requires a writing.

There are, moreover, several decisions, which refuse to admit that the nature of the consideration, can vary the character of the promise, and hold that a verbal promise to pay the debt of another, is invalid in all cases, unless the debt is extinguished and the promise accepted in its stead. *Jackson v. Rayner*, 12 *Johnson*, 291; *Campbell v. Tindley*, 3 *Humphreys*, 330. And on the other hand, it is well settled, that such a promise will be without the statute, when it is based upon a direct or consequential extinguishment of the debt. *Skilton v. Brewster*, 8 *Johnson*, 376; *Cooper v. Chambers*, 4 *Devereux*, 261; *Corbit v. Cochran*, *Riley*, 44.

The difficulties which have attended the construction and application of the fourth section of the Statute of Frauds, are so numerous and perplexing, as to justify a doubt, whether the innovation which it made on the rules of the common law, has been really beneficial. And some eminent judges have expressed the opinion, that it has been the occasion of more fraud, than it has prevented. In the state of Pennsylvania, where the provisions of this section have not been re-enacted, no ill consequences have resulted, or at least none which can be compared in frequency and magnitude, with those which it has occasioned in those parts of the Union, where it has been introduced. It may once have been necessary, but if so, the necessity for it has passed away with the change in the state of society, and all that is practically useful in its provisions, at the present day, might perhaps be attained, by providing that promises for the debt of another, in consideration merely of forbearance to bring suit, should be invalid unless reduced to writing.

H.

PRICE v. THE EARL OF TOR- [*139] RINGTON.

TRIN.—2 ANNE.—CORAM HOLT, C. J., AT GUILDHALL.

[REPORTED SALKELD, 285.]

In an action for Beer sold and delivered, in order to prove the delivery, a book was put in, containing an account of the Beer delivered by the plaintiff's draymen, and which it was the duty of the draymen to sign daily. The drayman who signed the account of Beer delivered to the defendant being dead, the book was admitted in evidence on proof of his handwriting.*

THE plaintiff being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was, that the usual way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-honse, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names, and that the drayman was dead, but that this was his hand set to the book; and this was held good evidence of a delivery; otherwise of the shop-book itself singly, without more.†

The books supply repeated instances in which the entries of a deceased person, *contrary to his own interest*, have been, after his death, received as evidence of the facts stated by him in those entries. But the decision in the principal case seems hardly to range itself within that class of authorities, for, as remarked by Mr. Phillipps, in his "Law of Evidence," such a declaration by a tradesman's servant as that made by the drayman in *Price v. Lord Torrington*, is clearly distinguishable from entries in the book of a receiver, who, by making a gratuitous charge against himself, knowingly against his own interest, and without any equivalent, repels every supposition of fraud. A disposition to commit fraud would have tempted him

to suppress altogether the fact of his having received any thing, or to misrepresent the amount of the sum, but not to mis-state the ground or *consi- [*140] deration upon which it was received; that is, not to mis-state the only fact sought to be established by the proposed evidence. On the other hand, the declaration of the tradesman's servant is given in evidence to prove the fact of delivery, and as he gives the account not against his own interest, which is some security for the truth of the statement in the other case, the probability of his account being true or false is neither greater nor less than the probability of his being honest or dishonest, which is nothing more than may be said in every case of hearsay. The

* See *Higham v. Ridgway*, post, vol. ii. 183.

† Sal. 690. Ib. 283. Mod. Cases, 264. 2 Lord Raym. 873.

circumstance of his thereby acknowledging the receipt of goods, which, it may be said, would be evidence in an action against him, seems to amount to little or nothing. It was the least he could say. To have said nothing at all would, as he must have known, necessarily lead to inquiry.

Price v. Lord Torrington falls within the class of cases thus described by Mr. Justice Taunton. "A minute in writing, made at the time when the fact it records took place, *by a person* since deceased, *in the ordinary course of his business*, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence." *Doe v. Turford*, 3 B. & Ad. 898. In that case a landlord instructed B. to give the defendant notice to quit, and B. communicated it to his partner P., who, having prepared three notices to quit, two of them to be served on other persons, and three duplicates, went out, returned in the evening, and delivered to B. three duplicates, one of which was a duplicate of the notice to the defendant indorsed by P. It was proved that the other notices were delivered as intended, that the defendant had afterwards requested not to be compelled to quit, and that it was the invariable practice of the clerks of B. and P., who usually served the notices to quit, to indorse, on a duplicate of such notice, a memorandum of the fact and time of service. The duplicate in question was so indorsed; and it was admitted, after the death of P. to prove the service of the third notice on the defendant.

The former cases on this subject will be found cited and discussed in *Doe v. Turford*; it will therefore be unnecessary to advert to them at length in this note. See *Pitman v. Maddox*, 2 Salk. 690; *Hagedorn v. Reid*, 3 Camp. 379; *Champneys v. Peck*, 1 Stark. 404; *Pritt v. Fairclough*, 3 Camp. 305, et notas; {and *Regina v. Dukinfield*, 11 Q. B. 678, 685.} In *Poole v. Dicus*, 1 Bingh. N. C. 649, a bill became due and was left with a notary to demand payment; M. the notary's clerk went out, returned, and, in one of the notary's books into which the bill had been previously copied, wrote in the margin *no effects*; another clerk made a similar entry in another book from M.'s dictation; all this was done in the regular course of business: the court held that after the death of M. the entry made by

him was admissible to prove the dishonour of the bill. "We think it," said Tindal, C. J., "admissible, on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by a person who had no interest to mis-state what had occurred."

Mr. J. Parke, in delivering his judgment in *Doe v. Turford*, remarks a distinction between the admissibility of an entry of this description, and of an entry admitted in evidence because against the interest of the party making it. "It is to be observed," said his Lordship, "that in case of an entry falling under the rule as being an admission against interest, proof of the handwriting of the party and his death is enough to authorise its reception; at whatever time it was made, it is admissible. But in the other case, it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." 3 B. & Ad. 898.

An entry admissible after the maker's death because made in the course of business is, however, evidence of those things only which, according to the course of that business, it was the duty of the deceased person to enter. In *Chambers v. Bernaseoni*, 1 Tyrwh. 342, 4 Tyrwh. 531, *in error*, a distinction was engrafted upon the rule laid down in *Doe v. Turford*. In that case it became material to ascertain the place at which one Chambers had been arrested. The under-sheriff of Middlesex being called, produced the writ, and stated that by the course of his office the bailiff [*141] *making an arrest was required immediately afterwards to transmit to the office a memorandum or certificate of the arrest, and that for the last few years an account of the place where the arrest took place had also been required from him; it was then proved that the bailiff who arrested Chambers was deceased, and the following memorandum in his handwriting, taken from the files of the office, was tendered in evidence to prove the place where he made the arrest.

"9 November, 1825.

"I arrested A. H. Chambers the elder only in South Molton Street, at the suit of William Brereton.

"THOMAS WRIGHT."

The memorandum was held by the Court of Exchequer inadmissible for the purpose for which *it was offered, and afterwards in the Ex- [*141a]

chequer Chamber whither the point was carried by a bill of exceptions. "The ground," said Lord Denman, C. J., delivering the judgment of the Exchequer Chamber, "on which the Attorney-General first rested his argument for the plaintiff in error was not much relied on by him, viz., that the certificate was an admission against the interest of the party making it, because it renders him liable for the body arrested. He had recourse to a much broader principle, and laid it down as a rule, that an entry made by a person deceased, in the course of his duty, where he had no interest in stating an untruth, is to be received as proof of the fact stated in the entry, and of every circumstance therein described which would naturally accompany the fact itself. The discussion of this point involved the general principles of evidence, and a long list of cases determined by judges of the highest authority, from that of Price v. Torrington, before Holt, C. J., to Doe d. Patteshall v. Turford, recently decided by Lord Tenterden in the Court of King's Bench. After carefully considering, however, all that was urged, we do not find it necessary, and therefore we think it would not be proper, to enter upon that extensive argument; for as all the terms of the legal proposition above laid down are manifestly essential to render the certificate admissible, if any one of them fails the plaintiff in error cannot succeed; and *we are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances.* Admitting then for the sake of argument that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal,) we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done." [See Lloyd v. Wait, 1 Phil. 61.]

It is difficult, in perusing this case, [Chambers v. Bernasconi,] to avoid remarking, that, although professing to steer wholly clear of the doctrine promulgated in Doe v. Turford, it still

seems hardly reconcilable in its facts with that decision; for it was proved in Chambers v. Bernasconi, and is indeed stated in the judgment of the L. C. J., that the course of the office of the Sheriff of Middlesex is to *require* a return in writing of the arrest, and *of the place where it is made*, under the hand of the officer making it. Now it certainly, in ordinary parlance, would be said to be the officer's *duty* to comply with the course of the office by returning the *place* of arrest, had he refused to do so he would probably have been discharged. And it is difficult to see how an entry which he was required to make, and had not the choice of omitting, could be more collateral to his duty than the entry of the service of the notice to quit was to that of the person making it in Doe v. Turford; and it seems obvious that the entry of the *place* of arrest might prove of utility to the officer's employer, the Sheriff; since, if an action of trespass were brought against him by the party arrested, he would, in order to his defence, be obliged to show that he arrested him within the county: so that a knowledge of the precise spot on which the caption took place might be very material and useful to him. But whatever may be our opinion ^{as to the} possibility of reconciling Chambers v. Bernasconi with Doe v. Turford, it may be safely stated, that the former case has not shaken the general doctrine promulgated in the latter, since the attention of the Court of Common Pleas was drawn to both in Poole v. Dicas, 1 Bingh. N. C. 649, where the authority of Doe v. Turford was expressly recognised; and Tindal, C. J., and Park, J., both stated, that the decision in Chambers v. Bernasconi turned wholly on the circumstance that the officer had gone beyond the sphere of his duty in making an entry of the *place* of arrest. See Baron de Rutzen v. Farr, 4 A. & E. 53; in the report of which there seems to be some mistake. See also Marks v. Lahee, 3 Bingh. N. C. 420. [Clark v. Wilmot, 1 Younge & C., N. C. 53, corrected 2 id. 259 n.; Pickering v. Bishop of Ely, 2 id. 249; and Lloyd v. Wait, 1 Phil. 61. In Doe d. Graham v. Hawkins, 2 Q. B. 212, the account admitted was written by a clerk (still living and not called) of the deceased officer, and it had been recognised by the officer as his. In Davis v. Lloyd, 1 Car. & M. 275, it appeared to be the practice of the Jews

that circumcision should take place on the eighth day after the birth, and that it is the duty of the Chief Rabbi to perform the rite and to make an entry thereof in a book kept at the synagogue. The death of the Chief Rabbi being proved, such an entry was offered in evidence to show the age of a Jew, but Lord Denman, after consulting Patteson, J., rejected it, probably on the ground that the duty of the Chief Rabbi did not spring from any relation recognised by law.

In *Brain v. Preece*, 11 M. & W. 773, it was the course of business for H., one of the workmen at a coal-mine, to give notice of the coals sold, to the foreman Y., who, not being able to write, employed another man to enter the sales, and the entries were afterwards read over to him. H. and Y. being dead, the entries were held not to be evidence, ap-

parently on the ground that they were not made by a person having direct knowledge of the facts or a person employed by him; and Lord Abinger, C. B., observed that, "as regards the case of *Price v. Lord Torrington*, it is better to adhere to that case as it stands, and not to give any extension to it." The declarations of a deceased witness to a deed tending to show that he was concerned in forging it are inadmissible, *Stobart v. Dryden*, 1 Mee. & Welsb. 615; but in that case it was not argued that they were declarations against interest, [nor could that have been successfully argued according to the *Sussex Peerage* case, 11 Cl. & Fin. 85. For the law as to admissibility of statements against the interest of the person making them, see *Highham v. Ridgway*, vol. II. p. 183, and the notes.] {See *Doe d. Padwick v. Skinner*, 3 Exch. 84.}

THE particular point in *Price v. Torrington* has often been confirmed in this country; and it may be taken as the settled law of all the states, that entries made in the usual course of business by the plaintiff's clerk, are admissible in evidence after his death, on proof of his handwriting. *Lewis v. Norton*, 1 Washington, 76; *Clarke v. Magruder et al.*, 2 Harris & Johnson, 77; *Clemens v. Patton, Donegan & Co.*, 9 Porter, 289; *Everly v. Bradford*, 4 Alabama, 371; &c.

And the general principle in *Doe v. Turford*, as distinct from the principle of entries against interest, had been ascertained and established in this country before that decision was made. The leading case is *Welsh v. Barrett*, 15 Massachusetts, 380, decided by Chief Justice PARKER in 1819. It was assumpsit on a promissory note, by endorsee against endorser. To prove demand and notice, the book of a deceased messenger of the bank where the note had been left for collection, was offered. The cashier proved it to be the book which the messenger had kept pursuant to the regulations of the bank, and in which he entered his doings with respect to notices to the makers and endorsers of notes belonging to the bank, or left with it for collection. The by-laws of the bank made it part of his duty to keep such a book, and he had taken the required oath faithfully to perform his duty. The book contained entries of the names of makers and endorsers of promissory notes, and certain figures and memoranda, which the cashier testified were in the handwriting of the deceased messenger, and were the minutes made by him of his doings with respect to such notes. The question was argued at length, (*Webster* against the admission of the book): PARKER, C. J., in delivering the opinion of the court in favour of the book, examines the subject and the cases with great ability, and says; "The principle seems to be founded in good sense, and public convenience. What a man has said when not under oath, may not in general be given in evidence,

when he is dead; because his words may be misconstrued and misrecollected; as well as because it cannot be known that he was under any strong motive to declare the truth. But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the jury." He added, that the practice might safely be extended to the proof of entries made by a merchant's clerk, after his death, in a case proper for the admission of a merchant's books. This case was confirmed and acted upon in *Halliday v. Martinet*, 20 Johnson, 168. This, also, was assumpsit by endorsee of a promissory note against endorser; in which, due diligence in making demand and giving notice was to be proved. The protest, and register of protests, of a deceased notary, proved by his clerk, the register containing memoranda of his acts respecting notices, were held admissible. The due diligence in making demand seems to have been established by these and the custom of the office; and though the fact did not amount to due diligence in giving notice, yet the register of protests was deemed evidence of the facts stated in it: and the court, per WOODWORTH, C. J., said, "If the notary had stated, that the endorsee could not be found, as he has done with respect to the maker, he would have made out sufficient to entitle the plaintiff to recover." It may be proper to observe, that, this being a promissory note, the protest had no other value as evidence, than an entry or memorandum. The principle of this case has been repeatedly confirmed in New York; as, in *Hart et al. v. Wilson et al.*, 2 Wendell, 513; *Butler v. Wright*, id. 369; *Nichols v. Goldsmith*, 7 id. 160; *Merrill et al. v. The Ithaca and Owego R. R. Co.*, 16 id. 587; and it is now considered a settled rule, "that entries and memoranda made in the usual course of business, by notaries, clerks, and other persons, may be received in evidence after the death of the person who made them;" *Brewster v. Doane* and another, 2 Hill's New York Rep. 537; *Sheldon v. Bentham*, 4 id. 129. See, also, to the same effect, *Williamson v. Doe*, 7 Blackford, 12, 18; *Spann v. Baltzell*, 1 Florida, 302, 321; *Bank of Tennessee v. Smith*, 9 B. Monroe, 609, 611.

The case of *Welsh v. Barrett* is likewise confirmed and acted upon in *Nicholls v. Webb*, 8 Wheaton, 326; an action of the same kind on a promissory note. The protest by the deceased notary, and an extract from his book which was duly authenticated as a regular record of his notarial acts, were offered in evidence to prove demand and notice; the book contained a copy of the note, and in the margin this memorandum, "Endorser duly notified in writing 19th July, 1819, the last day of grace being Sunday the 18th;" which was signed by the notary. The opinion of the court, in favour of the evidence, was given by SPOFFORD, J.; he says, that being a promissory note in which the action of a notary was not necessary, the protest itself was not evidence in chief of the fact of demand; but that from the usage in employing notaries it may be inferred that "the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged;" the subject is then examined, and the case distinguished from that class of cases in which the entry charges the person making it; the decision in *Welsh v. Barrett* is cited, and the judge concludes; "We are entirely satisfied with that decision, and think it is founded in good sense and public convenience.

We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. * * * A fortiori, we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence."

In *DELAWARE*, in *The Bank of Wilmington and Brandywine v. Bradun*, cited in 1 Harrington, 14, the register of a deceased notary was decided to be competent to prove notice, &c. In *Bank of Wilmington and Brandywine v. Cooper's Adm'r*, id. 10, there is a valuable remark of Chief Justice CLAYTON, which detects an important error on a collateral point in *Nicholls v. Webb*: "I must be permitted," he says, "to say a word as to the case of *Nicholls v. Webb*, so far as it is considered an authority to establish the point that the entry on the record of the deceased notary's book, 'that due notice was given to the endorser,' is to be taken as proof that legal notice was given. The book I would hold as evidence of all the facts it gives as to the time, manner, &c., of notice, by reason of his death. If we go further, we make the notary the judge of what is *legal notice* to fix the endorser. Now what is legal notice is a question of law for the court, and not for the notary. He should note the facts, when he gave notice; to whom; the mode, &c. These are *facts*, and his record would be sufficient to prove them; but the conclusion of law, whether it is due notice or not, is for us to decide, and not him. If the case in *Wheaton* goes as far as it appears it did go, it has not my approbation as sound law." And this is confirmed in *Spann v. Baltzell*, 1 Florida, 302, 323. In *Hatfield v. Perry*, 4 Harrington, 463, where *Nicholls v. Webb* is again approved, it is decided that the notary's certificate is not admissible.

In *PENNSYLVANIA*, the cases of *Welsh v. Barrett* and *Nicholls v. Webb*, are recognized, and the principle regarded as a settled one, in *Philadelphia Bank v. Officer* and another, 12 Sergeant & Rawle, 49; *Farmers' Bank of Lancaster v. Whitehill*, 16 id. 89; and see *Henry v. Oves*, 4 Watts, 46.

In *MISSISSIPPI*, these cases have been adopted, and it is there considered to be a settled principle of the common law, that "a memorandum of one who knew the fact had no interest to falsify it, and which was made by him as a public officer in the regular course of his business as such," he being dead, is admissible evidence; and accordingly the written entry or memorandum of a deceased notary, as to demand and notice, in case of promissory notes, is received. *Ogden v. Glidewell et al.*, 5 Howard, 179; *Bodley v. Scarborough et al.* id. 729.

In *MAINE*, a more interesting case occurs: in *The Inhabitants of Augusta v. The Inhabitants of Windsor*, 19 Maine, 1 Appleton, 317, in assumpsit for charges incurred by plaintiffs on account of a pauper properly chargeable on defendants, it became important to show *at what time* one Temple Linscott had *had his leg broken*; and for the purpose of fixing the *date*, the plaintiffs offered in evidence, a day-book of Dr. Neal of Gardiner, containing two charges against Temple Linscott, one dated Sept. 28, 1821, and the other, Sept. 29, of the same year, for reducing a fracture in his leg and for medical attendance. It

was further proved that Dr. Neal attended and set Linseott's leg; that he died in 1839; that he was a regularly practising physician in 1820 and 1821; and that the book introduced was in his handwriting. The court, per SHEPLEY, J., adopted the principle of *Doe v. Turford*, and *Nicholls v. Webb*; and on that ground decided that the evidence was admissible. And more recently it has been held in that state, that contemporaneous entries by third persons in their own books in the ordinary course of business, where the matter is within their knowledge and there is no apparent motive to pervert the fact, are evidence; *Dow v. Sawyer*, 29 Maine, 118.

In ALABAMA, it is declared to be a "principle now too firmly settled to require argument or illustration, that books of accounts kept by a deceased clerk, and other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence:" and moreover, that if the book containing the original entry has been destroyed or lost, a copy, proved by the oath of a person who copied it, is admissible; and accordingly a sworn copy, from the book of a deceased warehouseman and weigher, of an entry of the weight of some bales of cotton, the book itself having been destroyed in a fire, was decided to be admissible in a suit between third parties; *Batre v. Simpson*, 4 Alabama, 306, 312; *Brown, use, &c. v. Steele et al. Ex'r*, 14 Alabama, 63.

In CONNECTICUT, in *Livingston v. Tyler*, 14 Connecticut, 494, 499, entries by a deceased clerk of the defendant, of the quantity of bark delivered at the defendant's tannery, in a case where the plaintiff had kept no account, and was therefore to be considered as having acquiesced in the account's being kept by the clerk, in the character, to some extent, of the agent of both parties, were decided to be admissible evidence of the quantity delivered; within the principle, that private, original entries by third persons, are receivable when they have been made in the usual course of business, by a person now incapable of giving testimony, who had knowledge of the fact, and had no motive to misrepresent it, and more especially when made with the presumed assent of the person to be charged with them.

In *Nourse and Wife v. McCay and another*, 2 Rawle, 70, to show that a deed was a forgery, the account-book of a deceased magistrate showing charges for acknowledgments of three other deeds on the same day, and no charge for the acknowledgment of this, was decided to be admissible. It is obvious that the ground on which entries in the course of business are admitted, is that as *res gestæ* they afford a presumption as to other facts: and an omission in a course of usual entry, is often as strong a fact as an entry.

Taking these American cases together, the principle derivable from them is, that entries made in the regular course of the person's business or employment, though he was not a public officer, and though it was not his duty to make the entries, are admissible evidence after his death.

The general rule is that to render the entry admissible, the person who made it must be dead. This is strictly adhered to in New York and Alabama; and absence from the state permanent or temporary, is not sufficient; in such case, the person must be produced, or his deposition taken. *Brewster v. Doane & another*, 2 Hill's New York Reports, 537, where the New

York cases are cited; *Moore v. Andrews and Brothers*, 5 Porter, 107. In South Carolina, the handwriting of a clerk may be proved if he is out of the state, *Elms v. Chevis*, 2 M'Cord, 349; but not if he is within it. *Tunno v. Rogers and M'Bride*, 1 Bay, 480. In Pennsylvania, it is a settled general principle, "that absence from the state, as far as it affects the admissibility of secondary evidence, has the same effect as the death of the witness." *Alton v. Berghans*, 8 Watts, 77: and the admissibility of entries by a clerk who is out of the state or the jurisdiction of the court, upon proof of his writing, is abundantly settled; *Sterrett v. Bull*, 1 Binney, 234, 237; *Crouse and another v. Miller*, 10 Sergeant and Rawle, 155; but as a subpoena of a county court runs through the whole state, it is not enough that he is in a distant county. *Hay v. Kramer*, 2 Watts & Sergeant, 137; *Philadelphia Bank v. Officer*, 12 Sergeant & Rawle, 49. In Massachusetts, insanity has been held to be equivalent to death. *Union Bank v. Knapp*, 3 Pickering, 96; and in case of auditing a guardian's account where the referee had adopted the principle of admitting receipts as evidence of payment, where the receiver was dead or out of the state, it was decided not to be ground of objection.

The principle of *Doe v. Turford* is therefore to be considered as well settled in this country. But the American cases appear to establish another principle, which is derived directly out of the former, and is in fact but a more extended application of it; viz. That where original entries have been made in the usual course of business, and are authenticated as such by the oath of the person who made them, though he remembers and can testify nothing about the facts recorded in the entries, such entries thus verified by the oath of the person who make them, are admissible, primary evidence of those facts, during his life; and the accuracy of this view is confirmed in *Spann v. Baltzell*, 1 Florida, 302, 321.

The cases involving this principle are to be distinguished from those which turn upon a witness's being allowed to refresh his memory by referring to memoranda or entries. Under the notion of refreshing the memory by looking at papers, there are two kinds of practice: 1. Where the witness by referring to the paper, has his memory actually revived and restored, so that he swears to an actual recollection of the fact; and in this case, the paper thus used may be one made after the transaction, may be a copy, and need not be produced in court. 2. Where the witness after referring to the paper undertakes to swear positively to the fact; yet not because he remembers it, but because of the confidence he has in the paper; and, here, the paper must be produced to the court, must be an original, and made about the time of the occurrence. See *O'Neale v. Walton*, 1 Richardson, 234; and *Bank of Tennessee v. Cowan et als.* 7 Humphreys, 70. In illustration of the extent to which this practice is allowed in England, and for proof that it is the oath of the witness, and not the paper, which in such cases is the evidence, see the case of *Maugham v. Hubbard and Robinson*, 8 Barnewall & Cresswell, 14. See *Withers v. Atkinson*, 1 Watts, 236, 244. The American cases require that the oath of the witness from his paper, in the second case, should be positive to the truth of the facts.

The distinctive characteristic of both these latter classes of cases, is, that in both of them, the oath of the party is the primary, substantive evidence relied on; in the former of them, that oath being grounded on an actual

recollection, the means that have been used to stimulate memory are merely matter of observation to the jury; in the latter, it is still the oath alone that is the evidence, but being grounded wholly on the verity of a written memorandum, the court, to judge of the credibility of the oath and the justness of the witness's reliance, will have the paper produced for inspection, and will require it to be an original, and contemporary memorandum.

This appears to be the limit and legal signification of refreshing memory; and this practice differs from the principle above stated, as being involved in the American decisions, in this respect; that in one case the oath is the primary evidence, and this oath is affected as to its credibility by the nature and character of the memoranda connected with it; in the other, the entries are the evidence that goes to the jury, and the oath is only to verify them as being original and made in the course of business. The evidence in one case, is the direct testimony of a witness; in the other, it is the presumption derived from the contemporary entry as part of the *res gesta*.

It has been attempted to carry even still further this principle of receiving entries in evidence, and to admit any private memorandum made at the time for the purpose of perpetuating evidence of the fact, if verified to be such by the oath of the person who made it; though such person can state nothing about the fact. There is a powerful argument of GIBSON, J., in *Smith v. Lane*, 12 Sergeant & Rawle, 84, in favour of this more extended admission; which however, is but an extra-judicial opinion of that judge alone, in favour of what he admits to be an innovation. See also *Heart v. Hummel*, 3 Barr, 414. The acute, and very profound and learned author of the "Treatise on the Law of Evidence" appears to regard this practice settled in some of the states; "The American courts have sometimes carried the rule farther than it has been carried in England, by admitting the writing itself to go in evidence to the jury in all cases, where it was made by the witness at the time of the fact, for the purpose of preserving the memory of it, but, at the time of testifying, he can recollect nothing further than that he had accurately reduced the whole transaction to writing." *Greenleaf on Evidence*, 484, n. In *Merrill v. The Ithaca and Owego R. R. Co.* 16 Wendell, 587, there is a long extra-judicial argument by COWEN, J., plainly in favour of admitting such entries without any distinction between private memoranda and entries in the course of business. After extracting the case of *The State v. Rawls*, 2 Nott & McCord, 334, a case which, as will presently be shown, is misunderstood by him, he proceeds as follows: "A great variety of American cases have arisen where the witness, having made the entry or memorandum, could swear to his belief of its truth, but had entirely forgotten the facts which he recorded, in which the paper thus attested has been received and read in evidence to a jury. A memorandum in respect to a gambling transaction was so received against a criminal. *The State v. Rawls*, before cited. * * * So the notes of evidence by counsel were received, though he could not remember the facts. *Rogers v. Burton*, Peck, 108, 109, 116; *Clark v. Vorce*, 15 Wendell, 193. The entry of a bank clerk, who had forgotten the fact, *Farmers and Mechanics Bank v. Boraef*, 1 Rawle, 152; of a notary's clerk, who had forgotten the fact he had entered of notice to an endorser, *Haig v. Newton*, 1 Rep. Const. Court, 423-4; of a town clerk, who had forgotten his entries of charges for penalties, *Corporation of Columbia v. Harrison*, 2 id. 213; of a notary, entering a notice which he had forgot-

ten, *Bullard v. Wilson*, 5 Mart. Lou. Rep. N. S. 196, with many others to the same effect. * * The result is that original entries, attested by the man who makes them, may be read to the jury, though he remember nothing of the facts which they record."

But with deference to these learned writers, it is believed that the American cases have not gone to that extent, and that an examination of the cases cited by COWEN, J., and of others, will show that no entries have ever been admitted as evidence, attested by the person who made them, except entries, contemporaneous with the fact and *made in the usual and regular course of business*; other entries may be used to refresh the memory, according to the distinction above-mentioned, but are not themselves admissible in evidence. The true test, as established in this country, of the admissibility of an entry verified by the oath of the person who made it, appears to be this: entries, such as would have been admissible, after the death of the maker of them, on proof of his handwriting, are competent evidence in his lifetime when authenticated by his oath; and no other entries are. It is but an extension of the principle on which the entries of a deceased person are admitted; and it is a reasonable and safe extension.

The general rule is that hearsay, (meaning entries, as well as declarations, of a third person) is no evidence: the cases of *Doe v. Turford, &c.*, ascertain that original entries in the course of business, &c., are not hearsay, but are evidence; they partake of the nature of *legal evidence*: for, if such entries were mere hearsay, and did not possess the nature of evidence, the death of the person who made them could not render them evidence. Seeing then that such entries are *evidence*, the only reason why they are not admissible, during the life of the person, is, that they are secondary evidence: but if the person is called, and his memory is a blank on the subject, it would seem that the way is paved for the admission of secondary evidence, as much as if the person were dead; and he may then authenticate his entries. But a private memorandum is mere hearsay: it could not be admitted as evidence after the death of the person who made it, although it should be authenticated as an entry made by the deceased, according to his belief of the truth, and for the purpose of preserving a recollection of the facts as they were, &c.: and if it be inadmissible and not evidence, after his death, when authenticated by others, it cannot become evidence, by being authenticated by himself: the mode of verifying it, cannot affect its nature and legal operation.

An examination of the cases will show, 1, that the original entries, made in the regular course of business, are admissible, when authenticated by the person who made them; and, 2, that no other kind of entries are.

1. That entries such as would be admissible after the death of the person, upon proof of his handwriting, may be received during his lifetime, if authenticated by his oath, appears to be recognised in the following cases. In the *Farmers and Mechanics Bank v. Boraef*, 1 Rawle, 152, the bank, for the purpose of showing the amount of a deposit made by Boraef, offered in evidence an entry of this deposit, made at the time in the book of the bank, supported by the oath of the clerk who received the deposit, and made the entry; the court below rejected the book, but admitted the witness; the witness, however, knowing nothing but from the entry, could not, without it, undertake to swear at all; the Supreme Court decided that the book

might go, with the clerk's testimony, to the jury, "as containing one of the entries made by him at the time, with his explanations, if he had any to offer." "It is assumed," say the court, "that the clerk was able to swear that his entry in the book was true, to the best of his knowledge and belief; otherwise, most clearly, the book is not evidence for any purpose." Now it is very evident, from the case of *Union Bank v. Knapp*, 3 Pickering, 96, that this bank-book would have been evidence in such a case, and for such a purpose, after the death of the clerk, upon proof of his handwriting. The case therefore appears to go upon the principle above-mentioned; certainly it does not go beyond it; see *Oliver v. Phelps*, 1 Zabriskie, 598, 613. See *Henry v. Oves*, 4 Watts, 46.—*Bullard v. Wilson*, 5 Martin, N. S. 196, (3 Condensed Louis. 505,) seems to be much the same in principle; to prove notice, the court held that "the parish judge's memorandums of his having given the protest to the defendant in person, was on the back of the protest, and he deposed he had no recollection of giving it, but he had no doubt of his having given it, as he never made such a memorandum without having the notice." Here the entry, made according to the course of the witnesses's business, was the evidence; and it would have been competent after his death. It appears to be an authority for receiving such entries: at all events, it is not authority for admitting any other kind of entries. In New York, the admissibility of such entries is settled; and notwithstanding that the distinction between private entries, and such as are made in the course of business, was confused or doubted in *Merrill v. Ithaca, &c.*, it is expressly recognised in the recent case of *Bank of Monroe v. Culver*, 2 Hill's N. Y. 532. This was an action of assumpsit on a note; the defence was usury, to rebut which, the plaintiffs offered the cashier to prove how the note came to the bank, and was paid; the offer was to prove this "from memoranda and entries in the handwriting of the witness, made at the time the transaction to which they refer, occurred, and while he was cashier, and had charge of the books and correspondence of the bank; which memoranda and entries the witness would swear he believed were truly and correctly made; although, independent of such memoranda and entries, the witness had no recollection of the facts, and even after having his memory refreshed by their examination, he could not testify to the facts, independent of the entries and memoranda." The Supreme Court, per BRONSON, J., after observing that the entries and memoranda were made in the usual course of business, and were verified in the most ample manner by the witness who made, and whose duty it was to make them, said, "The question is, whether memoranda and entries, thus verified, should be allowed to speak for themselves. I think they should. * * *Lawrence v. Barker*, (see *infra*,) does not lay down a different rule. The memorandum in that case was not made in the usual course of business, but only for the convenience of the witness. But here, the memoranda and entries were made in the usual course of business, and as a part of the proper employment of the witness. I do not see how it is possible to doubt that such evidence ought to be received." In *Sickles v. Mather*, 20 Wendell, 72, there is a dictum which carries the rule to this extent, and not further: "A clerk can connect the books with the sales, (many of which he usually makes himself,) and his original entries, (to the general accuracy of which he can make oath,) become themselves evidence of what he may in fact have forgotten." And, indeed, from the language

in the two last cases, it seems rather that *Merrill v. Ithaca, &c.*, is understood as really not going farther. See, also, *Bank of Tennessee v. Cowan et als.*, 7 Humphreys, 70; and *Spann v. Baltzell*, 1 Florida, 302, 323.

2. The cases which decide that a private memorandum, made for the purpose of preserving a knowledge of the fact, is not admissible, though authenticated by the person who made it, are decisive. In *Lawrence v. Barker*, 5 Wendell, 301, a witness was called to prove a conversation. He stated "that he was present at such conversation, and produced a memorandum in his own handwriting, made at the time, and which he said he had no doubt contained a true account of what took place; but that he had no recollection of the facts, independent of the paper. The judge refused to allow the paper to be read, or the witness to state its contents; but told him he might read it to refresh his recollection. The witness said he had read it, but could only recollect that the parties were together in his presence, conversing on the subject; that he had no doubt that he put down precisely what was said; that he made the memorandum at the moment, but had no recollection of the facts, independent of the paper. The judge would not allow the witness to state the contents of the paper, or the paper to be read in evidence to the jury." The Supreme Court, per SAVAGE, C. J., said, "The rule is that a written memorandum may be referred to by a witness to refresh his memory, but he must swear to the truth of the facts, or his statement is not evidence. It is not sufficient for him to swear that he made a memorandum which he believes to be true, and that he relies upon it, without any present recollection of the facts. This is the extent to which the witness could go. The judge, therefore, properly refused to receive his statement as evidence. * * In case of goods sold and delivered, a merchant's books are evidence to a certain extent, but that is very different from a memorandum made by a witness for his own convenience, not sanctioned by the parties, and where no necessity exists, requiring the admission of such a paper, as is frequently the case in respect to merchants' books." And this case is approved and enforced in *Green v. Brown*,³ Barbour's S. Ct., 120, 123, where it is declared to be the established rule in that State, that a witness testifying, after inspecting a memorandum in court, must be able, after such inspection, distinctly to recollect the facts, independent of the written memorandum; and that if he cannot speak from his recollection of the fact, after having referred to his notes or memorandum, and brought the facts fresh into his mind again, the memorandum itself, or his statement upon the faith of the memorandum, cannot be received. The same point was decided in *Butler v. Benson*, 1 Id. 528, 535, where the testimony of a witness, founded upon his signature as an attesting witness to a will, where he had no recollection of the facts, was rejected. "The rule is well settled," said the court, "that the witness may use his memorandum to refresh his recollection. But it is not evidence to go to the jury, even though he swears he thinks it correct. He may refresh his memory, and then, if his recollection recalls the transaction, that recollection is testimony to go to the jury. He must be conscious of the reality of the matters he swears to, at the time he testifies; and it is not sufficient that his mind recurs to the memorandum, and he himself believes that true. A contrary doctrine would introduce a new species of written evidence, in the creation and production of which, the parties to be affected had no part. And it would

effectually preclude all inquiry into the circumstances of the transaction, except what a witness, perhaps casually present, might think it convenient or important to note. The courts of South Carolina have, perhaps, gone a little further (*State v. Rawls*, 2 N. & M. 331.) But in this State, and in England, this rule of evidence, it is believed, remains unshaken," &c. In *Calvert, &c. v. Fitzgerald, &c.*, *Littell's Selected Cases*, (Kentucky) 388, the same point is decided. The witness being asked if one Stewart had not rented the place under an adverse patentee, "answered," (says MILLS, J., delivering the opinion of the court,) "he could not tell. A paper signed by himself was then handed to him, to refresh his recollection. The paper was dated about the period in question, and purported to be a statement then made and signed by the witness, detailing transactions relative to the renting or lease aforesaid. The witness, after examining the paper, stated, that it was his handwriting, and that he wrote it, and he had no doubt it contained the truth: but, upon reflection, he had no recollection of the transactions stated in the paper, other than what the paper contained, and that he could not speak of them, independent of the paper. The court rejected the paper, and would not let it go in evidence; and this is the first question presented in this court. It cannot be pretended, that such a memorandum, written by a stranger, at the date of any transaction, would itself be evidence of the facts it contained. It is well settled, that a witness may use such a memorandum to refresh his recollection; but he must speak from his recollection, and not the memorandums. As this witness could not do that, the memorandum itself was properly rejected. It could not be for the use of the jury; the witness alone could use it; and as it did not aid his recollection, it was proper for no other purpose." It is, perhaps, a little too strongly expressed, that, after looking at the paper, the witness must speak from recollection, and not the memorandum; but the law seems to be very accurately stated in the last sentence, that the paper is for the use of the witness, and not of the jury; it is to aid the witness, and not to go in evidence. *Glover et al. v. Hunnewill*, 6 Pickering, 222, appears to be decided on the same ground; there had been a bill of sale, and then an attachment against the property, as the vendor's; after the attachment, the witness and another proceeded to identify the property which passed by the bill, and made a schedule, which was offered in evidence, with his oath; it is true the schedule was made after bill of sale and the attachment, but it was contemporary with the identification, which was what was to be proved, and as the oath of the witness as to the occurrences at that time seems to have been thought admissible, and to have been so, that would appear not to have been the reason for rejecting it; the court, per PARKER, C. J., said, "the witness called was not able to identify the property, except by a schedule taken after the attachment, and even with that he was unable to swear with any certainty as to its identity. We think his testimony was rightly rejected." See the subject ably and satisfactorily explained by Harrington, C. J., in *Redden v. Spruance et al.*, 4 Harrington, 265. See also *Petriken v. Baldy*, 7 Watts & Sergeant, 429. And see *Fitler v. Eyre*, 2 Harris, 392, where with the aid of memoranda, the witness "testified from her own knowledge." In *Dialogue v. Hooven*, 7 Barr, 327, also, the oath of the witness to the delivery seems to have been direct and positive.

The other cases which are cited as authority for the admission of entries

made not in the regular course of business, are all cases of refreshing memory. The South Carolina cases, some of which are cited in *Merrill v. Ithaca, &c.*, are all of this kind: their purport is not to make entries admissible, but *simply* to carry the practice of refreshing memory, beyond the case where the witness actually remembers, to the case where he will undertake to swear positively, from the paper, though without recollection. In short, the object of those cases is to establish the second kind of refreshing memory, above-stated; and nothing more. In *Haig v. Newton*, 1 Rep. Const. Ct. 423, to prove notice, a notary's clerk was called, who produced the minute-book kept by himself and the notary, and was confident he had left the notice with defendant, or at his house: he had no distinct recollection of this transaction without reference to his memorandum-book: the court held this evidence clearly admissible. This was unquestionably a case of refreshing memory; it is *within* the limit fixed by *Maughan v. Hubbard & Robinson*: the oath of the witness is positive; and *that* was admitted, not the entries. But had the entries been admitted, they were entries in the course of business. In *Sharpe v. Bergeley*, 1 do. 373, to prove notice, was offered the clerk of the notary who protested the note, the notary being now deceased: the clerk "produced the book in which the proceedings of the notary were recorded, and swore that from the proceedings in that book, and the habits of the notary's office in setting down the initials of the names of the clerks by whom notices were served, he was certain he must have served the defendant with notice, or left it at his place of residence, but he had not at first any recollection in his mind of the circumstance; but after looking attentively, he said he could undertake to swear that he had served the notice:" the court appear to have held the admissibility of the evidence too clear for argument: it was, in fact, a most ordinary case of refreshing memory: and in *Pearson and others v. Wightman*, 1 do. 336, the court which made these decisions, spoke of them both as proceeding on this principle;—"We decided in these cases," is the dictum there, "that the testimony of a witness who swore positively from written memoranda, though they did not recall to his memory a recollection of the facts, was admissible; and we were further of opinion that such testimony was better evidence than an adventurous and unaided recollection." In the *Corporation of Columbia v. Harrison*, 2 do. 213, to prove the amount of dues owing by the defendant, the town-clerk was produced; in relation to one set of charges, he swore that "he made the entry in his ledger, where he kept the accounts of the town, according to an estimate 'made between the defendant and himself. That with regard' to another charge, on another account, "he usually kept memorandums of it, and at the end of the year, after comparing his accounts with the defendant's he carried the amount as adjusted in this book. That he had had frequent settlements, and compared accounts with him, and that the balance appearing due was just." The court said, "The witness was properly permitted to recur to his ledger, or any other memoranda, to assist his memory; or, rather as the evidence of a fact which he knew to exist, by referring to it, although he might have lost all recollection of the fact itself. The books themselves in this case was not evidence. The witness might have proved the amount from recollection; but the memorandum was better." The court expressly decide that the books were not evidence: nothing was received but the

clerk's oath; and his oath is not grounded on the entries, but is an original, independent recollection and assertion, that the balance was just, and that the defendant had admitted it. The State v. Rawls, 2 Nott & Mc Cord, 331, was an indictment for gambling: a witness was called, who "began by stating the circumstances *as they appeared*, by a certain affidavit drawn up by himself, at the time, and which he held in his hand. He was asked by the defendant's counsel, whether he had a distinct recollection then of the facts contained in that paper, or whether he could only swear to them because he saw them there stated? He said, that some of them he recollected, but that of others he had no recollection; but that he knew he had put down at the time what he saw, and nothing more, and he was therefore *able to swear, that all those facts actually existed at the time*, although he had not now a distinct recollection of them." Objection being made, the court ruled that the evidence was admissible. "The witness then proceeded to answer, that he saw," &c.—"He said he recollected," so-and-so.—"He did not now *recollect distinctly*, that this defendant was playing, though he was under the impression that he was; but that he could not *swear* to it now, *except* from seeing it stated in his affidavit, and he knew that he did not put any thing down which he did not see." No other evidence was offered. A majority of the court above held the evidence rightly admitted: two judges dissented; why, it is not stated. This case comes clearly within the meaning of refreshing memory. To some of the facts the witness swears from recollection and impression; to every fact, after looking at his paper, he swears positively and absolutely: and the affidavit was not given in evidence at all. Such is the view taken of this case in the recent one of *Cleverly v. McCullough*, 2 Hill, 445, which was assumpsit for work and labour. The witness "had himself measured and superintended the measurement of a quantity of the work done, and made entries thereof in a memorandum book, which was produced, and by reference to which, he could testify as to the quantity of work, but he was unable to speak of the details from memory, independently of the book * * The court permitted the witness to testify as to the quantity from the entries in his book." The court above, per HARPER, J., said, "We think that the rule has been misconceived, which allows a witness to look at a memorandum for the purpose of refreshing his memory. The subject is fully considered in the case of *State v. Rawls*. The rule there established is, that if a memorandum were made by the witness at the time, with a view to perpetuate the recollection of the facts, and the witness can swear positively that the memorandum was made according to the truth of the facts, and consequently, that the facts did exist, this is sufficient, though they may not remain in his memory at the time he gives his testimony. * * Here, from the memorandum, the witness did swear positively to the truth of the facts in the memorandum." These decisions are very valuable, as carrying the practice of refreshing memory nearly, if not quite, to the same extent in which it is carried in England: the principle which they establish, that where the witness has made a memorandum at the time, for the purpose of preserving a recollection of the facts, and afterwards, upon looking at the papers, swears positively to the truth of the facts, though he can recollect nothing, his testimony is admissible.

With regard to the cases cited, of the admission of notes of counsel,

Rogers v. Burton and others, Peck, 108, was a case of refreshing memory : the judge swore positively to the accuracy of the notes : the point decided there was, that if after looking at the memorandum, the witness can recollect the facts, the paper need not be produced ; but if he cannot recollect, the original must be produced. In Clark v. Vorce, 15 Wendell, 193, the notes were used only to refresh memory, the witness swearing to their accuracy : the point whether the witness's statement from the notes, or the notes themselves should be admitted, was not before the court.

The opinion of PARKER, C. J., in the recent case of Haven v. Wendell, 11 New Hampshire, 112, is undoubtedly in favour of the admissibility of memoranda in certain circumstances, but the case has no application to *private* entries or memoranda, made by a witness for the purpose of preserving a recollection of facts, and so far as the remarks of the Chief Justice may embrace such entries, they are extra-judicial. In that case a witness testified that he had had a conversation with one of the defendants, of which at the trial he recollected only the principal fact ; and that he, the witness, supposing the facts then stated might be useful to the plaintiff, went immediately into the bank, on the pavement in front of which, the conversation had taken place, and made a memorandum of them, in writing, which he gave to the plaintiff, who was the cashier of the bank. A paper being shown to him on the trial, he said that was the memorandum, but he could not from reading it undertake to say that he now recollected the facts, or knew them, otherwise than by finding them in his handwriting ; but he had no doubt they were true, and that he should have sworn to them from recollection at or near the time. This memorandum, with the testimony of the witness, was decided to be admissible. This case proves that a written statement of a fact, made immediately after its occurrence, and given to a third person for his benefit, is, when supported by the oath of the person who made it, that it was so made and given, and that he believes it to be true, admissible evidence. The writing of such a paper at the time, and giving it to the person concerned in the conversation, is so far a part of the *res gesta* of the transaction, that when accompanied with the oath of the writer that he has no doubt it is true, it becomes primary evidence ; and its admissibility may be sustained on the same ground on which the attesting signature of a witness to a deed is legal evidence, when authenticated by the witness himself, though he may have forgotten the delivery of the instrument, or when his handwriting is proved after his death, by a third person. The only case cited in Haven v. Wendell, which comes near the point decided there is Alvord v. Collin, 20 Pickering, 418, 431, in which a certificate given by a witness that a notice had been posted up at his house, made near the time, was verified by the witness at the trial, as being in his handwriting, and the witness said he had no doubt the certificate stated the truth, though he had no recollection of the fact ; there, the court referred to the case of the attestation of a deed, and said "it is every day's practice to prove the execution of deeds and other instruments, by subscribing witnesses, who know nothing about them, except that their names are written by themselves." The difference between a contemporary *act*, like the signature of an attesting witness, or the delivery of the certificate or memorandum, as in the two cases just cited, done at the request, or for the benefit of a third person, and a private entry made for the witness's own conve-

nience, is, in principle, very wide. The cases cited, are extensions, and perhaps excessive extensions, of the principle on which the signature of a witness to a deed, when proved by himself or another, is admitted; but they did not touch the consideration of the admissibility of private memoranda made by a witness for the purpose of preserving a recollection of the fact. If a witness has made such a memorandum in good faith, and is confident that he made it for such a purpose, he ought to be willing to swear positively to the truth of the facts stated in the memorandum. He is the best judge of the credit due to his own memorandum, and if after reading it he is not so confident in it as to swear that he knows the fact which he has recorded, it ought not to be expected that a jury should believe it, and they ought not to be embarrassed with the determination of another's doubts, which the party who feels them cannot settle.

The conclusion upon all the American cases, as to the whole principle, is, that entries made in the regular and usual course of business are admissible in evidence after the death of the person who made them, on proof of his handwriting; and during his life, if authenticated by himself; other private entries may be used to refresh the memory, but are not admissible in evidence. And this principle is approved in *Redden v. Spruance et al.* 4 Harrington, 265, 269. In *Underwood v. Parrot*, 2 Texas, 168, 176, the entries were made in the regular course of business. The cases of *Haven v. Wendell*, and *Alvord v. Collin*, place certificates, or other written acts, which happened between a third party and one of the parties to the suit, about the time of the transaction and in relation to it, upon the same footing with entries in the course of business, as being admissible when fully verified by the person who made them, he being unable to give evidence from direct recollection.

The principle established in *Price v. Torrington*, has been carried much farther in many of the states in this Union; and the shop-books of the plaintiff, kept by himself, are received as competent evidence. The importance of this subject, and the variations in the practice of the different states, render it necessary to state the law as to each of them separately. It will be seen that in some, the oath of the party is received in authentication and support of his books; in others, the books are received, when verified by a disinterested witness, and the oath of the party is not received: in some a limited admission is given by statute: and in some, we find no trace whatever of the practice. The law of those states in which the books and oath of the party, both, are received, will be considered first.

In MASSACHUSETTS, a plaintiff's book of original entries, in his handwriting, and supported by his oath, is evidence of *articles delivered, and work and labour done*; but not of anything else; *Prince's administratrix v. Smith*, 4 Massachusetts, 455; except money charges, to the extent of forty shillings, or six dollars and sixty-six cents, and not beyond; *Union Bank v. Knapp*, 3 Pickering, 96, 109; *Burns v. Flay*, 14 id. 8: of articles delivered, they are evidence to any amount; *Shillaber v. Bingham*, 3 Dana's Abr. 321. They are evidence also of work done by the plaintiff's apprentice, and it is not necessary first to call the clerk; for books of entries verified by the plaintiff's oath are not secondary evidence; they are original evidence, though feeble and unsatisfactory; *Mathes v. Robinson*, 8 Metcalf,

269. If the articles were delivered to a third person, the book of entries would generally not be admissible without calling him; but if he is called and does not recollect, the book would generally be admissible; *Ball v. Gates*, 12 id. 491. In *Windsor and another v. Dillaway*, 4 Metcalf, 221, it was decided that the book of a ship-broker, containing a charge of a commission of sixty dollars upon a sale, was inadmissible, because it was of one single large item, and related to a transaction of which, from the nature of the case, other and better evidence could be given; and the court said that this was "a questionable species of evidence, admitted from necessity only, and intended for the aid of mechanics and small dealers, who keep daily accounts of their transactions; that it was a dangerous species of evidence, and not to be extended by new precedents."—The admissibility, or *competency*, of the book, is for the court; the *credit* due to it, is for the jury; and there are two principal objections which go to the competency of the book. *Coxwell v. Dolliver*, 2 Massachusetts, 217.—As to the *first* of these, the rule is laid down as follows: "To be admitted in evidence, the books must appear to contain the first entries or charges of the party, made at or near the time of the transaction to be proved; and when the contrary is discoverable on the face of the book, or comes out upon the examination of the party, they ought to be rejected as incompetent evidence:" per SEWALL, J., in *Coxwell v. Dolliver*: "it is essential to this kind of evidence, that the charges, appearing in the handwriting of the party, are in such a state, that they may be presumed to have been his daily minutes of his business and transactions, in which, regard is had to the degree of education of the party, the nature of his employment, and to the manner of his charges against other people. Where this appearance is wanting, and the presumption cannot be made, the evidence has usually been rejected as incompetent;" opinion of the court, per SEWALL, J., in *Prince's administratrix v. Smith*: "but as the law has prescribed no mode in which a book shall be kept, to make it evidence, the question of competency must be determined by the appearance and character of the book, and all the circumstances of the case, indicating that it has been kept honestly, and with reasonable care and accuracy, or the reverse;" per SHAW, C. J., in *Mathes v. Robinson*, 8 Metcalf, 269; where it was determined, that a book kept in a tabular form, with the days of the month at the head of the columns, and the name of the labourer at the side, and opposite to it in each column, the fraction of the day that he had worked, was admissible in evidence. Where a book was offered in evidence, and the plaintiff (a blacksmith) stated "that he kept a slate in his shop, on which he set down all his charges as they accrued, and that he was in the habit of transcribing the entries from the slate into the book: and after that was done, to rub out the charges on the slate, and begin anew:" the court admitted the book; saying, "The entries in the book may be considered original, although transcribed from a slate; the slate containing merely memoranda, and not being intended to be permanent." *Faxon v. Hollis*, 13 Massachusetts, 427. In *Smith et al. v. Sanford*, 12 Pickering, 139, the plaintiffs were in partnership as butchers; they swore that their custom, during part of the year, was, for one of them to carry the meat round in a cart to their customers, and he made chalk scores on the cart at the time of delivery, stating to whom the meat was sold, and the quantity and price; "from which scores, on the return of the cart, on the

same day, and before it went out again, it was the custom for the other partner to make entries in the book of original entries ;" the court held the book competent, and sufficient to justify the jury in finding for the plaintiffs. Entries made by a wife by the husband's direction and in his presence, are competent, and may be proved by her ; *Littlefield v. Rice*, 10 Metcalf, 287.—The *second* objection to the competency of the book of entries is stated thus : "Fraudulent appearances or circumstances, such as material and gross alterations, false additions, &c., are also objections to the competency of the book, in which they are discoverable, or against which they may be proved in any manner ;" *SEWALL, J.* in *Coxwell v. Dolliver*. Other objections than these two will only affect its *credit*, before the jury ; such, for instance, of its being in the form of a ledger, and not a day-book ; which, according to the circumstances, would be matter of observation to the jury. *Ib.* Where a blacksmith's book was in the ledger-form, the court held it no objection in that case, for it was the way ordinary mechanics, especially in the country, kept their books ; but if it had been a shopkeeper's book, it would have been liable to more suspicion. *Faxon v. Hollis*. In *Gibson v. Bailey*, 13 Metcalf, 537, it was held, that a book in the ledger-form, that is, with all the charges against the defendant entered on one leaf, with no intervening charges, was admissible. In *Prince's administratrix v. Smith*, 2 Massachusetts, 569, it appeared from marks in the day-book, that the account had been transferred to the ledger, and the court said, "When an account is transferred to a ledger from the day-book, the ledger should be produced, that the other party may have advantage of any items entered therein to his credit." See *Hervey et al. v. Harvey*, (Maine, *infra.*) The fact that the entries are in pencil is not a cause for rejecting them ; *Gibson v. Bailey*, 13 Metcalf, 537. In *Frye v. Barker et al.*, 2 Pickering, 65, it was said by *PARKER, C. J.*, to be a general principle, that where a *party's* oath is admitted, he must be sworn in court ; and that a plaintiff's testimony in support of his book of entries could not be taken by a commission. Generally, the original book should be brought into court : but where the day-book and ledger have been accidentally destroyed by fire, a transcript proved to be correct, by the witness who transcribed it, is admissible. *Holmes v. Marden*, 12 *id.* 169 : but not unless it is a proved and compared copy of genuine entries. *Prince's administratrix v. Smith*.

In *NEW HAMPSHIRE*, in *Eastman v. Moulton*, 3 New Hampshire, 157, the law of Massachusetts as above stated is neatly abridged, by *RICHARDSON, C. J.*, and adopted as the law of that state : and it is there further decided, that the admission of such books, is to be confined to cases where it may be presumed that there is no better evidence ; and, therefore, if the charges are not in the handwriting of the party sworn, or if it appear by the book, or the party's testimony, that the article was delivered by or to a third person, the book is to be rejected, (at whatever stage of the case this discovery is made,) because there must be better evidence attainable : accordingly, in this case, when it appeared that the articles were delivered to the servant of the party charged, and not to the party himself, the book was rejected as inadmissible. A summary of the principles on which this evidence is admissible is again given in *Cummings v. Nichols*, 13 *id.* 421, 425. The admissibility of this evidence is confined, also, to suits between the debtor and creditor ; for the necessity upon which the reception of it rests, does not

exist where the dealing between the debtor and creditor is, as to the parties to the suit, a collateral matter, since, in such a case, either the debtor or the creditor is a competent witness; *Woodes v. Dennett*, 12 id. 511. To render a book admissible, the charges should be separate and special, but no greater particularity in describing the nature of the work or service, than is usual in similar cases, is requisite; *Bassett v. Spofford*, 11 id. 167; *Cummings v. Nichols*, 13 id. 421, 426. Books of account are admissible to prove money charges to the extent of forty shillings, or \$6.67; id.; and the book of an intestate, supported by the oath of the administrator, is good evidence; *Dodge v. Morse*, 3 id. 232. Respecting the extent to which the party may be made a witness, it has been laid down, that, "The party, when called, is, in the first instance, permitted to state only that the book produced is his book of original entries; that the charges are in his handwriting; that they were made at the times they purport to have been made, and at or near the time of the delivery of the articles, or of the performance of the services. He may, however, be cross-examined by the other party; in which case, his answers become evidence, and he is entitled to give a full explanation of any matter in relation to which an inquiry is made on the cross-examination. It is reasonable and proper that he should be made a witness as far as the opposite party chooses to make him one; and that, as far as he is made a witness, he should be at liberty to give a full explanation. But, in our opinion, a cross-examination does not entitle him to go beyond this. It does not entitle him to testify as to independent facts, not necessary to the explanation of the facts, respecting which he may have been questioned upon the cross-examination. It does not make him a witness in chief in the cause;" *Eastman v. Moulton*. A book of entries verified by the party's oath is competent for no other purpose than to prove the account, which is the foundation of the suit, on the ground of set-off; but it is the book which is the evidence, and the party testifies only to verify it; *Little v. Wyatt*, 14 id. 23, 25. But the right of the plaintiff to give full explanations of the answers which he has made to the defendant's questions, exists even when the book has been rejected as incompetent; *McIlvaine v. Wilkins*, 12 id. 474, 478.

In MAINE, as in MASSACHUSETTS, books are competent evidence to prove work done, and goods delivered; and cash charges to the extent of forty shillings (\$6.67): but they are not admissible to prove that defendant was an agent, and to prove a delivery to him as agent, and an agreement by him to sell on account; *Dunn v. Whitney*, 1 *Fairfield*, 9: and it was said in this case, that the admission of books would be restricted for the future; that formerly, when few persons kept clerks, they were admitted from necessity; but that now, whenever it appeared from the testimony, or was to be inferred from the nature of the transaction, that better evidence was to be had; as, if it appeared that a clerk was kept; or if the articles were so large, or the transaction on such a scale, that it must be presumed that clerks and porters were employed, the books would not be admitted. In the recent case of *Mitchell v. Belknap*, 10 *Shepley*, (23 *Maine*) 475, however, it was decided, that, although when goods are delivered by a servant or agent, and the charges made by him, the evidence of that person will be required, yet where goods are delivered to a third person authorized by such receipt to charge the defendant, the books of the defendant are competent

evidence of the delivery, provided the authority to charge the defendant be proved *aliunde*. The principle that books of entry may be evidence of articles delivered, to a certain amount, and not beyond it, has been established in a recent case, and its application defined with precision. Leighton et al. v. Manson, 2 Shepley, (14 Maine,) 208, was assumpsit on an account consisting of only two charges, for beef, bearing date the same day, one for 355lb., the other for 360lb. The judge below rejected the book of original entries, because the article being so bulky, the delivery must be provable by other and better means; and the plaintiff was nonsuited. The court above, per SHEPLEY, J., sustained the nonsuit, and expressed the following striking and satisfactory views. "The object to be attained, by the admission of the books with the party's oath, is to prove the service performed, or the articles delivered. The party must be able to state, that he actually delivered the articles, or was knowing to their delivery, as well as that he made the entries. The necessity, then, for the oath of the party in aid of his books, seems to exist only where he delivered the articles himself. If the articles were of such bulk or weight, that the person making the entries could not reasonably be supposed to have delivered them without assistance, the presumption would arise, that better evidence of delivery might be produced; and the reason for admitting his own testimony would cease. Perhaps no better rule for the guidance of judicial tribunals will be found, than for the judge to decide on the inspection of the items of the account, whether the items charged could ordinarily have been delivered without the assistance of other persons; and admit or reject the testimony according as he may conclude that the articles could or could not have been so delivered. Acting upon this rule, the court must conclude, that it could not ordinarily be expected, that one person should have delivered the articles charged in the account; and the ruling of the judge must be regarded as correct;" and to the same effect is Mitchell v. Belknap, 482. In Leighton et al. v. Manson, also, it was decided, that if the books be in the handwriting of a deceased partner, they are evidence for the surviving partners, (if otherwise admissible,) on proof of his handwriting. But in any case, nothing can be proved by such evidence, but the delivery; and a contract as to price, or facts not entering into the items of charge, cannot be proved by the plaintiff's oath; Mitchell v. Belknap; Amee v. Wilson, 9 Shepley, (22 Maine,) 116, 120. It would appear that the word *book*, has received in Maine, a signification rather more extensive, than has usually been given to it elsewhere. In Kendall, Admr. v. Field et al., 2 Shepley, (14 Maine,) 30, which was assumpsit, for labour in hewing timber, the report states that, "The plaintiff offered in evidence a *shingle*, on which it was proved that his intestate entered from day to day in the woods, an account of the timber hewed by him each day, under a contract with the defendants." We have no further description of the shingle, nor account of what other evidence was offered. WESTON, C. J., admitted it; and the court above, per WESTON, C. J., said, "considering the nature of his employment, and the place where he was, and that the shingle contained the daily minutes of the business in which he was engaged, we think it was legally admissible: it was a substitute for a memorandum-book, which answered the purpose at the time, and was, perhaps, as little liable to alteration or erasure, without being detected by the eye, as if made on paper." It is proper to say, in respect to this extra-

ordinary case, that it appears from the argument of counsel, that everything, but the *quantity* of timber hewed, was proved by other evidence; and that it is stated in the opinion of the court, that after the entry was made on the shingle, the timber "was taken away by the defendants, without being surveyed; and mingled with other timber." So that the odium spoliatoris, probably had something to do with the admission given to this peculiar kind of document.—In reference to the Massachusetts decision of *Prince's Ex'rx v. Smith*, it was held in *Hervey et al. v. Harvey*, 3 Shepley, (15 Maine,) 357, that it is only where the *day-book itself* shows, by marks on its face, that the account had been transferred to the ledger, that the ledger need be produced, without notice.

In PENNSYLVANIA, books of original entries made by the party, and verified by his oath, are competent evidence of goods sold and delivered, and work done, and of the prices, but not of money lent or paid; *Ducoign v. Schreppel*, 1 Yeates, 347: but in a case where a foreign agent and consignee, sued to recover compensation for articles furnished, and money expended, and offered in evidence his day-book, supported by his oath, the court held, that as it related to a foreign mercantile transaction, necessity authorised the admission of the book, subject to close scrutiny as to its fairness and credibility; *Seagrove v. Redman et al.*, 2 id. 254; *S. C.* 4 Dallas, 153; and see *Himes v. Barnitz*, 8 Watts, 39, 47. The only proper operation of books of entries is, by showing contemporary charges for goods delivered and work done, in a course of dealing between the parties, to serve as evidence to raise an assumpsit in law to pay for them. If offered to prove any collateral matter; as, that a third party assumed to pay; or that a certain person was a partner in a house charged; or to prove an agency, and show that goods were delivered or received to sell on commission; or to prove a delivery of goods in performance of a special contract; for any such purpose, books are not competent evidence: *Poultney et al. v. Ross*, 238; *Juniata Bank v. Brown*, 5 Sergeant & Rawle, 226; *Baisch v. Hoff*, 1 Yeates, 198, and *Murphy v. Cress*, 2 Wharton, 33; *Lonergan v. Whitehead*, 10 Watts, 249, and *Nickle v. Baldwin*, 4 Watts & Sergeant, 290; *Alexander v. Hoffman*, 5 id. 382; *Petriken v. Baldy*, 7 id. 429; *Phillips v. Tapper*, 2 Barr, 323; *Fitler v. Eyre*, 2 Harris, 392; arguments of counsel in *Borrekens v. Bevan & Porter*, 3 Rawle, 23, 26; but see *Mifflin et al. v. Bingham*, 1 Dallas, 272, 276; *Moyes & Tatem v. Brumaux*, 3 Yeates, 30. In *sci. fa. sur mechanic's lien*, a book of entries, is, of course, competent to show that the materials were furnished on the credit of the house; for the house is the defendant. *McMullin v. Gilbert*, 2 Wharton, 277. But in such a proceeding, charges in the book made against the owner or contractor individually, are competent to show the amount of materials furnished, and the facts which render the building liable, may be proved aliunde. *Church v. Davis*, 9 Watts, 304; and if one is charged in a book of entries, and you prove aliunde that another is really liable as the principal debtor, the books are admissible to show the amount and price of the articles for which the latter is shown to be liable. *Linn v. Naglee*, 4 Wharton, 92; *Hartley v. Brooks*, 6 id. 189. And these decisions are entirely consistent with the principle above mentioned.—To render a book of entries admissible, the following matters appear to be necessary. The entries must be made in the course of the party's business; and, therefore, the person making them

should be in business: "it must be in a course of dealing between the parties, and the entries made about the time of the transaction;" *Walter v. Bollman*, 8 Watts, 544; *Curren v. Crawford*, 4 Sergeant & Rawle, 3; and the article sold must lie in the line of the party's general business; for the sale of a horse by a dry goods merchant, or tradesman, could not be proved by an entry in the books of account; *Shoemaker v. Kellog*, 1 Jones, 310. The book should be such a regular and usual account-book, as explains itself, and, on its face, appears to create a liability in the defendant: therefore, loose, unconnected pieces of paper, containing other figuring and scribbling beside the charges in question, and manifestly not "an account regularly kept," was rejected in *Thompson v. McKelvey* and another, 13 S. & R. 126; and a paper, appearing to be torn out of a book, containing memoranda unintelligible without explanation from the plaintiff, was held inadmissible in *Hough v. Doyle*, 4 Rawle, 291. *The entries should be made with the intent to charge*: for if the entry be a *charge*, this both asserts a delivery, and imports a contract; *Walter v. Bollman*: therefore, in a suit to recover for sales made through an agent, the *invoice-book* of the agent is no evidence; *Cooper v. Morrell*, 4 Yeates, 341: and a defendant's entries in his account-book, of work and labour done for him by the plaintiff, are, on this account, inadmissible; *Summers v. McKim* and another, 12 Sergeant & Rawle, 405; *Keim v. Rush*, 5 Watts & Sergeant, 377; and a memorandum paper on which neither the defendant's name appears, nor any charges against the defendant, is in like manner incompetent; *Hough v. Doyle*, 4 Rawle, 291; *Fairchild v. Dennison*, 4 Watts, 258; *Phillips v. Tapper*, 2 Barr, 323: and a book which is composed of receipts, signed by the agents employed to deliver, cannot be treated as a book of original entries; *Sterrett v. Bull*, 1 Binney, 234; *Curren v. Crawford*: and a book kept by a forge-master for the *purpose* of enabling him to settle with his workmen, where the defendant's name appears not as being charged, but only as *explanatory* of the other entries, is incompetent evidence of sales to defendant; *Rogers and another v. Old*, 5 Sergeant & Rawle, 404, where this principle is established and explained by DUNCAN, J.; and a book kept by a contractor, showing the amount of work done and by whom, but which did not purport to charge the defendant, but seemed to be an account against labourers employed by the contractor in the work, is in like manner inadmissible; *Alexander v. Hoffman*, 5 Watts & Sergeant, 382; and see *Smith v. Lane* and another, 12 id. 80, and *Rhoads v. Gaul et al.*, 4 Rawle, 404.—The book should be an *original*, made contemporaneously with the transaction, and not a transcript or digest subsequently made up; *Vance v. Feariss*, 1 Yeates, 321; S. C. 2 Dallas, 217; *Rodman et al. v. Hoops's Ex.* 1 Dall. 85; *Fairchild v. Dennison*, 4 Watts, 258: but if entries be made in the regular account-book, in proper season, from memoranda taken at the time, by the party or his assistant, and intended to serve only as notes, to make up the entries more accurately, the book is an original; *Ingraham v. Boekius* and another, 9 Sergeant & Rawle, 285; *Patton v. Ryan*, 4 Rawle, 408. The fact that some entries in the book are not original, will not render the book incompetent as concerns those entries which are proved by the oath of the party to be original. *Ives v. Niles*, 5 Watts, 323: But doubtless it would, if the two classes of entries could not be distinguished: *Vance v. Feariss*; *Kessler v. McConachy*, 1 Rawle, 435, 441. This book must be the day-book, and not

the ledger; *Hammill v. O'Donnell*, 2 Miles, 101: yet if the book be properly authenticated as an original, it is not an objection that it is kept in the ledger-form; *Thompson v. Hopper*, 1 Watts & Sergeant, 467, 468; *Rehrer v. Zeigler*, 3 id. 258; *Odell v. Cuthbert*, 9 id. 66. If from the magnitude or nature of the transaction, it must be presumed, or if from notes and marks on the book it appear, that the entries are made in another book, that should be produced, that the party may have the benefit of all the items therein; dictum per *DUNCAN, J.*, in *Rogers v. Old*.—As to the time when the entries are to be made: as the purpose of the entry is to record a charge on the defendant, the entry must not be made *before* he is chargeable. If the entries were made when the order was received, *before* the delivery was made, the book is incompetent: and an arbitrary mark affixed to items, to show that such were actually delivered, will not aid, if it appear by the evidence that that mark was *not to charge the defendant* but to inform the porter not to make a double delivery; *Rhoads v. Gaul et al.*, 4 Rawle, 404; *Thompson v. Bullock*, 2 Miles, 269, S. P.; the fault here was, that the charges were made, before the property in the goods was changed; “the proper time for making the entry, is at or about the time when there is a transmutation of property from the vendor to the vendee;” *Parker v. Donaldson*, 2 Watts & Sergeant, 9: and entries in a book made up from a memorandum, which was not itself, a memorandum of sales actually made, are inadmissible; because the entries were not “made in the book as a registry of sale and delivery actually made of the things therein mentioned, at the time of their being so entered.” *Fairechild v. Dennison*, 4 Watts, 258; but in *Kaughley v. Brewer*, 16 Sergeant & Rawle, 133, entries by a tailor employed to make up cloth left by the defendant, which entries were made after the work was cut out by him, and when it was delivered to the journeymen, such being the plaintiff’s manner, (as he stated,) of keeping his books, and such, according to the judge, being the usual practice in that and other professions, were deemed admissible: this decision, which is wholly irreconcilable with either legal principle or common sense, professes to be governed by the case of *Curren v. Crawford*; and since the true ground on which that case rests, has been ascertained in *Parker v. Donaldson*, it would be difficult to contrive a specious argument in support of *Kaughley v. Brewer*; and we may safely conclude that it is not law; as to the value of such a custom, even had there been any evidence of it, see *Sterrett v. Bull*, 1 Binney, and *Forsythe v. Norcross*. In *Keim v. Rush*, 5 Watts & Sergeant, 377, it was decided that when goods are delivered to a carrier to be carried to a distance, the proper time to make the entries, is when the carrier’s wagon is loaded and started: in *Koch v. Howell*, 6 id. 350, the plaintiff was a vendor of paper and a paper-hanger, and in one column of his book, noted the whole amount delivered out to his workmen, and in subsequent columns the number of pieces used and the prices for hanging them; and the court said that the entries in the first column alone might have been insufficient to charge the defendant, but the other entries having been made when the paper had come to the defendant’s use, and its quantity was ascertained by hanging it, were perfectly regular and legal. The entries must not be made too long *after* the time when the right to charge accrued: the *principle* on that subject, often approved since, is thus declared in *Curren v. Crawford*, 4 Sergeant & Rawle, 3: “The law fixes no precise instant when the entry should be made. At or near the time

of the transaction, they should be made. It is not to be a register of past transactions, but a memorandum of transactions as they occur." In *Jones v. Long*, 3 Watts, 325, this doctrine is repeated; and though later cases have appeared to recognize a stricter and arbitrary limit, a review of them will show, that the rule has not been, and cannot be established with any greater precision. In *Patton v. Ryan*, 4 Rawle, 408, where the plaintiff said she first made the entries on a card, and then copied them into the book, "either the same evening, or the next day, or as soon after as I conveniently could," no objection was made on the ground of delay. In *Kessler v. M'Conachy*, 1 id. 435, the party stated that the entries were first made by his journeyman on a slate, and thence copied by himself, sometimes the same evening, some of them in the week, none as long after as two weeks; the court decided the book to be inadmissible: and though there is a dictum that to admit entries which had been made after a week or more would cause mistakes, yet the ground on which the rejection of the books is really rested in the opinion of the court is, that the transfer of the book was not made and verified by the same person who made the memoranda on the slate; or, that *that* circumstance, together with the delay in the transcription (and there several objections besides,) necessarily took away the confidence in the book. In *M'Coy v. Lightner*, 2 Watts, 347, the circumstances as to this seem to have been precisely the same, excepting that here the man who made the first entries on the slate testified, as well as the plaintiff, to the facts; and also recollected that the *prices* of the work done were about the same as those charged; the court held the evidence admissible upon the distinction that in *Kessler v. M'Conachy*, the journeyman was not produced, but here the party's oath was fortified by the oath of the man who made the entries and did the work, and that he also confirmed the accuracy of the prices charged. The case is certainly not a strong one; yet it is a decision directly on the point, that a week's delay in transferring entries from a slate, does not render a book of entries incompetent, and is far stronger than any authority in *Kessler v. M'Conachy* to the contrary *on that point*. In *Vicary v. Moore*, 2 id. 451, the book was made up from entries on loose scraps of paper, carried in the pocket one, two, three, or four days; the court held the books so made up to be incompetent; and said, per GIBSON, C. J., that if the entries were not made *at* the time, they ought certainly to be made in the regular routine of business, and that here neither the routine of the party's business, nor any other circumstances accounted for the delay. The *principle* really decided in these cases appears simply to be, that in applying the two principles recognized in *Curren v. Crawford*, and *Ingraham v. Bockius*, the court will be guided by the consideration, whether the first memoranda were made on such material, prepared with such care, and transcribed under such circumstances, that the book entries may reasonably be relied on. *Forsythe v. Norcross*, 5 id. 432, would be more satisfactory, if we knew what authority is to be attached to a *per curiam* decision, and if the circumstances of the case were more fully and distinctly stated: the plaintiff, a blacksmith, having sworn to his book of entries, said that he made the entries on a slate till it was full, and then after four, five, or six days, transcribed them into his book; and he and three other witnesses, blacksmiths, swore that this was a general custom as far as they knew: "PER CURIAM: an entry on a

card or slate, is but a memorandum, preparatory to permanent evidence of the transaction, which must be perfected at or near the time, and in the routine of business. But the routine must be a reasonable one; for there is nothing in the condition of a craftsman to call for indulgence till his slate be full, or till it be convenient for him to dispose of the contents of it.

* * The entries ought, in every instance, to be transferred in the course of the succeeding day. * * On the principle of *Vicary v. Moore*, the book was, in the present instance, incompetent." The dictum in this case was acted on in *Cook v. Ashmead et al.*, 2 Miles, 268, (1838,) and entries which had been transferred from a memorandum-book, some on the first, some on the second, and others on the third day after, were held incompetent. But as *Forsythe v. Norcross*, is expressed to be ruled by *Vicary v. Moore*, it would seem that the circumstances of the first entries having been made on so uncertain a record as a slate, must have had much to do with influencing that decision; as well as the fact that the delay was very considerable and very irregular. In *Walter v. Bollman*, 8 Watts, 544, (1839,) after the case was decided on other grounds, there is a dictum, *per curiam*, that "certainly, more than one day ought not to intervene," (the entries being made from memory) "unless there was something very peculiar in the nature of the business." But in a later case, this limitation is entirely disregarded by the same "*per curiam*" by which it was made. In *Hartley v. Brooks*, 6 Wharton, 189, (1841) two books of entries were offered; as to one of them, the plaintiff testified that some of the entries "were made the first, and some *the second day after* I had done the work; not later than the second day in the evening;" and that some were taken from his head, and some from a slate, and that all were made by himself; the other book was objected to on another account. "PER CURIAM:—There is nothing to distinguish the case from others in which such entries as these have been received. * * In *Kessler v. McConachy*, no more was ruled than that the transfer was too late at the expiration of nearly two weeks." In *Swearingen v. Harris*, 1 Watts & Sergeant, 359, in respect to the books of one deceased, the court said, the evidence "showed that it was the general practice of the intestate to make his entries on a slate, and afterwards draw them off in his books; and that this sometimes was not done until two or three days. If it had been proved that the same practice was pursued as regards this account, it would be *doubtful* whether the evidence could be received." These decisions are not irreconcilable. The two last clearly show that the dicta that the entries "ought" to be made or copied during the next day, are not to be taken as deciding that they *must* be made within that time, in order to be competent, but only as saying, they would be better if made in that time. The cases are reconciled by considering the *rule of law* to be, as declared in *Curren v. Crawford*, and that the application of it is, in every case, to be determined by the court under the circumstances. In short, the principle on this subject seem to be stated with precise and very felicitous accuracy, by Mr. Justice SERGEANT, in *Jones v. Long*, 3 Watts, 325; "the entry need not be made exactly at the time of the occurrence; it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived, was unimpaired. The law fixes no precise instant when the entry should be made. If done at or about the

time it is sufficient." A principle so strongly founded in good sense, and so consistent with what has been decided in other states, cannot be considered as in any degree shaken by loose dicta in later cases; especially, when those dicta have subsequently been thrown aside with utter contempt by the court that made them.—In addition to the points which have been mentioned as affecting the admissibility of a book, it has been decided that, "a book of entries, manifestly erased and altered in a material point, cannot be permitted to go to the jury as a book of original entries, and ought to be rejected by the court, unless the plaintiff give an explanation which does away with the presumption which must exist on its face;" *Churchman v. Smith*, 6 Wharton, 146; but if the alterations are explained to the satisfaction of the court, the book may be admissible; *Kline v. Gundrum*, 1 Jones, 243, 249.—A book which wants any of the qualities above indicated, is incompetent. It has been said, "If the book appear, on investigation of the party by the court, not to be a legal book of entries, the court may reject it as incompetent. If this does not appear clearly, it is to be submitted to the jury to decide on;" *Curren v. Crawford*; with instructions of course, in the latter case, to disregard it entirely, if they find against it; *Rodman et al. v. Hoop's Ex'rs*, 1 Dallas, 85. But where the evidence is not conflicting, the practice has long been for the court alone to decide upon the subject; see *Churchman v. Smith*. It is not necessary to the competency of a book, that the party should be without a clerk or porters; nor is it necessary that the entries should be made from the party's own knowledge; if made from returns given by servants, it is enough; *Ingraham v. Bockius and another*; *Jones v. Long*.—The party, in support of his book, is to be sworn on his voir dire, and can only be examined as to whether his book is a book of original entries, and whether the entries were made at the time they bear date: but being a party, he cannot be examined generally by the other side, without his own consent: *Shaw and another v. Levy*, 17 Sergeant and Rawle, 99; *Stockton & Stokes v. Demuth*, 7 Watts, 39, 42. The authentication of the *handwriting* is the main support of the evidence; as is said in *Rhoads v. Gaul et al.*, "the genuineness of the writing must be proved, in order to raise a presumption that the transaction was in the usual course of business." Therefore, entries to which a party swears must be in his own handwriting: if the party who made them be dead, or out of the state, the books are admissible, upon proof of his handwriting; *Van Swearingen v. Harris*, 1 Watts & Sergeant, 359; *Alter v. Berghaus*, 8 Watts, 77; *Odell v. Culbert*, 9 Watts & Sergeant, 66: if the entries were made by a clerk, he should be called; or if dead or out of the state, his hand may be proved; *Sterritt v. Bull*, 1 Binney, 234. If the entries are made by a clerk who is absent at the time of the trial, his character for honesty may be impeached; and if made and sworn to by the plaintiff, the evidence may be discredited by showing that he is unworthy of credit on his oath, and that his books are notoriously unworthy of confidence, and to establish the latter point, particular acts of irregularity in keeping them may be shown; *Crouse and another v. Miller*, 10 Sergeant & Rawle, 155; *Barber v. Bull*, 7 Watts & Sergeant, 391. And see in confirmation of this, *Loosee v. Loosee*, 2 Hill's N. Y. 610, and note. In *Haughey v. Strickler*, 2 Watts & Sergeant, 411, it being shown that the clerk of the plaintiff was dead, the *plaintiff* appears to have been allowed to prove his handwriting,

and verify the books; and in *Seagrove v. Redman et al.*, 4 Dallas, 153, in case of a foreign transaction, the same thing was allowed. It is not necessary that the person who makes the entries should, with his own hands, have delivered the goods; *Kline v. Gundrum*, 1 Jones, 243, 244. Whether, or when, a *copy* of regular books is to be received, is not settled: it has been held that the original books of merchants abroad cannot be required, and that true abstracts, with the oath of the clerk, or proof of his handwriting, are admissible; *Bell & Decker v. Keely*, 2 Yeates, 255; see *Budden v. Petriken*, 5 Watts, 286.—A plaintiff is not bound to put his books in evidence, nor is he concluded by them; the claim may be proved in other ways; *Adams v. Columbia Steamboat Company*, 3 Wharton, 75; *Fidler v. Beckley*, 2 Watts & Sergeant, 458.

In SOUTH CAROLINA, the early statutes recognise the admissibility of the books of merchants, shopkeepers, and others, the party swearing to them; and this, on the ground of convenience and necessity. See 1 Brevard's Digest, 315, tit. 74; and *Clough v. Little*, 3 Richardson, 353. It has been decided that, notwithstanding the statute of James I., books are evidence beyond the year; and the evidence is applicable not only to goods sold, but to work done and articles furnished: *Lamb v. Hart's Adm'rs*, 1 Brevard, 105. For example; the books of a carpenter, *Slade v. Teasdale*, 2 Bay, 172; of a bricklayer, *Lynch v. Petrie*, 1 Nott & M'Cord, 130; or other mechanic, *Land v. Hart's Adm'rs*, 2 Bay, 362, 1 Brevard, 105, S. C.; of a ferryman, to establish charges for ferriage, *Frazier v. Drayton*, 2 Nott & M'Cord, 471; of a physician, for services and medicine, *McBride v. Watts*, 1 M'Cord, 384; *Lance v. McKenzie*, 2 Bailey, 449; of a miller to show the quantity of lumber delivered from the mill, *Gordon v. Arnold*, 1 M'Cord, 517; of a printer, to show charges for advertising, and for delivering a newspaper, *Thomas v. Dyott*, 1 Nott & M'Cord, 186; though, in a later case, it was held that the printer's books might be evidence of the authority to advertise, but that to prove that the advertisements were actually made, the file of papers should be produced, as being better evidence; *Richards v. Howard*, 2 id. 474; and, apparently, the books of a seine-maker, *Story v. Perrin*, 2 Mills's Con. R. 220; have all been held admissible evidence. But the courts will not go beyond the necessity on which the practice is founded, *Everingham v. Langton*, 2 M'Cord, 157: they hold that this species of evidence ought not to be allowed where it is in the power of the party to produce other evidence; *Thomas v. Dyott*, 1 Nott & M'Cord, 186; and it is proper only "where the party himself is the best or only witness the nature of the case admits of;" *Lamb v. Hart's Adm'rs*, 1 Brevard, 105. Accordingly, a schoolmaster's books, though regularly kept, are not evidence to prove his account, because, as he must have many witnesses at command, the evidence of his books cannot be necessary; *Pelzer v. Cranston*, 2 M'Cord, 328; a jailor's books are not evidence to prove the length of time a person has been in confinement, because they are "not the best evidence the nature of the case admits," *Walker v. McMahan*, 3 Brevard, 251; a scrivener's books are not admissible, especially if offered to prove what commissions were to be allowed on moneys received, *Watson v. Bigelow*, 2 id. 127; and by a majority of the court, the books of account of a farmer or planter are not admissible in evidence to prove the delivery and sale of articles, *Jeter v. Martin*, id. 156; 2 Bay, 173, S. C. In *Thayer*

v. Dean, 2 Hill, 677, (1835,) it was again said that the rule rests in necessity, and is not to be extended : and in this case, the memorandum-books of a pedlar were rejected. Such persons, it is said, usually do not deal on credit, and cannot conveniently keep books. They do not fall within that class of persons, (said JOHNSON, J., with whom the other judges concurred,) in whose pursuit or employment, convenience or the usage of the country, imposes the necessity of keeping books of account. They do not, therefore, fall within the principle of the rule ; and believing that it has already been extended too far, I am not disposed to superadd this item to the long list of suspicious evidence." The books of a billiard-table-keeper are not evidence, partly because the charge is neither for work done nor goods delivered, and partly as being against good morals ; *Boyd v. Ladson*, 4 M'Cord, 76, where a strong disposition is shown to restrict this sort of evidence ; but when the latter objection was made in case of the charges for spirituous liquors in small quantities, it was not considered sufficient ; *Herlock v. Riser*, 1 id. 481.—As to the purposes for which books of entries are competent, the principle is, that they are evidence to prove the delivery of the article, or work done, and nothing more : and the recent case of *St. Philip's Church v. White*, 2 McMullan, 306, 312, limits the rule very strictly, and determines that even in the case of a mechanic, they are admissible only where the work is done in the plaintiff's shop, and delivered out ; and not where the work is done on the defendant's premises, as in building or repairing a house or other fixture, as there can be no necessity for such evidence in a case of that kind, the work being apparent and palpable, and the only question being by whom and for whom it was done ; neither of which are proper to be proved by this evidence. In *Gage v. McIlwain*, 1 Strobhart, 135, 138, it is said, "the book of a shopkeeper or tradesman is only allowed to prove the account sued for, and not any other fact which may arise collaterally in the case." In an action to recover compensation for the labour of a slave, memoranda in defendant's books, though customary, are not evidence to show on what days the slave did *not* work ; *McKewen v. Barksdale*, 2 Nott & M'Cord, 171. Books are not evidence to prove or contradict a *special* contract ; *Pritchard v. McOwen*, 1 id. 131, note ; and with this agrees *Deas v. Darby*. In that case the plaintiff, a tailor, had charged the defendant with clothes, (not appearing to be necessities,) made for and delivered, by his direction, to his ward ; and there was no other evidence than the plaintiff's entries and oath. The court, after argument, decided the evidence to be incompetent. "The liability of a defendant to pay an open account of a merchant or shopkeeper," says the court in that case, does not arise merely on account of the charge against him, but in consequence of the delivery of the goods to him, or to his servant or agent, for his use ; or in other words, it is in respect of the consideration which he has received ; so that book-entries prove no more than the delivery of the article charged. Now, if from these it appears that the articles were delivered to another, and for another's use, the liability ceases, unless he is liable on some other special contract ; and if a merchant were allowed to make every contract the subject of a book-entry, and himself to prove it, the community would, indeed, be at their mercy ;" *Deas v. Darby*, id. 436 ; confirmed in *Brown v. Kinlock, et al.*, 2 Spears, 284 ; *Kinlock, Phillips & Co. v. Brown*, 1 Richardson, 223. This principle received a singular applica-

tion in *Venning v. Hacker & Sniezer*, 2 Hill, 584; the book there, was, in part, made up from memoranda made by the defendants; and these entries, as consisting of declarations or admissions of the defendants, the plaintiff, on the authority of *Deas v. Darby*, was held incompetent to prove; in the same case it was said the plaintiff's books could prove a delivery only by himself; and if the entries were made up from the representations of a slave, they were inadmissible. See, also, *Gage v. M'Ilwain*, 1 Strobhart, 135. In *M'Bride v. Watts*, 1 M'Cord, 384, a physician, in a suit against a captain, for attendance on the sailors, was allowed to prove, by his books, both the service rendered, and that it was at the instance of the defendant; but probably the true ground of that decision was, that when the service was proved, the law imposed on the captain the liability of paying for it.—A book to be admissible, should be regularly kept: and if the entries appear to have been made out of the usual course of business, and not in the regular order in which the transactions occurred, the books are to be rejected; *Lynch v. M'Hugo*, 1 Bay, 33; *Thayer v. Dean*, 2 Hill, 677. The charges must be specific and particular: and a general charge of work done, or services rendered, at such a time, is inadmissible; *Lynch v. Petrie*, 1 Nott & M'Cord, 130; *Lance v. M'Kenzie*, 2 Bailey, 449. If the book be regularly kept, and be a book of original entries, and not made up of transfers from another book or memorandum, it will be admissible whether kept by double or single entry, or by setting a part a page or a portion of a page for each customer, and exhibiting at one view the whole account; *Toomer v. Gadsden*, 4 Strobhart, 193. The books offered in evidence must be produced in court; for, the defendant has a right to inspect them in court, and attack their credit for any want of regularity or fairness apparent on the books themselves; *Furman & Smith v. Pray*, 2 id. 394. If some of the entries have been made in a way to render them incompetent, and there is no means of distinguishing these from the others the whole book is to be rejected; *Venning v. Hacker & Sniezer*, 2 Hill, 584. The entries should be proved by the oath of the party who made them: but if one of two partners, plaintiffs, has made the entries, and is dead or has moved out of the state, the other partner may prove his handwriting; *Foster v. Sinkler*, 1 Bay, 40; *White v. Murphy*, 3 Richardson, 369; and under circumstances which excused the necessity, third persons were permitted to authenticate a physician's books, he having moved out of the state; *Spence v. Sanders*, id. 119. The party proving his books may be cross-examined; *Clough v. Little*, 3 Richardson, 353.

The law of CONNECTICUT differs from the law in these states, only in the extent to which the party's oath is allowed; a deflection occasioned apparently by statute; in other respects, the decisions are well suited to illustrate the true character of this evidence. For the recovery of book-charges, the action of book-debt is given by statute; 1 Swift's Digest, 727; and the evidence of the parties recognized as admissible: but the decisions have placed a limit to the evidence which the parties may give. They may testify as to the quantity, quality, and delivery of the articles; *Phoenix v. Pringle*, Kirby, 207; and to everything tending to the support or confutation of the account, as having ever created a legal liability; accordingly, a plaintiff may testify to the acknowledgment of a debt made by the defendant, or to facts from which it may be inferred; *Johnson v. Gunn*, 2 Root, 130;

Bryan v. Jackson, 4 Connecticut, 289; Bradley v. Basset, 13 id. 560; but if issue be joined on some collateral matter, as, tender, release, accord and satisfaction, or the statute of limitations, the evidence of the parties is not admissible; Weed et al. v. Bishop, 7 id. 128; Terrill v. Beecher, 9 id. 344; nor to prove any special agreement or promise; Johnson v. Gunn.—This action and the evidence of book-entries, are permitted only, where the right to charge exists at the time of delivery, and arises in consequence of the delivery; Bradley v. Goodyear, 1 Day, 104; and therefore, where money had been sent to be applied in payment of plaintiff's note, and was not so applied, it was not allowed to be recovered in this action or by this species of evidence, because the delivery of the money gave no right to charge it, but the right to recover arose from subsequent events; *ibid.* On the same principles, where the right of action arises from special agreement, and the delivery is in pursuance of it, the books are not admissible; Terrill v. Beecher, 9 Connecticut, 344; Green v. Platt, 11 id. 205; Kirby, 158, 289; it is said, by DAGGETT, J., in Terrill v. Beecher, that this action will not lie, except for such a delivery as the oaths of the party may prove; which principle, on the authority of Johnson v. Gunn, throws it out in all cases of special agreement and promises. Charges made against a son, may in this action, be recovered against the father, where he is legally bound to pay for them; Bryan v. Jackson: this action and evidence are not appropriate in case of property loaned and not returned, or to recover for torts, or to a claim by use and occupation; Beech v. Mills, 5 Connecticut, 493; but they are for money lent; Clark v. Savage, 20 id. 258. In case of death, charges in one's books, for goods, services, and money, are legal evidence to sustain book-debt. Dwight v. Brown, 9 id. 84.

In DELAWARE, by statute, 25 Geo. 2, (Hall's Revised Laws, 1829, p. 89, tit., Contracts,) in actions for articles sold and delivered, and other matters properly chargeable in an account, the oath of the plaintiff, together with a book regularly and fairly kept, are declared to be, in all cases, evidence to charge the defendant. It is considered as settled, that cash is not a matter properly chargeable in account. Smith & Brown v. McBeath, C. P. Kent, 1814, cited 1 Harrington, 346: lottery tickets are, Bailey v. McDowel, *ib.*; Gregory & Co. v. Bailey's adm'r, 4 id. 256, 263. The subscription to a paper is not properly proved by an entry in a book-account; but if the subscription be established by other proof, the annual subscription price, it is said, might form a proper subject for a book-entry; Ward v. Powell, 3 id. 379, 381. If the plaintiff reside in the state, the original book must be produced, and supported by the oath of the party: if he reside out of the state, the practice is to admit, by consent, sworn copies of the entries, and the consent of the defendant will be presumed, it seems, unless he give timely notice to the counsel of the other party that the production of the original books will be required; but if such notice be given, the original books must be produced, or else the sale and delivery of the articles must be proved by common law evidence; Craig and Sergeant v. Russell, 2 Id. 353; Fitzgibbon's Adm'r v. Kinney, 3 id. 317. In Rowland v. Burton, 2 id. 288, a notched stick, with the party's oath that the notches were made at the time that the work was done, was admitted as a good *book of entries*. In this way the plaintiff, a negro, proved an account running through two or three years, consisting of a number of items, amounting in all to \$25.40,

and recovered: "he was fully examined on his *book*, and the accuracy of his entries tested by an account made out from it some time before." Scraps of paper and even a single bit of paper about two inches square, have been held admissible books; *Smith v. Smith's Ex'x*, 4 Harrington, 532; *Hall v. Field*, id. 533, *note*; and in the last case, it is said that in Pennsylvania a closet door with chalks, &c. was admitted! The plaintiff may prove books kept by his clerk or agent, as well as by himself; *Webb v. Pindergrass' Adm'x*, 4 Harrington, 439; and he may be cross-examined; *Fredd v. Eves*, id. 385, 386.

There are other states in which the book is admitted in certain cases, but not the oath of the party. These are New York, Illinois, New Jersey, Georgia, and perhaps Ohio.

In NEW YORK the oath of the party is not received: but the book itself under certain restrictions, is; and this, whether the party is a merchant, or engaged in other business. *Sickles v. Mather*, 20 Wendell, 72. The rule here adopted is, that the evidence should be received only upon preliminary proof that the books offered contain original entries, made by the party himself; that they are fairly kept; that the party had no clerk, and had dealings with the person charged; and these are questions upon which evidence is to be adduced to the court; *Larue v. Rowland*, 7 Barbour's S. Ct. 108, 110. In *Case v. Potter*, 8 Johnson, 211, the point of admissibility was not decided; but it was said *per curiam*, that though from the usage which had crept in, a shop-book might be admitted in case of a sale and delivery, yet "it can never apply to a charge for cash lent, but only to the regular entries of the party, in the usual course of his business." In *Vosburgh v. Thayer*, 12 id. 461, which was an action for butcher's meat furnished to the defendant and his family, it was proved by several witnesses that the plaintiff had been in the daily practice of supplying them with meat during the period for which he claimed payment; it was proved by some of those who had dealt with him, that he kept just and honest accounts; and it appeared that he had no clerk; the question was as to the admissibility of his books of account. The court held it too late to question the competency of such evidence. They said, (*per Curiam*) that such books "are not evidence of money lent; because such transactions are not, in the usual course of business, matter of book account. They are not evidence in the case of a single charge, because there exists in such case, no regular dealing between the parties. They ought not to be admitted where there are several charges, unless a foundation is first laid for their admission, by proving that the party had no clerk; that some of the articles charged have been delivered; that the books produced are the account-books of the party, and that he keeps fair and honest accounts; and this by those who have dealt and settled with him. Under these restrictions, from the necessity of the case, and the consideration that the party debited is shown to have reposed confidence, by dealing with and being intrusted by the other party, they are evidence for the consideration of the jury." *PLATT, J.*, dissented, *totis viribus*, from the whole principle of admissibility; holding it novel, dangerous, and not to be justified by necessity. In *McAlister v. Reab*, 4 Wendell, 483, the point was touched, but nothing was decided. In *Linnel and Foot v. Southerland*, 11 id. 668, an action for articles and work, the delivery of one article, and the doing of one item of the work, and the prices, were proved: "the books of account of the plaintiffs were then produced, and it

was proved by two witnesses who had dealt and settled with the plaintiffs, that they kept fair and honest books, and that during the time the account against the defendant accrued, they had no clerk:" the court, on error, held the evidence competent; whether sufficient, was not a question for them. In *Merrill & al. v. The Ithaca and Owego R. R. Co.*, 16 id. 587, a suit for work and labour, certain check-rolls kept by the plaintiff or his assistants to show the number of days the men employed by him worked, were held inadmissible as books of account, on the following grounds, derivable from the decisions of New York and other states: "1. Because the plaintiffs had clerks and other witnesses of the labour; 2. They were not the general books of daily account of the plaintiffs; and there was no trust implied, that they should keep these accounts for the defendants. 3. It is not a simple case of charge for services done on a quantum meruit, known and recognized as such by both parties at the time. Charges for any thing done or delivered under a supposed special contract, but which afterwards becomes matter of account by operation of law, in consequence of a rescission of the contract, (the case in hand) cannot be proved by the party's book. There must be a right to charge, when the service is done, or the goods delivered." In *Sickles v. Mather*, 20 id. 72, the rule of *Vosburgh v. Thayer* is adopted; the reason of requiring proof that no clerk was kept, is said to be that the books are secondary evidence, and not admissible till it is shown that the primary and better evidence of a clerk cannot be had; but a foreman, who only delivers goods, and notes the delivery on a slate from which the plaintiff makes up his books, is not a clerk within this rule, and the books in such case are admissible: in this case, moreover, the memoranda were made by the foreman on a slate, and thence transcribed by the plaintiff into his book; "the plaintiff used to take the slate home, sometimes every day, and sometimes every two or three days, as was found convenient, for the purpose of transcribing;" and the court, after reviewing the cases in other states, held this to be no objection; and they observe, respecting these petty restrictions, "The rule which receives the party's books, even with his oath, seems to be regarded as of questionable policy, if we are to judge of the language of the courts and the course of decision in several states where it prevails. In some, they appear disposed to load it with a multitude of restrictions as to the kind of business in respect to which the books are to be received, and the manner in which they are kept, and the probability that better evidence may be had, &c. The rule is undoubtedly a departure from the common law, and may be a dangerous one; but that is rather an argument for repudiating it altogether than attempting to mitigate its virulence by feeble palliatives." In *Larue v. Rowland*, 7 *Barbour's S. Ct.*, 107, it was decided, that *all* the books in which the account between the parties has been kept, must be given in evidence, and that one account book is not admissible by itself, if it appear that the account was continued in another book, which is not produced. And in this case, the court said, "Books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all, is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favour. The practice of admitting such evidence is, I believe, universally adopted. It is said

that it has its origin in a kind of 'moral necessity,' and that such is the general course of business, that no proof could be furnished of the frequent small transactions between men, without resorting to the entries which they themselves have made, in the form of accounts. The practice can only be justified upon the ground that, without such evidence there would, in many cases be a total failure of proof. It may be added, that it has been often doubted, by those too, who have had the best opportunities for observing the facilities for fraud, which this loose species of evidence affords, and the abuses which, in inferior courts, have been perpetrated under it, whether it would not have been more wise, to have excluded such evidence altogether. At the very best it is but presumptive evidence, and that, too, of the very lowest grade. It should always be received with extreme caution, and be subjected to the strictest scrutiny." It was added also, that if any fraudulent circumstances were proved, as, that material and gross alterations were made, or entries inserted *post litem motam*, or not at or near the time of the transaction, or any thing shown which made the books unworthy of credit, it is the duty of the court to reject the evidence as incompetent, and leave the party to his common law proof.

In ILLINOIS the New York rule is adopted, and it has been decided, that in case of open accounts, composed of many items, where the entries are in the plaintiff's own handwriting, and he kept no clerk, and it is proved by a witness who had settled with the plaintiff on the book, that it is fair and correct, and it is proved also that part of the articles were delivered, the plaintiff's book of accounts is admissible; but this will not apply to an account for money lent, as that is not usually the subject of a charge in account, notes being generally taken; nor to an account containing a single charge only, as that would show no regular dealings between the parties; *Boyer v. Sweet*, 3 *Scammon*, 120.

In NEW JERSEY, (where, in like manner, the party's oath is not received, but his book and handwriting must be proved by a witness) books are evidence of work done and articles delivered: as to cash, it is certain that of a single charge they are not evidence, *Carman v. Dunham*, 6 *Halsted*, 189; and it appears to be admitted that of two or three standing alone they are not evidence; yet where there have been miscellaneous dealings between the parties, and there are, among other charges, entries of cash lent, which appear to have been in the course of business and are according to custom, the practice has been, especially in earlier times, to admit the books. *Craven v. Shaird*, 2 *Halsted*, 345; *Wilson v. Wilson*, 1 *id.* 95; but in the latter case, *FORD, J.* was strongly against the admissibility of such items; and the able opinion of Chief Justice *HORNBLOWER* in *Carman v. Dunham*, shows clearly that the principle of admitting them is wrong. The entries ought to be original entries, "made at the time the transaction took place, or as nearly at the time as is usual," per *FORD, J.* in *Wilson v. Wilson*; and in *Hagaman v. Case*, 1 *Southard*, 370, *KIRKPATRICK, C. J.*, said the prices ought to be stated in the book: an account made up all at one time, without showing them, whether it be in a book of entries or out of it, is inadmissible; *Wilson v. Wilson*; *Swing v. Sparks*, 2 *Halsted*, 59. Charges need not be entered on the very day they are incurred; and two or three days' services may be entered in one charge; *Bay v. Cook*, 2 *Zabriskie*, 343, 353. Accounts kept ledger-wise have been admitted, "if it

appeared to be the general mode in which the party keeps his books, *but not otherwise*; and even then with great caution, and giving them little consideration without concurring circumstances to strengthen them, and give them weight," per KIRKPATRICK, C. J., in *Wilson v. Wilson*. In *Jones v. De Kay*, Pennington, 955, it was held, that the facts, that some leaves had been cut out of the book, and that the account was kept ledgerwise, did not render it inadmissible, and that the credit due to it was for the determination of the jury. In *Leveringe v. Dayton*, 4 Washington C. C. R. 698, the plaintiff's ledger was offered with a debit, "To duties \$1602;" and Judge ROSSEL cited a case in which such evidence has been admitted and the judgment for that reason reversed, in the Supreme Court of New Jersey; and upon that authority, Judge WASHINGTON rejected the evidence: the reason appears to have been not that the entry was in the ledger, but because it was a large charge of money paid on account, entered all at once, without appearing to be in the course of business; the case alluded to by Judge ROSSEL was, probably, *Wilson v. Wilson*. Entries against one may be given in evidence against another, if it be proved, aliunde, that the latter ordered the things, *Tenbroke and Chapman v. Johnson*, 1 Coxe, 288: *Townly v. Wooly* and another, *id.* 377; but not unless such order is proved, *Jones v. Brick and Lane*, 3 Halsted, 269.

In GEORGIA, the New York practice is adopted. In *Martin v. Tuffe, Dudley*, 16, the rule is declared thus: "A merchant's and shopkeeper's books are, by constant practice, received as evidence to prove the sale and delivery of goods, when it is shown that the books offered are of original entry, are in his handwriting, that he keeps fair books, has had dealings with the person charged, and that he kept no clerk." In this case, the entries were in the party's handwriting, and he had kept two clerks, but both were dead; and it was held that by reason of their death, the party's situation was the same as if he had kept no clerk, and that the books were competent as being the best evidence attainable. It was held, also, in this case, that the entries must be specific and particular, and that a general entry of "~~merchandise~~" without other proof, is not competent evidence: and in *Williams v. Abercrombie and Horton*, *id.* 252, where the entry was one charge of 31 days' work at so much a day, it was decided to be inadmissible; and the court said, the entries should "appear to be daily, or made when the work is done, or the article delivered. The credit given to such books seems to rest upon this idea: that as the entry is made from day to day as the articles are made or delivered, there is no reason to suspect that they are made with a view to fraud or injustice, especially when it is in proof that the party is in the habit of keeping fair and correct books."

In OHIO, the account-book and oath of the party are admitted to a certain extent by statute; and beyond the statute, the New York practice of admitting the book without the oath, in some cases appears to be recognized. The act of February 19, 1810, sect. 6, and of December 18, 1823, sec. 2, in the same words enact, "that in all actions where any claim or defence is founded on book accounts of not more than eighteen months' standing, in which is drawn in question the validity or amount of such book accounts, the court or justice may, upon the trial of such action, examine the party under oath or affirmation, touching the validity of such account or accounts, which shall be admitted as evidence on the trial, the credibility thereof

being left to the jury or justice to determine." Under this statute, it is not necessary that every item of the account should be within 18 months: if the transactions be apparently fair and the account continuous, so as to be one open account, it is enough if any of the items be within 18 months; *James v. Richmond and Bostwick*, 5 Hammond's Ohio, 337: a check book is not such a book-account as the act contemplates, and cannot be sworn to; *Wilson v. Goodin, Wright*, 219. When this law was first made, the courts considered that being an innovation on the common law, it must be taken strictly; and they held that a party could only testify that the book was his book of accounts, and could not swear to the truth of any of the charges. But a wider extent is now given to the oath of the party, and the following principles are, in a recent case, considered as established. If the matters charged are such as generally constitute the subject of a book account, the performance of the services, if the charge be for work, and the quantity, quality, and delivery of the articles, if the charge be for goods, may be proved by the oath of the party claiming by virtue of the book account; but the book in which the original entries were made must be produced, otherwise the oath of the party will be rejected; if, for instance, there be a day-book and a ledger, the day-book as well as the ledger must be before the court. But though the party may prove what services were performed, and the quantity, quality and delivery of articles, since in many cases he alone is acquainted with these facts, yet he cannot testify as to the price or value of the articles or services; this must be proved by disinterested witnesses; much less, if there be a specific contract, can he testify to such contract: but though the party's testimony in introducing his book is thus restricted, yet on the cross-examination, a wide range of inquiry is allowed. This practice is applicable to charges for goods sold, and labour and other service performed, contained in the account books of merchants, farmers, mechanics and professional men. As to money charges, a distinction is taken; if, in the course of business, small sums are passing between the parties, these may, with propriety, be charged on book, and proved in the same manner as the other items of the account: yet money lent or paid, especially if in any considerable amount, is ordinarily not the subject of book charge; a note or receipt is usually taken; and, therefore, though an individual might perhaps be engaged in such business as would justify such charges, yet in ordinary cases they are not admissible. *Cram v. Spear*, 8 Hammond's Ohio, 491; where the whole subject is examined. In that case, an account containing seven items of different things amounting to nearly 900 dollars, was offered: three of the charges, amounting altogether to nearly \$700, were for cash lent: and this part of the account, and this alone, it was proposed to prove by the party's oath.—The court decided that it could not have been the intention of the legislature to admit this kind of testimony in such a case; and the plaintiff was nonsuit. See *Smiley v. Dewey*, 17 Ohio, 156.—To what extent account books are admissible beyond the license of the statute, is not very clearly defined. In *James v. Richmond and Bostwick*, the court said, "We do not undertake to determine whether books of account of more than 18 months' standing, may or may not be given in evidence; or, if given in evidence, by what description of testimony they shall be supported. Such accounts are admitted in some of our sister states, and to a certain extent have been admitted in our courts. There is not, however, we believe,

any settled practice on the subject." In *Bentley's Administrator v. Hollenback, Wright, 168*, the defendant offered a book account as a set-off. The court said, the point was somewhat difficult. "In many cases, justice requires that account-books should be received in evidence; not as conclusive evidence of a claim, but as conducing to prove it. The books may be strengthened or weakened by other evidence, such as proving that the party kept fair books, had no clerk, &c. In this case we are disposed to look at the book. 12 Johnson's Rep. 461:" and judgment was given allowing the set-off. In *Vanhorne's Ex'or v. Brady, Wright, 452*, the account-book of one deceased was held to be of itself not evidence: but, under the circumstances,—it appearing that the accounts were kept regularly, that the parties had had dealings, and that the defendant had acknowledged the plaintiff's accuracy,—the book was admitted in evidence. In *Cram v. Spear*, it was said by the court, that "books of deceased persons have sometimes been permitted to go to the jury, in connexion with other evidence, and without further proof as to the books themselves, than that they were in the handwriting of the person making the charges. But this has not been done, not in consequence of the statute, but from the necessity of the case, and in accordance with the principle that the handwriting of a clerk in the habit of making charges, may be proven after his decease, or when he is without the jurisdiction of the court." Upon the whole, it would rather appear that the *principle* of the admissibility of account-books, without the oath of the party, and beyond the limits of the statute, is recognised in Ohio: that the admission is not regulated by a precise rule as in New York; but it is referred rather to the discretion of the court, who decide according to the necessity of the case, the apparent honesty and regularity of the books, and the concurrent testimony in favour of the claim from other quarters.

See the principles on this subject recognized in TEXAS; *Underwood v. Parrott, 2 Texas, 168*.

In MARYLAND, NORTH CAROLINA, TENNESSEE, ALABAMA, VERMONT, the oath of the party is admitted in certain cases by statute; but except as far as the statute extends, neither the plaintiff's book nor his oath are evidence.

In MARYLAND, by the statute of 1729, ch. 20, s. 9, an account of things properly chargeable in account, sworn by the creditor, before a justice, to be just and true, and that no payment, security or satisfaction, other than is credited, has been received, is good *prima facie* evidence: but by the statute 1785, ch. 46, s. 8, this is restricted to accounts not exceeding ten pounds, current money, in the course of any whole year. Beyond the operation of these statutes, a plaintiff's entries or oath are wholly inadmissible. In *Owings & Piet v. Low, 5 Gill & Johnson, 134*, the plaintiff's book was offered with the evidence of his clerks. Some of the entries were by the witness, some by another clerk, who was absent, some by one of the plaintiffs: the witness swore to the delivery of the things which had been charged by himself, and that the usage of the house was, never to enter a charge till the article was delivered, and that the plaintiffs were fair and honest men, and would not make false charges: the evidence as to the witness's own entries was received; but as to the others the book was rejected; and the court said, that the New York usage of admitting the plaintiff's books, had no existence in Maryland.

In NORTH CAROLINA, (1 Rev. Stat. 97, ch. 15,) and TENNESSEE, (Caval. I.—24

ruthers & Nicholson's Compilation, p. 131,) it is enacted, that in debt and assumpsit, where the declaration is general, and a copy of the account is filed with the declaration,—and likewise where a set-off is pleaded,—if the plaintiff swears that the matter in dispute is a book-account; and that he has no means of proof but his book, and that his book is a true account of all his dealings with the other, or of the last settlement of accounts, that the articles were delivered, and that all just credits had been given, the book and oath are good evidence of all articles delivered within two years, and not amounting, in North Carolina, to more than sixty dollars, or in Tennessee, to seventy-five dollars: similar provision is made for accounts of decedents, when the account accrued not more than two years before their death, and suit is brought within one year: and in all cases, a copy of the account is evidence, unless notice is given to produce the original.

In ALABAMA, a statute allows the *oaths of the parties* to be received, touching claims or set-offs, not exceeding twenty dollars; but this being an innovation on the common law, is to be construed as strictly as possible; *Lock v. Miller*, 3 Stewart and Porter, 13; *Thompson v. Jones*, 2 id. 46. Entries of the plaintiff, stating delivery of goods, are not evidence for him; “in this state the admissibility of proof in such cases, depends on the common law rules of evidence.” *Moore v. Andrews and Brothers*, 5 Porter, 107; *Nolley v. Holmes*, 3 Judges, 642.

In VERMONT we find a similar state of things. Statute (Rev. St. title 41, ch. 36,) allows the action of account to be brought on book-account; and directs that, after judgment quod computet, the auditor shall have power to examine all the parties to the suit on oath, in relation to the account, or any item of it, and call for the original books, if there are any: and in any action before a justice, where a book-account is sued on or used as set-off, the justice has similar powers to examine the parties on oath.—This action will lie, and a book-account is proper evidence, whenever general indebitatus assumpsit could be maintained; that is whenever either the contract is implied, or has been performed on the plaintiff's side; but if the suit is to recover damages for non-performance of a contract, and the plaintiff is obliged to sue specially, this action will not lie; per COLIMER, J., in *Way v. Wakefield*, 7 Vermont, 223; that in the former cases, a book-charge is proper, and this action maintainable, see *Newton v. Higgins*, 2 id. 366; *Fry v. Slyfield*, 3 id. 246; *Leach & Walker v. Shephard*, 5 id. 363; *Paige v. Ripley*, 12 id. 229; and that in the latter they are not, see 2 Aikens, 386; *Allen v. Thrall*, 10 Vermont, 255; *Blanchard v. Butterfield*, 12 id. 451; *Smith v. Smith*, 14 id. 440; but when goods have been manufactured to order, and the property in them has passed to the defendant, this action will lie, although there has been no delivery; *Mattison v. Wescott*, 13 id. 258; *Paddock & Riddle v. Ames*, 14 id. 515. The right to make a charge on book must exist at the time of delivering the article or performing the service; *Nasson v. Crocker*, 11 id. 463; and therefore money paid on a note, or articles delivered in payment of a note, cannot afterwards be recovered in an action on book account, if not so applied by the creditor; *Slasson v. Davis et al.*, 1 Aikens, 73; *Peach v. Mills*, 14 Vermont, 371, 376; *Stevens v. Tuttle*, 3 id. 519; but where money is advanced, or goods delivered, in creation of a debt, so that a right to charge exists at the time, though it may be the understanding of the parties that the claim is to be adjusted after-

wards by being set off against a note or other debt, it is a proper subject for book-account; *Strong v. McConnell*, 10 id. 231; *Brooks & Co. v. Jewell*, 14 id. 470; *Hickok & Catlin v. Ridley*, 15 id. 42; *Rogers v. Miller*, id. 431. It has been decided, also, that a charge of accountability against one as agent to sell, is enough; and when he sells, the action may be brought; *Hall & Chase v. Peck*, 10 id. 474; *Starr v. Huntley*, 12 id. 13; but for the purpose of recovering the price or value of property, this form of action should be limited to cases of actual sale, or to cases where the party has admitted his liability as upon a sale; *Tyson v. Doe*, 15 id. 571, 575.—The right to examine and to testify, as relates to both parties, is unlimited, extending to every material fact in relation to the account, proper to be considered in deciding on the merits of the claims; *Stevens v. Richards*, *Trusdell & Co.*, 2 Aikens, 81; *Fay et al. v. Green*, id. 386; *May and Wales v. Corlen*, 4 Vermont, 12: see *Matlocks v. Owens*, 5 id. 42. But the party must be examined in person; his deposition cannot be taken. *Pike v. Blake*, 8 id. 400. Money charges, *Warden v. Johnson*, 11 id. 455; *Chellis v. Woods*, id. 466; *Ins. Co. v. Cummings*, id. 503; and even a single charge, *Kingsland v. Adams*, 10 id. 201; are recoverable thus: also, charges for freight; *Boardman v. Keeler & Allen*, 2 id. 65: and matter on which a suit of this nature could be brought, (use and occupation, for instance,) may be involved in a defence to it; for it is settled that “if a party charge any matter upon book, and present it before the auditors, and claim to recover for it, he cannot object to any other matter being brought into the account upon which it was agreed that the charge should apply.” *Gun-nison v. Bancroft*, 11 id. 490; *Fassett v. Vincent*, 8 id. 73. It is obvious that these decisions in Vermont, on the evidence proper in the action of book-account, are wholly inapplicable to the other states; and in questions respecting the admissions of book entries, elsewhere, these cases cannot be cited without great danger. The whole practice rests upon statute: by that statute, it is not the book of entries, supported by the party’s oath, which is evidence; it is the oath of the party, affected as to its credibility by the appearance of his account-book, or the fact that he kept no books, that is the substantive evidence received. The statute gives the action of account, and directs the oaths of the parties to be taken, and gives authority to call for the books of account, where any have been kept. Accordingly, it is no objection to the *admissibility* of the book that there are erasures or alterations in it; *Sargent v. Pettibone*, 1 Aikens, 355; or that the entries are not by particulars, and made at the time, but are made all at once, in large amounts, long afterwards; *Read v. Barlow*, 1 id. 145; *Leach & Walker v. Shepard*, 5 Vermont, 363; *Newell v. Executors of Keith*, 11 id. 214: the account may be made up from memory in court; and indeed it is not necessary that there should be any books of account kept at all; if the charges are of a kind proper for book-charges, and the examination of both parties on oath, shows the claim to be just, the party shall recover; *Bell v. McClean*, 3 id. 185: and as the oath of the plaintiff is not conclusive, and is encountered by the oath of the defendant, it is deemed that this practice is not dangerous. *Leach et al. v. Shepard*; *Kingsland v. Adams*, 10 id. 201. This view of the law of Vermont has been given, to show that it is a peculiar practice, and that the decisions are wholly inapplicable to other states; a circumstance which, in some cases, has been overlooked. It is important

to observe, that the statute which gives this action of account does not take away the common law action of assumpsit for goods sold and delivered; and it has been decided that in such an action in Vermont, the book of entries and oath of the party is not admissible in evidence; but the entries must be proved as at common law, *i. e.* by the oath of the clerk or servant who made them, if he is living, and by proof of his hand if he is dead. *Brunham v. Adams*, 5 Vermont, 313.

In INDIANA and MISSISSIPPI, it has been decided that a party's books, in his own handwriting, are not competent evidence: the subject is regulated by the common law principle. *Decamp and another v. Vaudagriff*, 4 Blackford, 272; *West v. Poindexter*, Walker, 303. As to VIRGINIA, see *Downer & Co. v. Morrison*, 2 Grattan, 250.

H. B. W.

[*143] *PETER v. COMPTON.

TRIN.—5 W. & M. KING'S BENCH.

[REPORTED SKINNER, 353.]

“An agreement that is not to be performed within the space of one year from the making thereof” means, in the Statute of Frauds, an agreement which appears from its terms to be incapable of performance within the year.

THE question upon a trial before Holt, Chief Justice, *nisi prius*, in an action upon the case, upon an agreement, in which the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing,* for the marriage did not happen within a year: the Chief Justice advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra*†) where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary; otherwise not.

* According to the exigency of the Statute of Frauds, 29 C. 2, c. 3, s. 4. *Vide ante*, 326. Salk. 280.

† In *Smith v. Westall*, Lord Ray. 316, Lord Holt says, speaking of this case, that the reason of his opinion was, “because the design of the statute was not to trust the memory of witnesses beyond one year.”

THIS case, as well as *Birkmyr v. Darnell*, turns on the *fourth* section of the Statute of Frauds. That section directs, among other things, that no action shall be brought, to charge any person, *upon any agreement that is not to be performed within the space of one year from the making thereof*, unless the agreement, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. *Peter v. Compton* turned upon the meaning of the words printed in italics.

The opinion of the majority of the judges in this case has been often since confirmed. *Anon.*, Salk. 280; *Francam v. Foster*, Skinner, 356; *Fenton v. Emblers*, 3 Burr. 1281; 1 Bl. 333, ubi, per Denison, J., "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and [*144] expressly and *specifically so agreed: it does not extend to cases, where the thing *may* be performed within the year." Accord. *Wells v. Horton*, 4 Bingh. 40, where it was held, that a contract by A. that his executor should pay 10,000*l.* need not be in writing: [and *Souch v. Strawbridge*, 2 C. B. 808, where the contract was to maintain a child "so long as the defendant should think proper."]

The words of the statute are, however, express; that no action shall lie upon any agreement that is not to be performed within one year after the making thereof, unless it be reduced into writing and signed. Accordingly, when the defendant's wife hired a carriage for five years at 90 guineas per annum, which contract was, by the custom of the trade, determinable at any time on payment of a year's hire; the court held the case within the statute, and that the contract ought to have been in writing. *Birch v. Earl of Liverpool*, 9 B. & C. 392. And so must a contract for a year's service, to commence at a day subsequent to the making of the contract. *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; see also *Boydell v. Drummond*, 11 East, 142, stated ante, p. 136. [So also must a contract for payment of an annuity, though it may determine within the year by the death of the annuitant. *Sweet v. Lee*, 4 Sc. N. R. 77; 3 Man. & Gr. 452, S. C.; or a contract for more than one year's service, though subject

to the like contingency. *Giraud v. Richmond*, 2 C. B. 835.] It was hinted in *Bracegirdle v. Heald*, and decided in *Donellan v. Read*, 3 B. & Adol. 899, that an agreement is not within the statute, provided that all that is to be done by one of the parties is to be done within a year. There the defendant was tenant to the plaintiff, *under a lease of 20 years*, and, in consideration that the plaintiff would lay out 50*l.* in alterations, the defendant promised to pay an additional 5*l.* a year *during the remainder of the term*. The alterations were completed within the year, and an action being brought for the increased rent, it was objected among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court however held that it was not within the statute. "We think," said Littledale, J., delivering the judgment of the court, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer time than a year: and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." See *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433.

It may be observed on this decision, that the contrary seems to have been taken for granted in *Peter v. Compton*, and others of the older cases; for instance, in *Peter v. Compton*, there would have been no occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute or no, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation. It may be further observed, that the decision in *Donellan v. Read*, makes the word *agreement* bear two different meanings in the same section of the Statute of Frauds: the words of the 4th section are—"That no action shall be brought, whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or to charge the defendant upon any special promise to answer for

the debt, default, or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of any lands, tenements, or hereditaments, or any interest in, or concerning them: or upon any *agreement* that is not to be performed within the space of one year from the making thereof; unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." Now, it is clear, that the word *agreement*, when lastly used in the section, means what is to be done *on both sides*: and it has frequently been held upon that very ground, that guaranties are void, if they do not contain the consideration as well as the promise. *Wain v. Walters*, 6 East, 10; *Jenkins v. Reynolds*, 3 B. & B. 14; *Saunders v. Wakefield*, 4 B. & A. 595; [*Sykes v. Dixon*, 9 A. & E. 693]; 1 Wm. Saund. 211, in notis; and the notes to *Birkmyr* [*145] *v. Darnell*, ante; *but a much more confined sense appears to be bestowed upon the word *agreement* when it is held, that an *agreement* is capable of being executed within a year, where one part only of it is capable of being so. In the case put by Mr. J. Littleale, of goods delivered immediately, to be paid for after the expiration of a year, great hardship certainly would be inflicted on the vendor, if he were to be unpaid, because he could not show a written agreement. But it may be worthy of consideration, whether, even if he were to be prevented from availing himself of the special contract under which he sold the goods, he might not still sue on a *quantum meruit*. See *Teal v. Auty*, 2 B. & B. 99; 4 Moore, 542; *Earl of Falmouth v. Thomas*, 1 C. & M. 109; *Knowles v. Mitchell*, 13 East, 249. In *Boydell v. Drummond*, 11 East, 159, it is expressly settled that *part performance* will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in *Donellan v. Read*. "I cannot," said Lord Ellenborough, "say that a contract is *performed*, when a great part of it remains unperformed within the year; in other words that *part performance* is *per-*

formance. The mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." (See *Smith v. Westall*, L. Ray. 316.) These observations seem applicable in full force to such a case as *Donellan v. Read*. The performance of one side of the agreement within the year could not be said to be more than part-performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past, by *parol evidence*. Indeed, if there be any difference at all in the danger of admitting oral testimony after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as *Boydell v. Drummond*; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by *both* the contractors; whereas, if the part-performance had been on one side only, the witness would only have to make his tale consistent with what had been done on that side. It is true that, in *Donellan v. Read*, there was a part-performance on both sides; but so there was in *Boydell v. Drummond*; and the reason assigned for the decision in *Donellan v. Read*, viz. that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part-performance on the other side for twenty years. {*Donellan v. Read* is fully confirmed in *Cherry v. Heming*, 4 Exchequer, 631; and Baron Parke there says: "The learned observations of Mr. Smith are not sufficient to induce me to say that it was wrongly decided. The case of *Peter v. Compton*, which he relies on, does not support his view. All that can be said of that case is, that, there being two answers to the Statute of Frauds, Lord Holt gives one which is satisfactory, namely, that the agreement might have been performed within the year."}

A contract which cannot be fully performed within a year, is manifestly and essentially within the provisions of the Statute of Frauds. *Linseott v. McIntire*, 15 Maine, 201; *Hinckley v. Southgate*, 11 Vermont, 428; *Lockwood v. Barnes*, 3 Hill, 128; *Lower v. Winters*, 7 Cowen, 265. Thus in *Herrin v. Butters*, 20 Maine, 119, an agreement to clear and sow land in consideration of being allowed to take the profits for three years, was held to be insusceptible of performance in a year, and consequently invalid without a writing. The same thing has been held of a lease for a single year to commence *in futuro*: *Croswell v. Crane*, 7 Barbour's S. Ct. 191, and of every other contract, which cannot be finally and fully performed until after the expiration of a year from the time at which it is made, whether the delay arise, from the remoteness of the period at which the performance of the contract is to commence, or the length of time during which it is to continue; *Wilson v. Martin*, 1 Denio, 602. But the statute will not apply, where the contract can, by any possibility, be fulfilled or completed in the space of a year, although the parties may have intended, that its operation should extend through a much longer period; *Kent v. Kent*, 18 Pickering, 569; *Peters v. Westborough*, 19 id. 364; *Blake v. Cole*, 22 id. 97; *Roberts v. The Rockbottom Company*, 7 Metcalf, 46; *Souch v. Strawbridge*, 2 C. B. 808; *Derby v. Phelps*, 2 New Hampshire, 515; *Russel v. Slade*; *McLees v. Hale*, 10 Wend. 426; *Plimpton v. Curtis*, 15 id. 336. "We think it is settled by the recent cases," said SHAW, C. J., in *Roberts v. The Rockbottom Co.*, "that when the contract may, by its terms, be fully performed within a year, it is not void by the Statute of Frauds, although in some contingencies it may extend beyond that period." And this rule of construction has been carried still further, and to the extent of deciding, that an agreement which provides, *prima facie*, for a performance beyond the year, will not be invalidated by the statute, if it can be fulfilled in less than that period, under any possible circumstances, consistently with its terms; *Lyon v. King*, 11 Metcalf, 411. Thus a verbal contract to work for another for a year, will not be invalid, because the parties do not intend, that the service shall begin at once, nor unless it is expressly agreed, that its commencement shall be postponed until a future day; *Russell v. Slade*. And the same thing is true, when the parties contemplate a performance beyond the year, if there be any contingency in which the contract can be fully performed within it. Thus in *Peters v. Westborough*, 19 Pickering, 364, the contract was for the support of a child, until she should attain the age of eighteen years. Here the performance contemplated by the parties, and provided for by the contract, was manifestly intended to extend through a period of many years, nor was it subject to any contingency or qualification in terms. But as the whole contract was necessarily dependent upon the life of the child, and might have been brought to an immediate termination by her death, it was held not to come within the provisions of the statute. A similar point was decided in *Howard v. Burgin*, 4 Dana, 137. It seems necessarily to follow from these decisions, that whenever the length of the period during which the performance of a contract is to endure, is dependent upon the contingency of life; no writing is necessary to give it validity. Thus in *Lyon v. King*, 11 Metcalf, 411, an oral agreement not to carry on the business of a livery-stable keeper, was held valid, because it must necessarily terminate on the death of the contracting party, which

might as well happen before the end of the year as afterwards. So a promise to be performed on the death of the promisor, is not within the statute, because his death may happen instantaneously, and lead to the immediate performance of the promise; *Wells v. Horton*, 4 Bing. 40; *Thompson v. Gordon*, 3 Strobhart, 197. And it may be presumed, that an insurance on life would come within the same reason, as being susceptible of full performance, immediately upon the death of the person whose life is insured. But no contingency can take a contract out of the statute, unless it be of a nature to accomplish, instead of defeating it; *Harris v. Porter*, 2 Harrington, 27. An executory sale of a slave, to take effect after the expiration of a year, is therefore, within the statute, for although his death may put an end to the contract before the end of the year, yet it will at the same time render its performance impossible; *Saunders v. Kastenbine's ex'ors*, 6 B. Monroe, 17. And in the recent case of *Folley v. Greene*, 2 Sandford Ch. 91, where the validity of an oral agreement by one person, to support another came in question, a doubt was expressed, whether the contingent duration of the obligation imposed by a contract, would take it out of the statute, unless the contingency were dependent on the will of the parties, and not upon natural causes beyond their control. The same point was raised in *Bull v. McCrea*, 8 B. Monroe, 422, without being decided, though the majority of the court seem to have been in favour of the validity of the contract.

Whatever may be the rule, where the contingency is beyond the control of the parties, there is no doubt that where they have the power to perform the contract within the year, it will not be invalid because it was meant to continue, and has actually continued during a much longer period. This doctrine is strikingly illustrated by the case of *Moore v. Fox*, 10 Johnson, 244, where a promise had been made by one of the members of a congregation, to pay the plaintiff two dollars a year for his services as minister, and suit was brought for services rendered many years after the promise. It was held by the court that, as the plaintiff had received his salary in half yearly payments, it must be presumed that such was the understanding at the time of the promise, and if so, the contract could not be considered as within the statute, because his withdrawal before the end of the year would not have prevented a recovery for the services during the first six months. In like manner, where the contract was for the payment of a sum of money, as soon as a certain mortgage should be discharged, it was held, that although the mortgage would not be due for more than a year, yet as there was nothing to prevent the mortgagor from paying it off before that time, the case did not come within the provisions of the statute; *Archer v. Zeh*, 5 Hill, 200.

But where the contract is entire, and provides for a performance continuing longer than a year, to be paid for in gross, it will not be valid without the aid of writing; *Squire v. Whipple*, 1 Vermont, 69; *Shute v. Dorr*, 5 Wend. 204. Thus in *Drummond v. Burrell*, 13 Wend. 307, a verbal contract by the defendant, to work for the plaintiff for two years, for the sum of one hundred dollars, was held invalid. This case was distinguished from *Moore v. Fox*, on the obvious ground that while a recovery might have been had in the one, for the services rendered during the first year, at its

termination, even if the plaintiff had refused to serve any longer, the contract in the other was entire, and could give no right of action, until it had been fully performed by serving during two years, according to its stipulations.

It would seem, moreover, that as the statute was intended to lay down a rule of evidence, and to regulate the admission of testimony in disputed cases, regard must be had in its application, not merely to the period at which the contract may be performed in fact, but to that at which it can be so far fulfilled in law as to become a matter of legal cognisance. Thus in *Lapham v. Whipple*, 8 Metcalf, 57, where a contract for the sale of a patent, provided that, if the vendee did not realise the amount of the purchase money, within three years, from the profits of the patent, the vendor would repay it to him with interest, it was held, that the right of the vendee to repayment, was dependent on the state of his accounts at the end of three years, and not at any intermediate period; but that if this were not so, the contract would still be within the statute, because no action could be brought against the vendor before the three years expired, however great the loss which he might sustain previously.

It was decided in *Rake's Administrator v. Pope*, 7 Alabama, 161; and *Johnson v. Watson*, 1 Kelly, 348, that the statute of frauds does not extend to contracts which are wholly executed on one side, although they may be executory on the other, and that an absolute sale is consequently valid without writing, whatever the period fixed for the payment of the purchase money. It has also been held, that no contract is within the statute, which can be executed on either side within the year, even if it must remain open on the other for a much longer period; (*supra* 144), *Holbrook v. Armstrong*, 1 Fairfield, 31. And in *Souch v. Strawbridge*, 2 C. B. 888, *TINDAL, C. J.*, expressed the opinion, that the statute does not apply in any case, where there has been a complete performance on one side, assented to or accepted on the other; and that it was only intended as a protection against actions brought on unwritten contracts which have not been performed, and therefore rest wholly on the uncertain recollection and testimony of witnesses. But it has been generally held in this country, that, as the statute was meant to provide, against the danger of allowing contracts to be proved by parol evidence, at periods remote from those at which they were made, it applies in all cases where the obligation or duty sought to be enforced, could not have been fulfilled within a year from its date, and that an oral promise for the payment of money, or the performance of any other act at a greater distance of time than a year, is consequently invalid, whether made upon an executed or executory consideration; *Cabot v. Haskins*, 3 Pick. 83; *Holbrook v. Armstrong*; *Lockwood v. Barnes*, 3 Hill, 128. The law was held the same way in *Broadwell v. Gitman*, 2 Denio, 87, where it was decided, that unless an agreement can be completely executed on both sides within a year, it must be in writing. It is, however, universally admitted, that no one can make use of the goods or services of another, and then set up the statute, as an excuse for not paying for them, and that where a contract has been fully performed, and the performance accepted, a recovery may be had on a quantum meruit or valebant, if not on the contract itself. The chief practical difference, therefore, between the construction adopted in *Don-*

ellan v. Reed, and in Cabot v. Haskins, is that under the former it is enough to show that the defendant entered into the contract and that it was performed, while under the latter it must appear, that he assented to or benefited by the performance.

As the courts have no common law or statutory power to apportion an entire contract, it necessarily follows that where one part of such a contract is invalidated by the statute, the rest must share the same fate even when it would have been valid if standing alone; Crawford v. Morell, 8 Johnson, 253; Holloway v. Hampton, 4 B. Monroe, 415. Thus it is well settled, that where an entire contract for the sale of realty and personalty (as when land is sold with the standing crops or timber), is avoided by the statute to the realty, it must necessarily fail as to the personalty also; Rock v. Thayer, 13 Wend. 53. The same point was decided in Loomis v. Newhall, 15 Pick. 166, with regard to a contract which fell in part within the direct operation of the statute, and which was consequently held to be wholly invalid.

[*146]

*CUMBER v. WANE.

TRINITY, 5 GEO. I.

[REPORTED, 1 STRANGE, 426.]

Giving a note for 5*l.* cannot be pleaded as a satisfaction for 15*l.*

If one party die during a Curia advisari vult, judgment may be entered nunc pro tunc.

ERROR *c* C. B. in an *indebitatus assumpsit* for 15*l.* The defendant pleads, that he gave the plaintiff a promissory note for 5*l.* in satisfaction, and that the plaintiff received it in satisfaction. The plaintiff put in an immaterial replication, to which the defendant demurred. And, after judgment for the plaintiff, it was objected on error, that the plea was ill, it appearing that the note for 5*l.* could not be a satisfaction for 15*l.*, and that where one contract is to be pleaded in satisfaction of another, it ought to be a contract of a higher nature. Hob. 68; 2 Keb. 804. One bond cannot be pleaded in satisfaction of another. 1 Mod. 225; 2 Keb. 851. Even the actual payment of 5*l.* would not do, because it is a less sum. 5 Co. 117; 1 Leon. 19. Much less shall a note payable at a future day.

E contra. It was argued, that the plaintiff's demand consisting only in damages, it was for his benefit to have it reduced to a certainty, and to have the security for it made negotiable.* A stated account may be pleaded in

* [The argument was considered valid in Sibree v. Tripp, 15 M. & W. 23.]

bar of an action of covenant. 4 Mod. 43; 1 Mod. 261; 1 Roll. Abr. 122. Formerly indeed executory promises were not held a satisfaction, but the contrary has been since adjudged, Raym. 450; Salk. 76. And now it is held that an award before performance is a bar of the former action.†

Et per Pratt, L. C. J. (on consideration.) We are all of opinion that the plea is not good, and therefore the judgment must be affirmed. As the plaintiff had a good cause of *action, it can only be extinguished by a satisfaction he agrees to accept; and it is not his agreement alone [*147] that is sufficient, but it must appear to the court to be a reasonable satisfaction; or at least the contrary must not appear, as it does in this case.(a) If 5*l.* be (as is admitted) no satisfaction for 15*l.*, why is a simple contract to pay 5*l.* a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment. Nay, in all instances the bettering his case is not sufficient, for a bond with sureties is better than a single bond, and yet that will not be a satisfaction. 1 Brownl. 47. 71; 2 Roll. Abr. 470. The judgment therefore must be affirmed.(b)

Then it was alleged, that, since the time when the court took to advise, the defendant in error was dead; and therefore they prayed, that they might enter the judgment *nunc pro tunc*, as was done in the case of Baller v. Delander, Trin. 1 Geo. in B. R., which was ordered accordingly.(c)

THE main point in this case, viz. that a security of equal degree for a smaller sum, if it presented no easier or better remedy, cannot be pleaded in an action for the larger one, has frequently been affirmed since the decision of *Cumber v. Wane*; [although the doctrine laid down by Pratt, C. J., in delivering the judgment of the court, has not been to its full extent sustained, *Sibree v. Tripp*, 15 M. & W. 23.] In *Fitch v. Sutton*, 5 East, 230, the action was *indebitatus assumpsit* for goods sold and delivered. *Plea, non assumpsit*. At the trial it appeared that the defendant, who owed the plaintiff 50*l.* had compounded with his creditors,

and paid them seven shillings in the pound, and, at the time of such payment to the plaintiff, promised to pay him the residue of his debt, when he should be of ability so to do, which he was proved to have been before this action brought. On the other hand, the defendant produced a receipt signed by the plaintiff, for the composition, and which purported to be in full of all demands. And it was urged that the receipt was either a discharge of the promise, or that the promise itself was void, as being a fraud upon his creditors, or that, at all events, the plaintiff ought not to have declared upon the original cause of action, but specially upon the new promise to pay

† See *Crofts v. Harris*, Carth. 187; *Parslow v. Baily*, Salk. 76; *Freeman v. Bernard*, Salk. 69; *Allen v. Milner*, 2 Tyrwh. 113.

(a) [See *Pritchard v. Hitchcock*, 6 Sc., N. R., 851, where an issue joined upon the fact of payment in satisfaction was sustained by evidence that the payment relied upon was void, as being a fraudulent preference, and that the assignees had recovered the amount.]

(b) *Taylor v. Baker*, 5 Mod. 136. But the present case was denied to be law in *Hardcastle v. Howard*, II. 26 Geo. 3. Vide 2 Term Rep. 28. See also *Kearslake v. Morgan*, 5 Term Rep. 513.

(c) *Craven v. Henley*, Barnes, 255; *Astley v. Reynolds*, Str. 917; *Tooker v. Duke of Beaufort*, 1 Burr. 147. Sir John Trelawney v. Bishop of Winchester, Ib. 226, S. P. Vide also 1 Leon. 287; 1 Sid. 462; 1 Vent. 58. 90. But *Blackhall v. Heal*, Comp. Rep. 13, contra.

when of ability. But the court *in banc* after a verdict for the defendant, made a rule for a new trial absolute on the express grounds that the acceptance of 17l. 10s. could not be a satisfaction for a debt of 50l. "There must be some consideration," said Lord Ellenborough, "for the relinquishment of the residue, something collateral, to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is nudum pactum. But the mere promise to pay the rest, when of ability, puts the plaintiff in no better condition than he was before. It was expressly determined in *Cumber v. Wane*, that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a greater. And though that case was said by me, in argument in *Heathcote v. Crookshanks*, to have been denied to be law, and in confirmation of that Mr. J. Buller afterwards referred to a case, stated to be that of *Hardcastle v. Howard*, H. 26 G. 3, yet I cannot find any case of that sort, and none has been now referred to: on the contrary, the authority of [*148] *Cumber* v. Wane* is directly supported by Pinnell's case, which never appears to have been questioned." The other judges concurred, and Lawrence, J., referred to Co. Litt. 212. b., and to *Adams v. Tapling*, 4 Mod. 88, as confirmatory of the same doctrine, in the former of which it was laid down that "where the condition is for payment of 20l. the obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater. But if the obligee or feoffee do at the day receive part, and thereof make an acquittance, *under his seal*, in full satisfaction of the whole, it is sufficient by reason the deed amounteth to an acquittance of the whole. If the obligor or lessor pay a lesser sum, either *before the day*, or at *another place*, than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." (See the cases on this point collected S. N. P. Debt on Bond; and see *Worthington v. Wigley*, 3 Bingh. N. C. 451).

Fitch v. Sutton is stated thus at length, because it is perhaps more frequently referred to than any other case upon this subject; the doctrine there laid down, viz. that a similar security for a

smaller debt cannot be pleaded in satisfaction of a larger one, has been frequently affirmed, both before and since. See *Heathcote v. Crookshanks*, 2 T. R. 24; Pinnell's case, 5 Rep. 117; *Lynn v. Bruce*, 2 H. Bl. 317; *Thomas v. Heathcote*, 2 B. & C. 477; 3 D. & R. 647, S. C. [*Mitchell v. Cragg*, 10 M. & W. 367, where to a demand for 16l. a plea stating an agreement to set off 4l. and the price of a horse in satisfaction was considered bad because the price of the horse might have been less than the difference]. And though it was once ruled at Nisi Prius, that a creditor who had given a receipt in full of all demands, would be thereby precluded from insisting afterwards upon any demand prior to such receipt; *Alner v. George*, 1 Camp. 392: yet it is clear, both upon general principle, and from the decisions in *Fitch v. Sutton*, and other cases, that such an instrument, not being an estoppel, cannot prevent the plaintiff from insisting that part of his demand remains unsatisfied. See *Graves v. Key*, 3 B. & Ad. 313; *Skaife v. Jackson*, 3 B. & C. 421; *Stratton v. Rastall*, 2 T. R. 366.

It must be observed, that later cases seem to have engrafted on the doctrine, that a smaller sum can be no satisfaction for a larger one payable in the same manner, this distinction, that, although, where there is a liquidated debt, the rule laid down in *Cumber v. Wane* prevails, yet, if there be not a liquidated debt, but an unliquidated demand of pecuniary damages, in that case the acceptance of a smaller sum than the plaintiff may have originally claimed will be a satisfaction of his whole demand, and a good answer to an action in respect of it. This distinction seems to have originated in the case of *Longridge v. Dorville*, 5 B. & A. 117; it was discussed in *Waters v. Smith* 2 B. & Adol. 889, [and *Haigh v. Brookes*, 10 A. & E. 309,] and approved in *Wilkinson v. Byers*, 1 Adol. & Ell. 106. That was an action of *assumpsit*; the declaration stated that T. R., as the defendant's attorney, had sued the plaintiff in the Palace Court for 13l. 10s., which action was depending; and thereupon, in consideration that the plaintiff would pay the defendant the 13l. 10s., the defendant promised the plaintiff to settle with the said attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly paid the 13l. 10s.; but that defendant neglected to settle with

the attorney, who proceeded with the action and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavouring to set aside the judgment. At the trial, it appeared that Byers, the present defendant, was a wood-turner, who had done work for Wilkinson, the present plaintiff, to recover a compensation for which the action had been brought. A verdict was found for the plaintiff, subject to the opinion of the court, upon the question, whether, as the payment of the 13*l.* 10*s.* was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The court held that the verdict was right. "The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a quantum meruit, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand has been held to be no satisfaction in the case of a liquidated debt; but where the debt is unliquidated, it is sufficient. Now, here [*149] we cannot say that *there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labour, and goods sold, it is not a specific sum that forms the subject matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise." Vide tamen per Littledale, J., in *Wright v. Acres*, 6 A. & E. 729. The principle laid down in *Longridge v. Dorville* was approved of in *Atlee v. Backhouse*, 3 M. Welsb. 651, per Parke B. [And in *Sibree v. Tripp*, 15 M. & W. 23.] In *Down v. Hatcher*, 10 A. & E. 121, a plea of payment of 6*l.* 10*s.* in satisfaction of 200*l.* was held bad after verdict. No reason is assigned for the decision, but probably it may have proceeded on the ground that the plaintiff's demand (which was for use and occupation agistment and on an account stated) was, *prima facie*, to be considered liquidated, and that, if the amount was in dispute at the time of the accord, that ought to have been pleaded specially; in *Wilkinson v. Byers*, it will be remembered that the special matter appeared on the declaration.

[In *Edwards v. Baugh*, 11 M. & W. 641, the declaration stated that disputes were pending between plaintiff and defendant as to whether defendant was indebted to plaintiff in 173*l.* 2*s.* 3*d.* for money lent, &c., and that, in consideration that the plaintiff would promise the defendant not to sue him for it, and would accept 100*l.* in satisfaction, the defendant promised to pay him 100*l.* This was held bad on general demurrer, Lord Abinger saying that it might have been sufficient had the declaration shown some debt due and a dispute as to the amount. See per Parke, B., *Sibree v. Tripp*, 15 M. & W. 36. Accordingly, where the *declaration stated [*149a] unsettled accounts and disputes concerning them, and mutual claims to the balance, and that in consideration that the plaintiff would relinquish all claims against the defendant, he promised, &c., it was held sufficient. *Llewellyn v. Llewellyn*, 3 Dowl. & L. 318, *Patteson, J.* And the suspension or abandonment of an *action* or *suit* is presumed to be a good consideration, unless the contrary distinctly appear, *Smith v. Monteith*, 13 M. & W. 427.

In *Sibree v. Tripp*, 15 M. & W. 23, the case of *Cumber v. Wane* was much observed upon, and the decision qualified to this extent, that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount, the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt, which was not negotiable. And Parke, B., observed upon *Cumber v. Wane*, and *Thomas v. Heathorn*, "The reasoning of Pratt, C. J., in the former case is certainly not correct, for we cannot inquire into the *reasonableness* of the satisfaction. But there it did not appear that the note was a negotiable one; and the point now before the court was not made. * In *Thomas v. Heathorn* it does not appear to have been a case of accord and satisfaction; although the bill accepted by the defendant was a negotiable security it does not appear that it was given by way of accord and satisfaction."]

It was once thought, that when, upon the dissolution of a firm, the partner who remained in trade agreed, as generally happens, to take upon himself the debts of the late firm, a creditor of the whole body would not, by assenting to this arrangement, dis-

charge the retiring partner from liability: a notion principally founded on the decisions in *Davie v. Elliee*, 5 B. & C. 196; *Lodge v. Dicae*, 3 B. & A. 611; by which, however, it was not perhaps warranted to its full extent. This doctrine, which was based on a ground similar to that on which *Cumber v. Wane* was decided, viz. that there would be no consideration to the creditor for such an arrangement, had been much complained of, and at last came to be canvassed solemnly in *Thompson v. Percival*, 5 B. & Adol. 925; 3 Nev. & Mann. 167. That was an action against James and Charles Percival, for goods sold and delivered. James pleaded bankruptcy, on which the plaintiff as to him entered a *nolle prosequi*. Charles pleaded the general issue, and at the trial it appeared that James and Charles had been in partnership, which was dissolved in the usual way, James to continue in the business, and to receive and pay all debts. At the time when notice of the dissolution was first given to the plaintiff, he had a demand on the firm, for which James told him he must look to [149b] *him alone. He afterwards drew a bill on James for its amount, which was dishonoured. Upon these facts, a verdict being found for the plaintiff, the court granted a new trial, in order that the jury might be asked whether the plaintiff had not agreed to accept the individual liability of *James*, instead of the joint liability of *James and Charles*; and it was held, that, if that question should be answered in the affirmative, the defendant would be entitled to a verdict. "Many cases," said the Lord Chief Justice, delivering the judgment of the court, "may be conceived, in which the sole liability of one of two debtors may be more beneficial than the joint liability of two, either in respect of the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy, survivorship, or in various other ways; and whether it was actually more beneficial in each particular case cannot be made the subject of inquiry." Acc. *Winter v. Innes*, 4 M. & Cr. 109. In *Kirwan v. Kirwan*, 4 Tyrwh. 491, a similar point occurred. That case was decided upon special circumstances; but from it, as well as from *Thompson v. Percival*, the following rule may be collected: viz. that mere knowledge of such an arrangement amongst members of a partnership about to be dissolved

will not bind the creditor of the firm, but that his own agreement to accept the transfer of liability will; and that the question, whether he have, or have not, entered into such an agreement, is a question proper to be decided upon by a jury. [See *Hart v. Alexander*, 2 M. & W. 484; *Powles v. Page*, 3 C. B. 16.]

There is another class of cases also of frequent occurrence, and of great practical importance, which are exempted from the general doctrine laid down in *Cumber v. Wane*, though once supposed to fall within it; those, *videlicet*, in which a debtor has induced a number of his creditors to accept a composition amounting to less than their entire demand. Such an agreement, if entered into by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for each, in that case, has the undertakings of the rest as a consideration for his own undertaking. *Reay v. White*, 3 Tyrwh. 596; 1 C. & M. 713, S. C. {Acc. *Daniels v. Hatch et al.*, 1 Zabris-
kie, 391, 394, and *Aiken v. Price*, 1
Dudley, 50: and it is not necessary that all the creditors should enter in the agreement; *Norman v. Thompson*, 4 Exchequer, 755.} And so of an agreement to give time. *Goode v. Cheeseman*, 2 B. & Ad. 323. But if one of the creditors be afterwards refused the benefit held out to him by the arrangement, it will cease to be binding on him. *Garrard v. Woolner*, 8 Bing. 253. So, if the consideration in any manner fails, the agreement is at an end. Thus, if some creditors sign on the faith that others will do so, if the others hold out, those who have subscribed already are not bound. *Reay v. Richardson*, 2 C. M. & R. 422. So if it purport to pass an *interest in lands, but want the formalities required by the [150] Statute of Frauds, it will not bind the creditors. *Alchin v. Hopkins*, 1 Bing. N. S. 99. Nor will the debtor be entitled to the benefit of it if he neglect to perform accurately what is to be done on his part. Thus he must tender the composition money on the appointed day; for as Lord Ellenborough said, in *Cranley v. Hillary*, 2 M. & S. 120, the party to be discharged is bound to do the act which is to discharge him; accord. *Shipton v. Casson*, 5 B. & C. 373; *Wenham v. Fowle*, 3 Dowl. 43; [*Rosling v. Mugeridge*, 16 M. & W. 151; *Evans*

v. Powis, 1 Exch. 601; unless, indeed, the creditor have positively refused to accept less than his original demand, in which case he is taken to have waived a tender. Reay v. Whyte, 3 Tyrwh. 596; 1 C. & M. 748, S. C. See Cooper v. Phillips, 5 Tyrwh. 170.

{It is settled, that where one creditor, by undertaking to discharge his debtor, induces other creditors to accept a composition, and discharge the debtor from further liability, he cannot afterwards enforce his claim, since it would be a fraud upon other creditors. But to make a valid *composition*, the debtor must be insolvent or in embarrassed circumstances, the other creditors must have released or agreed to release; they, or third persons, must be exposed to prejudice or injury from the creditors' refusal to release, and the debtor must have duly performed or tendered the terms of the composition. Cutter & Co. v. Reynolds, 8 B. Monroe, 596.}

The general doctrine in *Cumber v. Wane*, and the reason of all the exceptions and distinctions which have been engrafted on it, may perhaps be summed up as follows: viz. that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained debt of larger amount, such an agreement being *nudum pactum*. But if there be any benefit, or even any legal possibility of benefit, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. See *Steinman v. Magnus*, 2 Camp. 124; 11 East, 390; *Bradley v. Gregory*, 2 Camp. 383; *Wood v. Roberts*, 2 Stark. 417; *Boothby v. Sowden*, 3 Camp. 175; [*Sibree v. Tripp*, 15 M. & W. 23.] It is laid down in most of the earlier authorities, that an accord to avail *must be*

executed; and that doctrine is affirmed by *Bayley v. Homan*, 3 Bingh. N. C. 915. See *Allies v. Probyn*, 5 Tyrwh. 1079; *Edwards v. Chapman*, 1 M. & Welsb. 231; *Reeves v. Hearne*, 1 M. & W. 326; *Collingbourne v. Mantell*, 5 M. & W. 292. On the other hand, it is said in *Com Dig. B. 4*, "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party had a remedy to compel the performance." See *Good v. Cheeseman*, *ubi supra*. The rational distinction seems to be, that if the *promise* be received *in satisfaction*, it is a good satisfaction; but if the *performance* not the *promise* is intended to operate in satisfaction, there shall be no satisfaction without performance. See *Reeves v. Hearne*, 1 M. & W. 326; [*per curiam Evans v. Powis*, *ubi supra*]. The same distinction is made in the cases cited in the notes to *Cutter v. Powell*, vol. ii., where it is held that, where the *promise* on one side is the consideration for that on the other, *performance* is not a condition precedent to the right of action.

*The second point decided in [*150a] this case is an exemplification of that maxim of law—*Actus curiæ nemini facit injuriam*, for the delay is the act of the court, therefore the parties should not suffer by it. Acc. *Toulmin v. Anderson*, 1 Taunt. 385. See *Lanman v. Lord Audley*, 2 M. & W. 535; *Vaughan v. Wilson*, 4 Bing. N. C. 116. [*Evans v. Rees*, 12 A. & E. 167; *Miles v. Bough*, 3 Dowl. & L. 105; *Harrison v. Heathorn*, 6 Scott, N. R. 794. The practice only prevails in cases of delay by the act of the court; *Wilkes v. Parks*, 5 Man. & Gr. 376; 6 Sc. N. R. 42, S. C.; *Fishmongers' Co. v. Robertson*, 3 C. B. 970.]

To constitute a good *accord* and *satisfaction*, the following particulars seems to be necessary.

1. The matter agreed to be received in satisfaction of the debt, must be something of legal value, to which the creditor before was not entitled.

2. Every part of the matter agreed to be received as satisfaction, must be effectual, so that if a part fail, or do not take effect, the whole agreement is bad.

It seems from this, that the legal notion of accord is, a new agreement

on a new consideration, to discharge the debtor; and this agreement comes within the general principles of law as to contracts; the consideration must have legal value, and every part of the alleged consideration must take effect.

3. The accord must be executed; and a mere excentory agreement by the debtor can never be pleaded as an accord and satisfaction.

4. Another rule of no great practical value, is, that the matter received in satisfaction must be given by the debtor, and not by a stranger: *Clow v. Borst and Best*, 6 *Johnson*, 37; *Stark's Adm'r v. Thompson's Ex'rs*, 3 *Monroe*, 296.

These are the technical rules which relate to this plea; and the general principle to be deduced from them, in regard to the present subject, is, that any thing of legal value, whether a chose in possession or in action, *i. e.* any legal interest or right, which the creditor had not before, agreed to be received, and actually received, in full satisfaction of the debt, is a good satisfaction, without regard to the comparative magnitude of the satisfaction with the original debt; and may be pleaded in bar, as accord and satisfaction. The matter given and received must have legal value and be of advantage to the creditor (or a disadvantage to the other); that is, must vest in the creditor an interest or right which he had not before; and hence, giving what was really the creditor's own before, or giving a note of a third person which from the infancy of the person making it, is nought, or assigning accounts or orders on which an action is not maintainable, or where the assignment is not valid, is bad as an accord and satisfaction; because there is no valid consideration for the accord. *Keeler v. Neal*, 2 *Watts*, 424; *Davis v. Noaks*, 3 *J. J. Marshall*, 494; *Commonwealth for the use of Johnston v. Miller*, 5 *Monroe*, 205; *Nave v. Fletcher*, 4 *Littell*, 242; *Buddicum v. Kirk*, 3 *Cranch*, 293; and if *part* of the consideration agreed on be not performed, the whole accord fails; *Nave v. Fletcher*. But, if the consideration of the accord be, some interest or right of action vested in the creditor which he had not before, though it be smaller than the original debt, this is good; and if it be proved that it was *agreed* that this matter should be a satisfaction of the debt; this constitutes a valid accord and satisfaction: it being necessary and sufficient to a plea of accord and satisfaction, that there should be a promise on valid consideration, to treat the debt as satisfied, and that this contract should be executed by the delivery and acceptance of the consideration. Hence, delivery and acceptance in satisfaction, of some collateral thing; as, commodities, though confessedly of less value than the money due; *Jones v. Bullett*, 2 *Littell*, 49; or, the promissory note or endorsement of a third person; *Booth v. Smith*, 3 *Wendell*, 66; *New York State Bank v. Fletcher*, 5 *id.* 85; *Frisbie & McKinley v. Larned and Corning*, 21 *id.* 451; *Bullen et al. v. McGillicuddy*, 2 *Dana*, 90; *Pope v. Tunstall and Waring*, 3 *Pike*, 209; and even though the note of the third person should be for a less sum than the original debt; *Brooks and another v. White*, 2 *Metcalf*, 283; *Boyd and Suydam v. Hitchcock*, 20 *Johnson*, 76; *Le Page v. McCrea*, 1 *Wendell*, 164; *Kellogg and Dumont v. Richards and Sherman*, 14 *id.* 116; *Sanders v. Branch Bank at Decatur*, 13 *Alabama*, 353; or services rendered by the debtor, such as building, &c.; *Blinn v. Chester*, 5 *Day*, 359; or an assignment of all the debtor's stock in trade and outstanding debts; *Watkinson v. Ingleby and Stokes*, 5 *Johnson*,

386; or, of specific real estate; *Eaton v. Lincoln*, 13 Massachusetts, 424; or any chattel; per *McKEAN, C. J.*, in *Musgrove v. Gibbs*, 1 Dallas, 216; or a smaller sum of money before the day on which the original debt was due, or at another place; *Smith v. Brown*, 3 Hawks, 580; *Brooks and another v. White*, 2 Metcalf, 283; *Austin v. Dorwin*, 21 Vermont, 39, 44; *Spann v. Baltzell*, 1 Florida, 302, 316; dictum in *Milliken and another, v. Brown*, 1 Rawle, 391, 400, 403; will all sustain the plea of *accord and satisfaction*. See *Warren v. Skinner*, 20 Connecticut, 559, 561.

And it is not enough that there be a clear agreement or accord, and a sufficient consideration, but the agreement or accord must be executed; *Williams v. Stanton*, 1 Root, 426; *Pope v. Tunstall and Waring*, 3 Pike, 209. The plea must allege that the matter was *accepted* in satisfaction; *Sinard v. Patterson*, 3 Blackford, 354; *Maze v. Miller*, 1 Washington C. C. 328, 329; *Morris Canal v. Van Vorst*, 1 Zabriskie, 101; mere readiness to perform the accord, or a tender of performance, will not do, and a plea of accord and tender is bad upon demurrer; *Russell v. Lytle*, 6 Wendell, 390; *Hawley v. Foote*, 19 id. 516; *The Brooklyn Bank v. De Grauw and others*, 23 id. 342; see *Spruneberger v. Dentlee*, 4 Watts, 126, and *Rising v. Patterson*, 5 Wharton, 316. *Coit v. Houston*, 3 Johnson's Cases, 243, and *Latapee v. Pecholier*, 2 Washington C. C. 180, 184, contain dicta a little contra. In *Fellows and others v. Stevens*, 24 Wendell, 294, it was held, that tender of satisfaction on an accord is not sufficient as between debtor and creditor; but if other creditors are parties to the arrangement, a tender is sufficient; but even then it would seem that it cannot be pleaded as accord and satisfaction. Proof of delivery to, and acceptance by, an agent of the creditor, or one whose act is afterwards ratified, will sustain the plea of accord and satisfaction; *Anderson v. Highland Turnpike Co.*, 16 Johnson, 86; *Evans v. Wells*, 22 Wendell, 325; *Eaton v. Lincoln*, 13 Massachusetts, 424; and if a judgment be given to a trustee for satisfaction of a creditor, and the creditor affirm the arrangement by proceeding on the judgment, this is an acceptance; and the plea of accord and satisfaction will be good. *Seaman v. Haskins*, 2 Johnson's Cases, 195. See *Phillips v. Berger*, 2 Barbour's S. Ct. 609, 612. Though the accord must be executed, yet if the accord were to accept in satisfaction an executory obligation, and the accord be executed by giving such obligation, there seems no reason why it should not be good. See *Kinsler et al. v. Pope*, 5 Strobhart, 126. See, also, *Spann v. Baltzell*, 1 Florida, 302, 313; *Morris Canal v. Van Vorst*, 1 Zabriskie, 101; *Evans v. Powis*, 1 Exchequer, 601, 607.

These principles apply to debts due by instruments under seal, as well as those due upon simple contract: but this distinction is taken; that a parol accord and satisfaction cannot discharge the instrument or obligation, but may discharge the money due upon it. In *Strang v. A. and J. Holmes*, 7 Cowen, 225, it is decided, that giving and accepting some third thing, as, a conveyance of land, in satisfaction of a debt due by bond, is a good satisfaction: and this, if done after forfeiture as well as before, because, since the statute 4 Ann. ch. 16, s. 13, the amount due upon the bond after forfeiture as well as before, the is sum expressed in the condition: and the cases there reviewed, show that if such satisfaction be specially pleaded, the plea must allege that the matter was given and accepted in full satisfaction of the amount due on the bond, or the sum mentioned in the condi-

tion, and not, in satisfaction of the bond or obligation, for that can only be discharged by instrument under seal; but if the satisfaction be shown by notice under the general issue, this technicality may be avoided. See, also, *Morris Canal v. Van Vorst*, 1 *Zabriskie*, 101, 119. Upon the same distinction it is, that accord and satisfaction before breach, without release by deed, is no bar to an action of covenant: but after breach, it is of the damages; *Harper v. Hampton*, 1 *Harris & Johnson*, 622, 675; *Smith v. Brown*, 3 *Hawks*, 580; *Cabe v. Jamesson*, 10 *Iredell*, 193; *Payne v. Barnett*, 2 *Marshall's Kentucky*, 312: and to the same effect is the note of *Serjt. Manning*, in 6 *M. & Gr.* 262, note (a).

It appears from the foregoing remarks, that to make a good accord and satisfaction, the matter given and received must be some new thing, to which the creditor before had no right. It seems to be reasonably well settled by the American cases, that the giving and accepting of a smaller sum of money in payment or satisfaction of a larger one due, is not a valid discharge, and cannot be pleaded, either as payment, or as accord and satisfaction. *Dedrick v. Leman and others*, 9 *Johnson*, 333; *Harrison v. Wilcox and Close*, 2 *id.* 448; dictum in *Johnson v. Brannan*, 5 *id.* 268, 271; *Seymour v. Minturn*, 17 *id.* 169; *Latapee v. Pecholier*, 2 *Wash. C. C.* 180, 184; *White v. Jordan*, 27 *Maine*, 370, 378; *Warren v. Skinner*, 20 *Connecticut*, 559; *Eve v. Mosely*, 2 *Strobhart*, 203; *Gurley v. Hiteshue*, 5 *Gill*, 218, 222. In *Johnson v. Brannan*, this is spoken of, as the "rigid and rather unreasonable rule of the old law:" and in *Kellogg & Dumont v. Richards & Sherman*, 14 *Wendell*, 116, where the acceptance of the promissory note of a third party, for a less sum, was held to be a good accord and satisfaction, the court, per *NELSON, J.*, said, "It is true, there does not seem to be much, if any, ground for distinction, between such a case, and one where a less sum of money is paid, and agreed to be accepted in full, which would not be a good plea. * * The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts, therefore, have departed from it upon slight distinctions." In *Brooks and another v. White*, 2 *Metcalf*, 283, where the same point is decided, the court, per *DEWEY, J.*, says, "The foundation of the rule seems to be, that, in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate with legal impunity his promise to his debtor, however freely and understandingly made. This rule, which obviously may be urged in violation of good faith, is not to be extended beyond its precise import, and whenever the technical reason does not exist, the rule itself is not to be applied. Hence the judges have been disposed to take out of its application, all those cases where there was any new consideration, or any collateral benefit received by the payee, which might raise a technical legal consideration, although it was quite apparent that such consideration was for less than the amount of the sum due." However, the case of *Smith v. Bartholomew and another*, 1 *Metcalf*, 276, affirms the old principle, and comes fairly up to the mark of *Fitch v. Sutton*. It was a suit against G. & H. on a joint and several note by them to W., or bearer; G. was defaulted, and the suit defended by H., who produced a

paper signed by W. acknowledging the receipt of part of the money from H., and agreeing to look to G. for the rest. It will be observed, that the note had passed into other hands, and that might have afforded sufficient ground for taking all effect from the agreement; but the court did not go on that ground: they decided, that the agreement was "not valid and obligatory, not being sustained by a sufficient consideration," and said; "The payment of a debt by a debtor, the same being due and payable, is not a sufficient consideration to support a promise. It is not considered as any detriment to the debtor, or benefit to the creditor. The one pays only what he was bound to pay, and the other receives no more than his just debt. Such a consideration is merely nominal and insignificant, and no consideration at all." And in the late case of *Pearson and Fant v. Thomason*, 15 Alabama, 700, it is decided, that if a creditor say to his debtor, who is in insolvent circumstances, that if he will pay a designated sum, constituting but a part of the debt, he would accept it in full satisfaction, and the debtor thereupon pay the sum named, the liability is not discharged, and the creditor can maintain an action for the recovery of the residue: but the court added, that, "if, instead of paying the money, the defendant had paid in property, or in a note or other security on a third person, or had delivered up to the plaintiff a note which he held on him for a smaller sum than the debt sought to be recovered, in either of these cases, we should be inclined to think the satisfaction complete." *Barron, ad'm v. Vandvert, ad'mr*, 13 id: 232, 238, is to the same effect. But the case of *Milliken and another v. Brown*, 1 Rawle, 391, of which the circumstances are very similar to *Smith v. Bartholomew*, is directly opposed to it. It is there decided, that accepting from one of three joint debtors, one-third of the debt, with intent to exonerate him, is a valid release of him, and, therefore, a release of all. The reason upon which this was regarded as a release, and not merely as an agreement not to sue, may be peculiar to that case; but that the transaction constituted a valid discharge of the one who paid,—in other words, that the acceptance of one-third of a debt from one bound to pay the whole, with intent to discharge him, is a valid discharge,—is decided upon reasons which appear to be of general application. The case, according to the explanation given by the chief justice, was decided on the ground that "the creditor had agreed *on sufficient consideration*, to exonerate one of the three debtors entirely from liability, and the most sacred principles of justice required, that this agreement should be performed:" and it therefore settles, that actual payment of a smaller sum, by one bound to pay a larger sum, for the purpose of being discharged, is a good consideration to support an agreement to discharge or release; and may be considered, so far as Pennsylvania is concerned, as overthrowing the old common law rule above mentioned. If the decision of this case was at all grounded on the fact, that the payment was made during a stay of execution, and, therefore, before the money was attainable by process of law, though it was fully due and bearing interest, that reason will apply to every case: for, whenever a debtor pays before the money is actually made by the sheriff, he pays voluntarily, and before the time when the law would give it to the creditor: the stay of execution given by the act of assembly, being merely a provision regulating the practice and process of courts of law, akin precisely to those which require a delay of a certain number of days, before judgment by default can be had, before a judgment can be entered on a

verdict, before execution can, in any case, issue on a judgment, or the goods be sold on execution. This reason, which appears to be hinted at by the chief justice in *Millikin another v. Brown*, though it be a meagre technicality, seems sufficient, when it is backed by the good sense and justice of the case, to bring all the cases within the distinction of *Pinnell's case*. When such arrangements are bona fide, and are clearly proved, there is doubtless much equity in protecting them: they amount to this; the creditor has a claim upon the debtor,—this claim the debtor might perhaps defeat in an action,—certainly could delay,—may postpone to the payment of other creditors,—may discharge more advantageously to himself by purchasing claims of others upon his creditor,—all which he has a perfect right to do: if, then, the creditor induce him to give him priority over his other creditors, and to pay him some part of the debt sooner than the law would let him have any payment, by a promise that it shall be a discharge of the debt, which sum the debtor otherwise would not pay, and the creditor could not compel him to pay; in such a case, it would be a fraud upon the debtor if this were not a discharge. But all this takes for granted, that clear, deliberate, bona fide character of the agreement to discharge, which the rule of the common law is chiefly designed to secure. A principle so deeply established in the very forms and elements of the law, and which has so long sustained itself in the courts, has something better than a mere barren technicality to rest upon. In fact, as a technical rule, it may be doubted whether the maxim that a smaller sum cannot be a satisfaction of a larger debt, could apply to any thing but a bond, which the old law regarded as an actual gift or transfer of the money, and gave the action of debt for the detainer of what was in law the very property of the obligee; technically, it would be difficult to make it apply to simple contracts. But as a principle of evidence, this rule, which requires for the substantiation of such agreements, either a surrender of the instrument, or a legal release, is a just, wise, and convenient rule; so great is the danger of fraud and mistake. The rule which requires a deed to be solemnly sealed and delivered,—the rule which requires the word *heirs* in a deed to create a fee,—these are now commonly regarded as mere technicalities: but, in their spring and essence, what are they but great and comprehensive principles of evidence and policy? designed to promote fairness, and to ensure certainty and repose in the transactions of men, by affording a sure, simple, obvious test of the validity and effect of contracts? The whole of this law in relation to accord and satisfaction, furnishes one of the many instances in which we can see that the “old narrow ordinances” of law, are designed and adapted to fix and guard some vital principle of equity and reason. If a debt has been paid, there is the plea of payment: if satisfied by some collateral thing, it is accord and satisfaction: but if you claim to have been released from the whole bond or debt, by having paid a part of it, you are relying upon a release; and to know what constitutes a valid release, you are referred to other departments of the law, and to general and established rules of pleading, which cannot be disturbed without shaking the most inveterate foundations of the law.

The preceding remarks refer to the question of the legal effect of a partial payment, alleged to have been received in full, when the fact of the payment being but partial, stands admitted before the court. But, upon the question whether, in point of fact, the whole debt is or is not paid, it appears

that the acknowledgment of the creditor that the payment is in full, is not only competent evidence, but is *prima facie* evidence, that the whole is paid. The case of *Henderson v. Moore*, 5 Cranch, 11, is a strong case to this effect. Upon the plea of payment, to debt on bond, it appeared that, the defendant owing the plaintiff on other accounts, the plaintiff, many years after the date of the bond, had orally acknowledged, or declared, that he had received a certain sum from a debtor of the defendant, and that what he so received, was in full of all his claims against the defendant. The court below declined instructing the jury, as prayed by the plaintiff, that if they were satisfied that the bond had not been fully paid off, no declaration of the plaintiff's 'that his claims against the defendant were all satisfied,' would be a bar to this recovery; and instructed the jury, that if they found, that the defendant paid the plaintiff a sum of money less than the amount mentioned in the condition of the bond, which the plaintiff then acknowledged to be in full satisfaction of his claims against the defendant, such payment and acknowledgment, are competent evidence upon the plea of payment, and that the jury may and ought to presume, therefrom, that the whole sum in the condition of the bond has been paid to the plaintiff, unless such presumption be repelled by other evidence in the cause. The jury found for the defendant; and the Supreme Court, on error, said, per MARSHALL, C. J., "That there was no error in the opinion of the court below. *A part of the money due on the bond might have been paid before*; and such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence upon the plea of payment."

The rule that payment of a smaller sum cannot be a satisfaction of a larger debt, is applicable only to cases where the larger debt is fixed and liquidated, or is ascertainable by merely an arithmetical calculation; it does not apply where the previous claim is unliquidated and uncertain; *McDaniels v. Lapham et al.*, 21 Vermont, 223, 234; *Lamb v. Goodwin*, 10 Iredell, 320, 323.

That a mere *agreement*, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, seems to be settled; and apparently is not contradicted by any American cases. See *Spruneberger v. Dentler*, 4 Watts, 126; *Rising v. Patterson*, 5 Wharton, 316; *Daniels v. Hatch, et al.*, 1 Zabriskie, 391, 393.

These appear to be the general principles applicable to the plea of accord and satisfaction; it may be proper to take a more particular notice of three cases falling within them, which are of very frequent occurrence; one, where the note of a third person is given by the debtor; another, where the note of one joint debtor or partner is given for the joint or partnership debt; the third, where the debtor's own negotiable note is given.

1. The note or bill of a third person may be given by a debtor and received by the creditor, as *collateral security*, as *conditional payment*, that is, to be a satisfaction if and when paid, or, as an absolute and immediate *satisfaction and discharge*, and to be wholly at the risk of the creditor; and which of these three it will be, depends entirely upon the intention of the parties, to be derived from all the circumstances of the case,—the mere acceptance by the creditor, of the negotiable note of a third person, makes it but *collateral security*; and the general settled principle that the acceptance of collateral security has no effect whatever on the legal rights and liabilities of

the parties on the original debt, either to impair or suspend the right of action, *Kemmil v. Wilson*, 4 Washington C. C. 308; *Ripley v. Greenleaf*, 2 Vermont, 129; *Bank of Pennsylvania v. Potius*, 10 Watts, 148, applies equally where the collateral security is a negotiable note; *Weakly v. Bell and Sterling*, 9 Watts, 273, and see *Berghaus v. Alter*, id. 386; the creditor, however, may sue upon the collateral security whenever the debt becomes due, for a creditor may press all his securities at once. *Lishy v. O'Brien*, 4 Watts, 141.—If the negotiable note be taken as payment, this is, ordinarily and *prima facie*, but *conditional payment*; still more clearly is it conditional payment where it is expressed that it is to be in full if or when paid, as in *Herring v. Sanger*, 3 Johnson's Cases, 71, *Tyson and others v. Pollock*, 1 Penrose & Watts, 375, and *Chapman v. Steinmitz*, 1 Dallas, 261. See *Jamee v. Williams*, 13 M. & W. 828; *Griffiths v. Owen*, id. 58; *Mailard v. The Duke of Argyle*, 6 M. & Gr. 40. By this arrangement of conditional payment, the creditor agrees to look to the new instrument, primarily, as the fund from which satisfaction is to come, and to postpone the debtor's personal liability till then; and therefore the legal effect on the original debt is, an extension or suspension of the debtor's liability till the collateral note falls due; *Okie v. Spenser*, 2 Wharton, 253; *Proctor v. Mather, &c.* 3 B. Monroe, 353, 354; and there is no other effect on it. A creditor accepting a negotiable note, either as collateral security or as a conditional payment, is bound to use due diligence in demanding payment and giving notice of non-payment, under penalty of being answerable for any loss incurred by his neglect; but he is not bound to sue upon it. *Gallagher's Executors v. Roberts et al.*, 2 Washington C. C. 191; *Clark v. Young & Co.*, 1 Cranch, 181; *Snyder v. Findley*, 1 Coxe, 48; *Ormsby and another v. Fortune*, 16 Sergeant & Rawle, 302; *McLeighlan v. Boyard*, 4 Watts, 308; *Herring v. Sanger*; *Brower v. Johnes*, 3 Johnson, 230; *Woodecock v. Bennet*, 1 Cowen, 713: as to the diligence demanded in such cases, see *Taylor & Byers v. Daniel*, 9 B. Monroe, 53, 55: in *Dayton v. Trull*, 23 Wend. 345, it was held, that if a bill be received, to be in satisfaction when paid, it will be presumed that the bill was paid, and the onus is on the plaintiff of proving due diligence, or such facts as will excuse demand and notice.—The note of a third person will operate as an absolute and immediate *satisfaction* and *discharge* of the debt, if such be the intention and understanding of the parties; and the distinction on this point, as to the first presumption of intention, is, that where the notes of a third person are accepted in payment at the time the purchase is made, this is to be understood as an exchange or barter of the thing purchased, for the notes, and the notes are at the risk of the purchaser; *Whitbeck v. Van Ness*, 11 Johnson, 409; unless the note were forged, *Markle v. Hatfield*, 2 id. 455, and be returned within a reasonable time; *Raymond v. Baar*, 13 id. 318; or unless there were a fraudulent concealment of the fact of the maker's insolvency, *Willson v. Force*, 6 id. 110; or a false assertion of the note-maker's solvency, which probably was considered a guaranty, *Snyder v. Findley*, 1 Coxe, 48: yet if the fact of such understanding or intention be negatived by the finding of the jury, it is no discharge; see *Porters v. Falcott & Bowers*, 1 Cowen, 359: but where the notes or bills of a third person are given for a pre-existing debt, there the presumption is the other way, and although it will still be an absolute discharge where such an intention and agreement

can clearly be inferred from the evidence, or is necessary to the fairness of the case; *James and Flack v. Hackley and others*, 16 Johnson, 273; *Brown v. Jackson*, 2 Washington C. C. 24; yet nothing short of an actual agreement, or some evidence from which a positive inference is to be made of an intention entirely to discharge the debtor and to take the security of the third person in lieu and substitution of the debtor's, or fraud, will suffice; merely receipting the notes as cash, or giving a receipt in full, or receipting the notes as being in payment of the debt, will not, alone, be sufficient to prove that the notes were taken, not as conditional payment, but as an immediate and absolute discharge; *Tobey v. Barker*, 5 Johnson, 68; *Johnson v. Weed and another*, 9 id. 310; *Isaac Roget v. Merritt and Clapp*, 2 Caines, 117; *Van Epps v. Dilleye*, 6 Barbour's S. Ct. 245, 252; *Hays v. Stone*, 7 Hill, 128, 130; *Maze v. Miller*, 1 Washington C. C. 328; *Harris and Donaldson v. Lindsay*, 4 id. 271; *Peter v. Beverly*, 10 Peters, 534, 567; *Glenn v. Smith*, 2 Gill & Johnson, 494; *Gordon v. Price*, 10 Iredell, 385, 388; *Perit and another v. Pitfield and others*, 5 Rawle, 166; *McGinn v. Holmes*, 2 Watts, 121; *McLughlin v. Bovard*, 4 id. 308, 312; *Moore v. Briggs*, 15 Alabama, 24, 27; *Fulford v. Johnson, Hendon & Co.*, Id. 386, 393. But the later New York cases are less strict in requiring positive evidence of an intention that the note shall be at the risk of the creditor: in *The New York State Bank v. Fletcher*, 5 Wendell, 85, it was held that the promissory note of a third person taken by express agreement in payment of a judgment is an extinguishment of a preceding debt; and in *Frisbie and McKinley v. Larned and Corning*, 21 Wendell, 451, it was held that the note of a third person, received as payment and credited on the creditor's books, is *prima facie* an accord and satisfaction, and discharges the debt, unless an intention to receive it only as collateral be shown, at all events is competent evidence for the jury; and COWEN, J., was inclined to think that generally, in the absence of proof that it was collateral, it would be a satisfaction.

2. The case of the acceptance of a note of one partner for a liability of the firm, appears to be considered the same as the acceptance of the note of a third person. A distinct agreement, by a creditor, upon a dissolution of a partnership, to accept the notes of the member or members continuing in business, in discharge of the retiring members, is a valid discharge of them; and may be pleaded in bar of an action brought against them. *Sheehy v. Mandeville & Jamesson*, 6 Cranch, 253, establishes the validity of such an arrangement, when set forth by special plea. In that case the plaintiff had sold goods to Jamesson, and taken his negotiable promissory note for the amount; afterwards supposing Mandeville to be a secret partner, he instituted this suit against both: Mandeville appeared, and pleaded that the note which Jamesson had given for the same goods, was *given and received* for and in *discharge* of the account or bill for goods; and upon demurrer, the plea was adjudged to be a good bar. "That a note," said Chief Justice MARSHALL, delivering the opinion of the court, "without a special contract, would not of itself discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received

in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm, which might be a sufficient consideration for discharging the firm :” and the correctness of this mode of pleading cannot be questioned since *Sard v. Rhodes*, 1 M. & W. 153, and *Sibree v. Trip*, 15 Id. 23. The intention to substitute the individual for the firm must be proved, and some of the cases are pretty strong in calling for an express agreement; *Estate of Davis v. Desauque*, 5 Wharton, 531; *Muldon v. Whitlock*, 1 Cowen, 290: see *Parker v. Cousins*, 2 Grattan, 373, 388; but, upon sufficient evidence, the fact of the intention is for the jury. *Mason v. Wickersham*, 4 Watts & Sergeant, 100. The cases most usually occurring, where the acceptance of the note of one partner has been held a discharge of the others, are, where the creditor’s entering into the arrangement, has caused the funds of the partnership to be entrusted to the one giving the separate note, and the business to take such a course, that the recurring to the other partners would be a fraud upon them: such is the case of *Arnold v. Camp*, 12 Johnson, 409, (and see *James v. Hackley*, 16 Id. 273,) and the case of *Harris & Donaldson v. Lindsay*, 4 Wash. C. C. 271, where the subject of accepting the responsibility of one partner, is discussed very ably by Judge WASHINGTON: The hinge of the decision there was, that the funds of the partnership had been given to one partner, *and* the creditor had entered into such arrangement with that partner, and so amalgamated that debt with others, that the retiring partner “could never plead payment of the balance due by the partnership, even although a larger sum than that due by them should have been paid by the partner whose separate security had been accepted, out of the very funds retained by him for that purpose,” (p. 100.) See *Parker v. Cousins*, 2 Grattan. 373; and see the subject reviewed in *Wildes and others v. Fessenden and others*, 4 Metcalf, 12. So where an agent’s note has been given for several principals, it will require distinct evidence of an intention to discharge the principals, and take the agent’s note in lieu, to have that effect. *Schemerhorn and others v. Loines and others*, 7 Johnson, 311; *Insurance Company of Pennsylvania v. Smith*, 3 Wharton, 521; *Porters v. Talcott & Bowers*, 1 Cowen, 359. And it is reasonable, that when the transaction, as alleged by the debtor implies the creditor’s having given up some right of action, or abandoned a claim on any individual, without any apparent advantage to himself, clear and full proof should be made, or it should appear that his assertion of the previous liability would partake of the character of fraud.

In New York, it was at one time held by the Supreme Court, that the acceptance of the note of one partner, will not and cannot, extinguish the liability of the others, although the creditor expressly accept the note in satisfaction; *Cole v. Sackett*, 1 Hill’s N. Y. 516; *Waydell v. Luer*, 5 Id. 448. In the latter of these cases, a firm composed of Cort, Underhill, and the defendant, borrowed in January, 1837, a sum of money from the plaintiff, Luer; in 1838, the firm was dissolved, and Luer knowing of the dissolution, took the individual notes of Cort, for a part of the amount due; Cort also paying a sum of money and giving, as one witness believed, the note of a third person; the whole amounting to the sum due by the

firm. "The notes and cash," said COWEN, J., who stated the case and delivered the opinion in the Supreme Court, "were given in settlement of the money borrowed; and Luer gave up to Cort the note of the firm, which he held for that sum. Cort's notes were renewed from time to time, for two years. They were credited by Cort's former partners, in his general account, as so much assumed by him." The notes given by Cort remaining unpaid, Luer sued the firm on the original loan; and it was decided by the Supreme Court, that he was entitled to recover! No question was made of the intention to discharge the other partners; and the case was put by COWEN, J., upon what he declared to be a settled principle of law, that a promise cannot, under any circumstances, be a satisfaction of a debt antecedently due by the debtor himself, and *à fortiori* cannot discharge a debt due jointly by himself and others. But surely the retiring partners' giving up to the continuing partner all control of the assets of the firm upon the faith of an agreement by the creditor to accept his sole liability in substitution of theirs, and the partners' being induced by the creditor's agreement, to settle among themselves upon the basis of such a substitution, constitute an abundant consideration for the creditor's agreement. To say that such an arrangement between the creditor and the debtors is void, and that the law will not allow it to be valid, is unreasonable: and after such an arrangement has been made, and a creditor has become a party to such a settlement, has given up the notes of the firm, and, accepting the notes of one of the members, has renewed them from time to time for two years, as in *Waydell v. Luer*, to allow him to pursue the retired partners on the original consideration, is wholly opposed to justice and convenience. The case of *Waydell v. Luer* was afterwards reversed in the Court of Errors, 3 Denio, 410: and the recent cases of *Livingston v. Radcliff*, 6 Barbour's S. Ct. 202, and *Van Eps v. Dillaye*, id. 245, 252, appear to bring the law of New York into accordance with *Harris & Donaldson v. Lindsey*. See, also, *Kinsler et al. v. Pope*, 5 Strobhart, 126.

3. The effect of a debtor's giving his own negotiable promissory note to the creditor for the full amount of the original debt, is perhaps less clearly settled. There are two class of cases, which it is necessary to distinguish: one, where the note is alleged to have been given and accepted in satisfaction and discharge of the original cause of action; the other, where a new note is given in substitution of a former note. The latter arrangement is undoubtedly valid, being a mere exchange of securities, and it depends entirely on the intention of the parties. As to the validity of the former arrangement in England, there can be no doubt; *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 id. 23; but in this country the cases differ.

In NEW YORK, it may be taken as conclusively settled, that a promissory note, or bill, of the debtor, though accepted by the creditor in full satisfaction, is not, and cannot in law be, a discharge of the debt, so as to bar the original cause of action: the acceptance of the note will postpone the right of action till it falls due; *Putnam v. Lewis*, 8 Johnson, 389; *Frisbie v. Larned*, 21 Wendell, 450, 452; *Myers v. Welles*, 5 Hill, 463; (and see *Baker v. Walker*, 14 M. & W. 465; *Maillard v. The Duke of Argyll*, 6 M. & Gr. 40); but, if it be not paid, the creditor may put it aside, and sue on the original cause of action. In *Hawley v. Foote*, 19 Wendell, 516, a plea that an order drawn by defendant on a third person, was, by agree-

ment, given and received by plaintiff in full satisfaction, was, upon demurrer, adjudged, per BRONSON, J., to be bad in substance. In *Frisbie & McKinney v. Larned & Corning*, 21 id. 450, the dicta of COWEN, J., are to the same effect. In *Cole v. C. & E. Sackett*, 1 Hill's N. Y. 517, a plea in assumpsit, that on accounting together, a certain balance was found due, "of which defendants paid a part, and gave their promissory note to the plaintiff for the residue, which the latter accepted in full satisfaction and discharge," on demurrer was adjudged bad, per COWEN, J., and that a promise to receive a promise in satisfaction is nudum pactum. The amount of the New York cases is, that acceptance of a note of the debtor, in payment and satisfaction, is, in law, but conditional payment; and, if not paid, may be thrown out of view. But the case of *Myers v. Welles*, 5 Hill, 463, involves the New York Courts in a manifest contradiction, and exposes the unsoundness of their position, as to the debtor's negotiable note not being a discharge, even by agreement. It was there decided, that accepting a principal debtor's negotiable note, payable at a future time, was such a giving of time upon the demand, as discharged a surety. "Being negotiable," says COWEN, J., "they might be used more beneficially than the account. Besides, they operate to liquidate the plaintiff's claim. These advantages constituted a sufficient consideration for the suspension." This case establishes the point that these advantages are a legal consideration: and if they are sufficient to sustain an agreement to give time; they are certainly sufficient to sustain any other lawful agreement which the parties choose to make upon them.

On the other hand, in the other states of the Union, though the validity of such an arrangement, as would make the note of the debtor a bar to the original cause of action, has perhaps not been directly adjudged, it seems to have been generally taken for granted. No distinction as to the validity of the transaction is recognised between a note of the debtor for a preceding cause of action, and a note in substitution of a former note, or a note of a third person: but in all these cases, everything depends on intention. It is certain that without an express agreement, the receipt of a negotiable note of the debtor, is not a payment of a prior debt; *Jaffrey v. Cornish*, 10 New Hampshire, 505; but by express agreement it may be a satisfaction and bar; *Dougal v. Cowles & Smith*, 5 Day, 511; dicta of MARSHALL, C. J., in *Sheehy v. Mandeville & Jamesson*. In Pennsylvania, indeed, the understanding to this effect is so general, that it must probably be considered as settled; *Darlington v. Gray*, 5 Wharton, 487; *Weakley v. Bell & Sterling*, 9 Watts, 273; *Hays v. Clurg*, 4 id. 452. In Massachusetts and Maine, as presently stated, the law is certainly so.

The New York decisions are to be understood as applicable to the case, where the creditor retains the note, and can produce it on trial. For it is well and generally settled, that if a negotiable note by the debtor have been given on account of the debt, and the creditor part with it for a valuable consideration, he cannot sue on the original cause of action, until he has taken up the note, and if he have not parted with it for a valuable consideration he cannot recover, unless, on the trial, he produce and cancel the note: hence, the creditor will be defeated, if the debtor plead or prove, that he had given a negotiable note, which the plaintiff, by having assigned it for a valuable consideration, and not under his control at the commencement

of the suit; or, if it be under the plaintiff's control, and he do not produce and cancel it at the trial, or prove that it has been destroyed or lost; *Small v. Jones*, 8 Watts, 265; *Hughes v. Wheeler*, 8 Cowen, 77, where the New York cases are collected; *Dayton v. Trull*, 23 Wendell, 345; *Hays v. McClung*, 4 Watts, 452; *Harris v. Johnston*, 3 Cranch, 311; *McConnell et al. v. Stettinius et al.*, 2 Gilman, 707, 713; *Cocke v. Chaney*, adm'r, 14 Alabama, 65. In Massachusetts and Maine, this reason is carried so far, that the debtor's giving his negotiable note for a parol debt, is taken to be a payment or discharge, "unless it be proved not to have been the intention of the parties to give it that effect;" *Johnson v. Johnson*, 11 Massachusetts, 359; *Thatcher and others v. Dinsmore*, 5 id. 299; *Varner v. The Inhabitants of Nobleborough*, 2 Greenleaf, 121; *Butts v. Dean*, 2 Metcalf, 76. But this is admitted to be a peculiarity in the law of those states; *Wallace v. Agry et al.*, 5 Mason, 327; *Descadilla et al. v. Harris*, 8 Greenleaf, 298; and it only applies to negotiable notes; *Greenwood v. Curtis*, 4 Massachusetts, 93. And accordingly to the late cases the presumption is merely one of fact, founded on the consideration that as it is as convenient, and generally more so, to the creditor to sue on the note, there is no reason to consider the original contract as continuing in force; and this presumption of fact may be rebutted by evidence that the note was not intended as a payment, and the fact that such extinguishment would deprive the party taking the note of a substantial benefit, would generally be sufficient to rebut the presumption; *Curtis and another v. Hubbard*, 9 Metcalf, 322, 328.

Where a promissory note has been given, and upon its falling due, a new note is given by the debtor, there is no doubt this may be a satisfaction and discharge of the former. There is no legal difficulty in the way; for the cause of action is not touched; the transaction is only an exchange of securities; it is therefore a mere affair of evidence and intention. In *Hart v. Boller*, 15 Sergeant & Rawle, 162, the first count in the declaration was on a promissory note of one Miller, payable to defendant's order and indorsed by defendant, dated Oct. 11, 1818, for \$240, at sixty days, and falling due 13 Dec.; the second count was on a note for the same sum, drawn and endorsed by the same parties, dated 14 Dec. 1819: the court below told the jury that it was a matter of *law*, that the second note was not a satisfaction and discharge of the first, and that therefore the plaintiff was entitled to a verdict on the *first count*: the judgment was reversed on this account: and *TILGHMAN, C. J.*, delivering the opinion of the court, said, "It is a general rule that if one indebted to another by note, gives another note to the same person for the same sum, without any new consideration, the second note shall not be deemed a satisfaction of the first, unless so intended and accepted by the creditor. But if so accepted it is a satisfaction. The *quo animo* it was accepted is matter of *fact*, which the court cannot take to itself, and exclude the jury from the decision of it. The intent may often be deduced from circumstances, though nothing positive was expressed. We are of opinion, therefore, that the court below erred in assuming the determination of this point as matter of *law*. It should have been submitted to the *jury*, whether the second was accepted in satisfaction." *S. P. Jones v. Shawhan*, 4 Watts & Sergeant, 257, 263; acc. *Musgrove v. Gibbs*, 1 Dallas, 216; *Hacker and others v. Perkins*, 5 Wharton, 95; *Porters v. Talcot & Bowen*, 1 Cowen, 359. Where the transaction is the renewal of notes in whole or

in part, at bank, the general course of business and understanding of merchants rather implies, that the new note is a satisfaction of the old; that the transaction is a new discount and a repayment of the former note, *Slaymaker v. Gundacker's Ex'rs*, 10 Sergeant & Rawle, 75; *Bank U. S. v. Daniel*, 12 Peters, 34: "these transactions, of renewing debts by new notes, are equivalent to paying the existing debt, and again borrowing the money;" *Castleman, &c. v. Holmes*, 4 J. J. Marshall, 1. Still, even here, the decision of the court is regulated exclusively by the intention of the parties and the justice of the case. And where the former note is paid and discharged by the new discount, it is not to be pleaded as *accord* and *satisfaction*, but as *payment*; *Bank of Commonwealth v. Letcher*, 3 J. J. Marshall, 195; 1 Dana, 82.

The receipt of one bond expressly agreed to be in discharge of a former one, is a good discharge: dicta in *Morrison v. Berkey*, 7 Sergeant & Rawle, 238, and *Weakly v. Bell & Sterling*; but without evidence of such agreement or intention, it will not be a discharge; *Hamilton, Ex'or v. Callender's Ex'ors*, 1 Dallas, 420; *Gregory v. Thomas*, 20 Wendell, 17.

A doctrine somewhat akin to this of satisfaction or exchange of one security by or for another,—viz. that of extinguishment of one security by a higher one, by operation of law,—may be taken notice of. See *Jones v. Johnson*, 3 Watts & Sergeant, 276, where the two principles are very ably distinguished by GIBSON, C. J.

The acceptance of a higher security or obligation from the debtor, for the payment of the same debt, is an extinguishment of a lower security or obligation for that debt; that is, a judgment on a bond or other contract, extinguishes that bond or contract: *Green v. Sarmiento*, 1 Peters's C. C. 74; *Butler v. Miller*, 1 Denio, 407; and a bond or other sealed instrument given as an obligation for a debt, extinguishes a simple contract liability or security for that debt; *Curson v. Monteiro*, 2 Johnson, 308; *Pleasants v. Meng et al.*, 1 Dallas, 380, 388: because there cannot be liabilities on both instruments, and a judgment and a bond both import an absolute liability; the legal obligation of the inferior instrument must be considered as at once blotted out. A joint judgment against all the obligors in a joint and several bond merges the entire instrument; *The United States v. Price*, 9 Howard, 83, 94; but a judgment against one of them in a several suit against him, will not affect the liability of the others; *Sawyer v. White et ux.*, 19 Vermont, 40. In like manner, a judgment against one joint debtor on a joint cause of action, merges the liability of all; *Willings and Francis et al. v. Consequa*, 1 Peters's C. C. 393; *Ward v. Johnsons*, 31 Massachusetts, 140; *Robertson v. Smith and others*, 18 Johnson, 459; *Peters v. Sanford*, 1 Denio, 224; *Penny v. Martin and others*, 4 Johnson's Chancery, 566; *Averill v. Locks*, 6 Barbour's S. Ct. 20, 25; *Sloo v. Lea*, 18 Ohio, 279; *Ferrall et al. v. Bradfords*, 2 Florida, 508; *Smith and another v. Black*, 9 Sergeant & Rawle, 142; *Lewis v. Williams*, 6 Wharton, 264; *Anderson v. Levan*, 1 Watts & Sergeant, 334; *King v. Hoare*, 13 M. & W. 494. (The case of *Sheehy v. Mandeville and Jamesson*, 6 Cranch, 253, has sometimes been considered as *contra*, and erroneous; but that is a mistake, occasioned by not properly understanding the point of that case, which turned almost entirely upon the effect of an insolvent discharge of one of the defendants; the view of Chief Justice MARSHALL in that case appears to

have been; that a judgment against one on his sole contract, does not strictly *extinguish* or *merge* the liability of his dormant partners, in the same way that it extinguishes or merges the liability appearing on the face of the declaration; it would be a bar in their favour, indeed, but only because of the legal impossibility of enforcing the liability against them, without reviving it against him; but that where the one against whom the former judgment was, has been discharged under the insolvent law, and appearing in the second action, is discharged by the judge, and the proceedings continue against the newly discovered partner only, who pleads severally, here there is no reason why judgment should not be entered against him, for it does not affect the other; and that in fact, in that case, the judgment was entered against the new defendant only, Mandeville, is shown by the circumstance, that, when that judgment came up again in 7 Cranch, 208, it came up by the name of Sheehy v. Mandeville. The main peculiarities of this case, it will be seen, are, that the declaration in the first suit set out a sole, and not a joint liability, and that in the second suit the former defendant availed himself of his insolvent discharge, and either a *nolle prosequi* was entered against them, or the proceedings were considered equivalent to that: had the declaration in the first been upon a joint liability, say upon a parol contract, then probably the liability of the other partner would have been strictly *extinguished* or *merged*, though he were not sued, because a judgment extinguishes the whole liability declared on: or if the defendant in the previous suit had not availed himself of his insolvent discharge, but had joined in the plea in the new suit, then, perhaps, judgment could not have been given for the plaintiff; though this latter question, the Chief Justice said, "would have presented an inquiry of some intricacy." This decision, so far from deserving the disrespect with which some of the later judges have treated it, appears to be one of the most acute and able judgments ever pronounced by C. J. MARSHALL; but whether right or wrong, none of the subsequent decisions appear to have overruled or shaken it.) And a bond accepted from one joint debtor for a joint debt, discharges the joint liability previously existing upon a simple contract; because since the bond is an obligation for the same debt, the one giving it must be discharged from his liability on the simple contract, as he cannot be liable on both; and if one joint debtor is discharged, the other is; Tom v. Goodrich and others, 2 Johnson, 213; Clement v. Brush, 3 id. 70; The U. S. v. Astley et al., 3 Washington, C. C. 508; Anderson v. Levan, 1 Id. 334; Banorgee v. Hovey et al., 5 Massachusetts, 11; Doniphan, &c. v. Gill, 1 B. Monroe, 199; Patterson, &c. v. Chalmers, 7 Id. 595, 597.

It is said, no doubt correctly, in Jones v. Johnson, that extinguishment of a lower security by a higher, is an operation of law, and that no intention of the parties can prevent it: "An agreement, however explicit, would not prevent a promissory note from merging in a bond given for the same debt; for to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation," &c. These remarks of the Chief Justice, it will be observed, refer to the case where the bond is an obligation for the same debt which the simple contract secures or evinces, and the strongest ground for this principle is, that there cannot in law exist two liabilities for one consideration: but

then the evidence may show that the bond is not given as the evidence and obligation of the same debt, but was a new and contingent obligation for a new debt, (though for the same sum, perhaps,) devised and created to protect and secure the former debt; and in such a case, it would be but collateral security, and no extinguishment. In other words, it is a matter of law, that an absolute obligation under seal for the payment of a debt, extinguishes a parol instrument or liability to pay the same: but it is a question of fact, depending on the intention of the parties, whether the deed is a new absolute obligation for the payment of the same debt, or whether it is a contingent and collateral instrument, concocted and given for the better securing of the parol debt. The presumption of fact, where the bond is between the same parties, and for the same sum, is, that it is an extinguishment; *Stewart's Appeal*, 3 Watts & Sergeant, 476; *Frisbie v. Larned*, 21 Wendell, 450; and that appears to be a general presumption in all cases of a higher security; *Butler v. Miller*, 1 Denio, 407, 413; *Gardner v. Hust*, 2 Richardson, 601; but if it be proved that the intention was that the former instrument should not be extinguished, an extinguishment will not take place; see *U. S. v. Lyman*, 1 Mason, 482, 505; *Van Vliet et al. v. Jones et al*, Spencer, 341; and *Yates v. Aston*, 4 Q. B. 182, 196; *Bell v. Banks*, 3 M. & Gr. 258, 265. A bond and warrant by one partner, with agreement, "when paid, to be in full," is no extinguishment, for the contrary intent is manifest; *Wallace v. Fairman*, 4 Watts, 378: and an agreement under seal, whose expressed purpose is only to secure the liquidation or discharge of the debt, is no extinguishment or merger of the simple contract liability; *Charles v. Scott*, 1 Sergeant & Rawle, 294; *Bank of Columbia v. Patterson's Adm'r*, 7 Cranch, 299; *Baits v. Peters & Stebbins*, 9 Wheaton, 556; *Montgomery v. St. Stephen's Church*, 4 Watts & Sergeant, 542, 546; but when the bond of one is taken at the time of the debt created, and of the consideration of it, it would require very strong evidence to show that it was not the only security entered; *Bond v. Aitken*, 6 Watts & Sergeant, 165. In *Bray v. Bates and another*, 9 Metcalf, 238, 250, it was held that a bottomry bond was necessarily an extinguishment of previous simple contract securities.

If the higher security be not between the same parties, as, if it be the bond of a third person, or a judgment against a third person; *U. S. v. Lyman*; *Day and Penfield v. Leal & Leal*, 14 Johnson, 404; *Axers, Ex'rx v. Musselman*, 2 Browne, 11; *Beale v. Bank*, 5 Watts, 529; *Wolf v. Wyeth*, 11 Sergeant & Rawle, 149, or, be in any way between different parties, *Davis v. Anable & Fidler*, 2 Hill's N. Y. 339; see *Holmes v. Bell*, 3 M. & Gr. 213; *Bell v. Banks*, Id. 258; or be in its terms collateral to the previous contract; *Langdon v. Paul*, 20 Vermont, 217, 221; it cannot be an obligation for the same debt, and the doctrine of *extinguishment* does not apply; but the effect will be regulated by the principle respecting *satisfaction*, considered in a previous part of this note. That is, the presumption of fact is, that the higher security of a different party, or for a different sum, is intended not to be a satisfaction, but only collateral security or conditional payment; but if an agreement of the parties, that it should be received in full satisfaction and discharge, be proved, it will be a discharge: see *Weakly v. Bell & Sterling*; *Jones v. Johnson*; *Leas and another v.*

James, 10 Sergeant & Rawle, 307; Jones v. Fennimore, 1 Green's Iowa, 134, 146.

H. B. W.

*ARMORY v. DELAMIRIE. [*151]

HILARY, 8 G. 1.—IN MIDDLESEX, CORAM PRATT, C. J.

[REPORTED 1 STRANGE, 504.]

The finder of a jewel may maintain trover for a conversion thereof by a wrongdoer.

A master is answerable for the loss of a customer's property entrusted to his servant in the course of his business as a tradesman.

Where a person who has wrongfully converted property will not produce it, it shall be presumed, as against him, to be of the best description.

THE plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under a pretence of weighing it, took out the stones, and calling to the master to let him know it came to three-halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled:—

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. (†)

2. That the action will lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that *would fit the socket would be worth; and the Chief Justice directed the jury, that unless [*152] the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did.

THIS is the case usually referred to ing principle of law, that bare possession for the purpose of illustrating that lead- constitutes a sufficient title to enable

(†) 1 Com. Dig. Action upon trover (B.) 310.

the party enjoying it to obtain legal remedy against a mere wrong-doer. It would be almost a waste of time to enumerate the modern decisions by which this proposition is enforced and explained. Two of the most remarkable are, *Sutton v. Buck*, 2 Taunt. 302; and *Burton v. Hughes*, 2 Bingh. 173, where property having been lent to the plaintiff under a written agreement, it was nevertheless held that he might maintain trover for it without producing that agreement; for though, if it had been necessary to prove the nature of his interest in it, the rules of evidence would have rendered the production of the writing indispensable, still as possession is a sufficient title against a wrong-doer, it was sufficient to show his possession without inquiring into the terms of it. [The qualified right of a bankrupt or insolvent to *after acquired* property also strikingly illustrates this position. *Herbert v. Sayer*, 5 Q. B. 965.] See also *Matson v. Cook*, 4 Bing. N. C. 392. [*Elliot v. Kemp*, 7 M. & W. 306.]

Formerly the right of the plaintiff in trover to the possession of the goods always came in question under the plea of not guilty; but now, by Reg. Gen. Hil. 1836, if the defendant deny the plaintiff's title to the goods, he must plead specially. Since these rules, it has been held, in conformity with the doctrine laid down in the principal case, that "the plea of no property in the plaintiff, means no property as against the defendant." Per Parke, B., in *Nicholls v. Bastard*, 2 C. M. & R. 662; and *quare* as to the case of *Howell v. White*, 1 M. & Rob. 400. [See *Leak v. Loveday*, 4 M. & Gr. 980; 5 Sc. N. R. 908, S. C.]

It was in consequence of the doctrine thus affirmed in *Armory v. Delamirie*, viz. that *mere possession is sufficient against a wrong-doer*, that it was decided in *Trevelian v. Pyne*, Salk. 107; and *Chambers v. Donaldson*, 11 East, 65; in opposition to several old authorities, that a *command* alleged in pleading is traversable. In *Trevelian v. Pyne*, the action was replevin for cattle. *Cognizance*, by the defendant as bailiff to J. S. *Plea in bar*, that defendant was not bailiff to J. S., and held good on demurrer; for though J. S. had a right to take the cattle, yet a stranger without his authority could not. *Acc. Robson v. Douglas*, Freem. 536; *George v.*

Kinch, 7 Mod. 481. It was thought, indeed, long after the decision in *Trevelian v. Pyne*, that in trespass *quare clausum fregit*, if the defendant justified under the command of A., in whom he alleged the freehold to be, the plaintiff could not in his replication traverse the command, because that would admit the freehold to be in A.; and if the freehold were in A. the plaintiff ought not to maintain his action. But this distinction is now completely exploded, for in *Chambers v. Donaldson*, 11 East, 65, the defendants to an action of trespass *quare clausum fregit*, pleaded that the *locus in quo* was the freehold of E. B. Portman, Esq., and that they by his command broke and entered the same. The plaintiff traversed the command, and on demurrer the replication was held good upon the express ground that the defendant, if he had not the command of Portman, was a wrong-doer, and that as against a wrong-doer the plaintiff's possession, even supposing him to have no title, would be sufficient to maintain the action. See *Heath v. Milward*, 2 Bing. N. C. 98. [*Carnaby v. Welby*, 8 A. & E. 878; *Brest v. Lever*, 7 M. & W. 594.]

On the same principle rests the well-known rule in actions of ejectment, viz. *that the plaintiff must recover by the strength of his own title, not the weakness of his antagonist's*; for no one can recover in ejectment, who would not be entitled to enter without bringing ejectment, and any person entering on the possession of the tenant, unless he have a better title, is a wrong-doer.

In the late case of *Dobree v. Napier*, 2 Bing. N. C. 781, a distinction was engrafted *upon the general rule [*153] that a command is traversable.

This was an action of trespass for seizing a steam-vessel. The defendant pleaded a seizure of the vessel as a prize, by the command of the Queen of Portugal. The plaintiff replied facts showing that the defendant was prohibited from entering the service of the Queen of Portugal, by the provisions of the Foreign Enlistment Act. Upon demurrer, judgment was given for the defendant. "The only ground," said Tindal, C. J., "on which the authority of the servant is traversable at all in an action of trespass, is to protect the person or property of a party from the officious or wanton interference of a stranger, where the principal might have

been willing to waive his rights. It is obvious, that the full benefit of this principle is secured to the plaintiffs, by allowing a traverse of the authority *de facto*, without permitting them to impeach it by a legal objection to its validity in another and foreign country." [And on similar reasoning seems to rest the well-known doctrine that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies; nay, that it has relation back to the time of the act done, and is in point of law, and may be described in pleading as a *command*. So that, where a person is present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name, or as one acting by the authority of the person entitled, (whether to his advantage or not,) and obtained his subsequent ratification.—The *Rolla*, 6 Rob. 364, *Baron v. Denman*, 2 Exch. 167; *Wilson v. Tammon*, 6 Scott, N. R. 891: see *Cameron v. Kyte*, 3 Knapp, 332; *Hill v. Biggs*, 3 Moore, P. C. 465.]

As to the third point decided in this case, it is an illustration of that favourite maxim of the law, *omnia præsumuntur contra spoliatorem*; which signifies, that if a man by his own tortious act, withhold the evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted. Thus, if a man withhold an agreement, under which he is chargeable, it is presumed to have been properly stamped. *Crisp v. Anderson*, 1 Stark. 35. So, too, if goods are sold without any express stipulation as to their price, if the vendor refuse to give any express evidence of their value, they are presumed to be worth only the lowest price for which goods of that

description usually sell; unless the vendee himself be shown to have suppressed the means of ascertaining the truth, for then a contrary presumption arises, and they are taken to be of the very best description. *Clunnes v. Pezzy*, 1 Camp. 8, *et notas*. In a recent case, *Braithwaite v. Coleman*, 1 Harrison, 223, the Court of King's Bench differed on the application of this principle; it was an action by the indorsee against the drawer, and the only evidence of notice of dishonour was the following statement made by the defendant:—"I have several good defences to the action; in the first place, the letter" (containing the notice of dishonour) "was not sent to me in time." A notice to produce the letter had been given, but it was not produced: Lord Denman, C. J., thought, that, as the defendant withheld the letter, the jury were justified in assuming, as they actually had done, that if produced it would appear to have been in time. But *Littledale*, *Patteson*, and *Coleridge*, J. J., thought; that the letter might have been dated on the proper day, but sent by private hand, or in some way in which it would [*153a] not have arrived in proper time; and that the defendant would not be bound to produce a letter, which, on the face of it, might make against him, and which he might not have evidence to explain; and a rule for a new trial was made absolute. [On the other hand, in *Curlewis v. Corfield*, 1 Q. B. 814, where a letter was shewn to have been sent to the defendant the day after dishonour, and the defendant, an attorney, afterwards objected the want of due presentment, but not that of notice; the jury on proof of a notice to produce was held warranted in inferring that the letter contained due notice of dishonour. See *Bell v. Frankis*, 4 M. & Gr. 446; *Lobb v. Stanley*, 5 Q. B. 574.]

Few things in law are more difficult, than to determine what is a sufficient right of property, to support trover or replevin. The object of both actions, is to afford a remedy for injuries to the right of property in chattels personal, and the plaintiff must allege in both, that the goods for which he brings suit, are his, or that he is possessed of them as of his own property. The latter allegation is sufficient in trover, but not as it seems in replevin, where the goods are usually described as the goods of the plaintiff. A traverse

of the property of the plaintiff, is consequently a sufficient answer in all cases to a declaration in replevin, and unless on special demurrer, will also be sufficient in trover. Both trover and replevin stand in this respect on the same footing, and neither can be sustained for an injury to possession apart from property. A distinction has been taken between these actions and trespass, which, although requiring an allegation of property in the declaration, may unquestionably be brought for every direct injury to a lawful possession. *Demick v. Chapman*, 11 Johnson, 132; *Schermerhorn v. Von Valkenburgh*, 11 id. 529; *Cook v. Howard*, 13 id. 276; *Hoyt v. Gelston*, ib. 141, 561; *Aiken v. Buck*, 2 Wend. 461; *Butts v. Collins*, 13 id. 143. But this distinction is extremely thin, and seems to be verbal rather than real. The allegation of property is substantially the same in all these actions, and there can therefore be but little difference in the proof.

The possession of chattels is *prima facie* evidence of property, and the right to their possession a right of property, if not, against all who cannot show a better title, at least against all who rely on one which is worse. And the distinction between trover, and trespass *de bonis trespportatis*, if any, seems to be, that the one is founded on mere possession, and the other on right as constituted or evidenced by possession. So far, therefore, as regards the property of the plaintiff, trover and trespass are identical in pleading, and approach very nearly in evidence. Thus where the defendant in an action of trover, pleaded the bankruptcy of the plaintiff, and the consequent transfer of all his interest in the goods in suit to his assignees, and the plaintiff replied, that subsequently to the bankruptcy he became lawfully possessed of the goods, and continued so possessed down to the time of suit brought, the court held, that the replication was a good answer to the plea, and sustained the declaration; *Webb v. Fox*, 7 Term, 391. "*Prima facie*," said KENYON, C. J., "the possessor of personal property is the owner of it." And LAWRENCE, J. held the following language, in delivering his opinion on the same occasion. "To maintain trover, the plaintiff must have either the absolute or a special property in the goods that are the subject of the action: he need not have both; either the one or the other is sufficient. Absolute property is, where one, having the possession of chattels, has also the exclusive right to enjoy them, and which can only be defeated by some act of his own. Special property is where he, who has the possession, holds them subject to the claims of other persons. There may be special property without possession: or there may be special property, arising simply out of a lawful possession, and which ceases when the true owner appears. Such was the case of *Armory v. Delamirie*, 1 Str. 504, where a chimney-sweeper's boy, having found a jewel, carried it to a goldsmith to know what it was, who refused to return it; and it was holden, that though the plaintiff did not, by such finding, acquire an absolute property, yet he had such a property as would enable him to keep it against all, but the rightful owner, and consequently that he might maintain trover for it against the goldsmith, who was a wrong-doer. Now that appears to me to go the whole length of deciding this case. Here the plaintiff says, that he was possessed of these goods, to which the defendants plead that the plaintiff is a bankrupt, and that all his effects are vested in his assignees: and I cannot agree with the plaintiff's counsel, that the plea should have gone farther, and shown that this was not one of the cases, in which a bankrupt may have property; the plea states

generally, that the property was out of the plaintiff. But for the same reason, I think, it was sufficient for the plaintiff in his replication to show a right to the goods, which he has done by alleging, that he 'became lawfully possessed of them since the bankruptcy, and that he has kept them without any claim, interruption, molestation or denial of the assignees.' I agree with the defendant's counsel, that it is not sufficient to state in a declaration in trover, that the plaintiff is possessed, without adding that the property of the goods is in him: but it was not necessary to repeat in this replication, that the property was in the plaintiff, since the replication shows those circumstances, in answer to the plea, from which the law will infer a special property in him; such a property as enables him to maintain trover." The views thus expressed were substantially adopted in the subsequent case of *Gilas v. Grover*, 6 Bligh, 277, in the House of Lords, where all the judges expressed the opinion, that possession is sufficient proof of property in trover against a wrong-doer.

The rule of law has been thus established from the necessity of the case, and to prevent the inconveniences which would arise, if no redress could be had for the wrongful appropriation or detention of chattels personal, unless by a suit in the name of the absolute owner. For as the various events of life and business, frequently place this species of property in the hands of persons, who have a bare possession without title, their possession must be protected, in order to prevent it from becoming a prey to violence, and a bait for fraud. No one, therefore, who takes or withholds chattels personal wrongfully from another, can set up a defect in the title of the injured party as a bar to his remedy. To hold the law otherwise would be as Lord Kenyon remarked, to invite all the world to scramble for the possession of personal property, whenever it was out of the care and custody of the owner, and thus open a door to numerous acts of fraud and violence. All the forms of action are designed for purposes of public policy, as well as of private advantage. The breach of the peace by the wrongful act of the defendant, was once a necessary part of the complaint in trespass, and although this allegation is now usually omitted, the action may still be brought, whenever the possession of property, although without title, is assailed by a wrong-doer, who has neither possession nor title, for even if the plaintiff were destitute of all right, the public good would require, that the defendant should not profit by an act wrong in itself, and dangerous to the community. (*Supra.*) *Burrows v. Stoddard*, 3 Conn. 100. This reason obviously applies to trover, as well as trespass, for otherwise no redress could be had in the numerous instances, in which the injury consists in withholding possession, and not in obtaining it, and where an action on the case is the only remedy.

The finder of a chattel, who is wrongfully deprived of it, may, therefore, sustain trover, when trespass will not lie, not so much for the purpose of affording him redress, as for that of inflicting proper punishment on the defendant. And, although his loss is evidently less than it would be, if he had a good title instead of a precarious occupancy, his recovery will extend to the full value of the chattel in damages, because anything short of this, would enable the defendant to profit by his own wrong.

It is accordingly well settled, in most of the states of this country, under the principles and decisions cited above, that, although the action of trover is founded on the right of property, if this right exist relatively, it need not be absolute; and that, as it is enough if the right of the plaintiff be

better than that of the defendant, whatever it may be, with regard to the rest of the world, possession will be sufficient evidence of right, as against all who have neither right nor rightful possession. *Rogers v. Arnold*, 12 Wend. 30. The right of the finder of a chattel to maintain trover against every one but the true owner, and those claiming under him, was judicially recognised in *McLaughlin v. Waite*, 9 Cowen, 670; *Poole v. Symonds*, 1 New Hamp. 289; and *Pinkham v. Gear*, 3 Id. 485; and expressly adjudged in *Clark v. Molony*, 3 Harrington, 68, where it was decided that he might enforce his right against a second finder, who was said to stand in the same position relatively to him, as he did towards the owner. It was held in like manner in *Duncan v. Spear*, 11 Wend. 54, that a prior possession is sufficient evidence of title in trover, as against all who have nothing better to show than a subsequent possession, and that it cannot be rebutted, by showing, that it was acquired under a sale, which passed no title, and left the ownership outstanding in a third person. *Sutherland, J.*, in delivering the opinion of the court, relied on the previous case of *Daniells v. Ball*, 11 Wend. 58, note, when it was decided, that trover might be maintained by the plaintiff, for goods which had been delivered to him by the agent of the owner, but without any authority for the purpose, against the defendant who obtained possession of them unlawfully, under color of legal process. It was held in like manner in *Thayer v. Hutchinson*, 13 Weston, 507, after an elaborate examination of principles and authorities, that the lawful possession of chattels, is sufficient to sustain trover, as against any one who converts them to his own use without right, and consequently, by wrong. Similar ground was taken by the Supreme Court of New Hampshire in *Poole v. Symonds*, 1 New Hampshire, 289; *Pinkham v. Gear*, 3 Id. 485; and *Hyde v. Noble*, 13 Id. 494, where it was said, that a special property is sufficient to sustain trover, and that although mere physical possession may not always be enough to constitute special property, it will do so when coupled with the duty to keep safely, and deliver to the absolute owner, on demand. And it was consequently decided, that one who has received goods belonging to another, from the sheriff, and given a receipt promising to redeliver them when required, is entitled to recover full damages in trover, for their conversion.

It is, notwithstanding, thoroughly well settled that the goods must be described in pleading as the goods of the plaintiff. It is not enough to aver that he is entitled to their possession, for, although this is in many cases sufficient as evidence, both in trover and replevin, yet it is not so always, and cannot be pleaded without contravening the rule, which requires that conclusions of fact shall be set forth positively, and not left to inference from other allegations, *Patterson v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barbour, S. C. 304. But the better opinion seems to be, that rightful possession, when given in evidence, not only proves, but constitutes a sufficient right of property, to maintain replevin as well as trover, as against every one who takes, or withholds chattels personal, without having either the right of property, or the right of possession. *Rolle's Abridg. title Replevin, A. C.* Nor will evidence that the absolute right of property, is in a third person, be sufficient in replevin, any more than in trover, to rebut a right founded in a rightful possession. The contest in both actions is between the plaintiff and the defendant, and the rights of third persons are immaterial, unless they operate directly or indirectly on those of the parties.

The plaintiff must undoubtedly show a *prima facie* right to possession, but if he show this as against the defendant, he need not do so, as against all the world. "The cases of *Demick v. Chapman*, 11 Johnson, 132; and *Cook v. Howard*, 13 Id. 276, said Nelson, C. J. in *Rogers v. Arnold*, expressly decide that as in the action of trespass, the possession of a chattel, is *prima facie* evidence of right, so a mere stranger cannot deprive the party of that possession, without showing some authority, or right, from the true owner, to justify the taking. This sound and incontrovertible principle has been extended to trover, and we think it applies to replevin." And he went on to hold, that the existence of an outstanding title in a third person is immaterial, in replevin, unless, in so far as it negatives the right of the plaintiff, as between himself and the defendant, and would constitute a bar in trover or trespass *de bonis asportatis*. It is true that a plea of property in a third person, is frequently put in contradistinction to a plea of property in the defendant, and that either plea will be a good answer to the action. *Quincy v. Hall*, 1 Pick. 357. But in truth, both these modes of pleading are substantially the same. The gist of both is a traverse of the property of the plaintiff, without which the affirmative allegation of property, whether in the defendant or a stranger, would be immaterial. This allegation is mere matter of inducement, and a replication traversing it, and tendering issue demurrable. *Prosser v. Woodward*, 21 Wend. 208; *Robinson v. Calloway*, 4 Pike, 94; *Anderson v. Talcott*, 1 Gilman, 365; *Gentry v. Borgis*, 6 Blackford 261. The plaintiff must reply, reaffirming his property, and concluding to the country. *Chambers v. Hunt*, 3 Harrison, 339; *Pringle v. Phillips*, 1 Sand. Sup. Ct. 202. And if the jury summoned to try such an issue, merely find that the property is not in the defendant, or that it is in a stranger, without finding whether it is or is not in the plaintiff, the verdict will be immaterial, and a judgment on it, erroneous. *Bemus v. Beekman*, 3 Wend. 667. The true character, therefore, of the pleas in replevin, which are commonly described as pleas of property, in the defendant or in a stranger, is, that of a broad traverse of the property of the plaintiff, as averred in the declaration. And any right of property, either general or special, and whether of unlimited duration, or merely for the time being, will, consequently, support this averment, and sustain the issue on the part of the plaintiff. *Rogers v. Arnold*. Even, therefore, when issue is joined on a plea of property in a third person, proof of property in him, will be insufficient, unless it disproves the right of the plaintiff to possession, as between himself and the defendant. Such is undoubtedly the law in trover; *Duncan v. Spear*, 11 Wend. 54; and such, notwithstanding the remarks of Cowen, J., in *Prosser v. Woodward*, 21 Wend. 210, would seem to be the law in replevin. And the general principle, that although mere possession may not be enough to support replevin, it may be maintained, when there is a right of possession, however temporary, has been frequently applied by the courts of this country. *Chambers v. Hunt*, 3 Harrison, 339; *Mead v. Kilday*, 2 Watts, 110; *Smith v. Williamson*, 1 Harris & Johnson, 147; *Cullum v. Bevans*, 6 Id. 469; *Miller v. Adsit*, 16 Wend. 335; *Buckly v. Handy*, 2 Miles, 455.

In order, however, that possession should confer the right to bring trover or replevin, it must be rightful in itself, and for the time being, however, subject to be defeated by the acts of the person who is the true or absolute

owner. Thus a sheriff's officer who takes the property of one man under a writ against another, cannot recover in either of these forms of actions, even against a wrong doer. *Kemp v. Thompson*, 17 Alabama, 9. The possession must, moreover, be held by the plaintiff on his own behalf, and not merely on behalf of another. A servant cannot, therefore, maintain trover or replevin for goods committed to his custody, by his master, for his possession, is exclusively that of his master and not his own. *Harris v. Smith*, 3 S. & R. 20. And this will be true, so long as the master retains the entire dominion over the chattel, and the right to recover the possession whenever he may think proper, although he has entered into an executory contract, which may end in transferring the right of property to the servant. *The Lehigh Co. v. Field*, 8 W. & S. 232; *The Farmer's Bank v. McKee*, 2 Barr, 318; *Tathill v. Wheeler*, 6 Barbour's S. C. 362. It is, moreover, well settled, that in order to sustain trover, the right on which it is founded must continue in force down to the time of the conversion. Thus a sheriff's officer cannot recover in trover, for goods which he has deposited with the defendant for safe keeping, after the writ under which they were taken has been set aside by the court. *Walpole v. Smith*, 4 Blackford, 74. And when the plaintiff's right grows out of possession apart from title, it will fail if the goods come to the hands of the true owner, before their conversion by the defendant. *Schermerhorn v. Van Valkenburgh*, 11 Johnson, 329.

It was held in *Buckley v. Handy*, above cited, that where the defendant in replevin, relies on a special right or interest, derived directly or indirectly from the plaintiff, he must plead it specially, and cannot give it in evidence under a general plea of property in himself, and traverse of the property of the plaintiff. This decision is, in some measure, sustained by the reasoning of the Court of Exchequer, in *Mason v. Farrall*, 12 M. & W. 674, 684. But it would seem, notwithstanding, that as the question in replevin, is not as to the absolute ownership of the plaintiff, but as to his right relatively to the defendant, any evidence must be admissible, which shows either a general or special property in the latter, superior to that of the plaintiff as it regards the immediate possession, which is the purpose of the action. And this view is sustained by the case of *Owen v. Knight*, 4 Bing. N. C. 54, and *White v. Tiel*, 12 A. & E. 114, where it was held that a lien may be given in evidence under a traverse of the plaintiff's possession in trover, which puts both property and possession in issue. And there can be little doubt that the defendant may sustain a plea of property in himself, by proving that he holds the property under a lease for a term certain from the plaintiff. *Wheeler v. Train*, 3 Pick. 255; *Collins v. Evans*, 15 id. 63.

There are, however, several decisions in this country, which deny the right to maintain trover or replevin, on the mere ground of possession apart from property. Thus in *Ludden v. Leavitt*, 9 Mass. 104, it was held that there must be either a general or special property to support trover, and that it cannot be brought by a mere bailee who has no interest in the goods, and has simply received them to keep safely. Similar decisions were made in *Barker v. Miller*, 6 Johnson, 195; *Edson v. Weston*, 7 Cowen, 280; *Phillips v. Hall*, 8 Wend. 613; and *Dillenback v. Jerome*, 7 Cowen, 294. The existence of an outstanding title in a third person, was treated as a bar to a recovery in trover in *Laspeyze v. McFarland*, 187; *Sylvester v. Girard*, 4 Rawle, 185, and *Grubb v. Guilford*, 4 Watts, 223. In *Harrison v. McIntosh*, 1 Johnson,

380, and *Waterman v. Robinson*, 3 Mass. 304, the same ground was taken with regard to replevin, which was held to require proof of property in the ordinary sense of the word, as distinguished from a mere right to present possession. The law was held the same way in *Whitwell v. Wells*, 24 Pick. 30, where it was decided that replevin cannot be founded merely on possession, or be sustained by a bailee, without other right than that given by the bailment. And in *Butts v. Collins*, 13 Wend. 139, Chancellor Walworth said, that the possession of property is not sufficient to sustain trover or replevin, even when coupled with an obligation for its safe keeping and re-delivery, although amply sufficient to authorise a recovery as against a wrong doer in trespass. It has been shown above, that this distinction necessarily involves the conclusion, that the possession of chattels should be protected against direct and immediate injuries, but not against those which are inflicted indirectly, and that it may be fraudulently withheld with impunity, where it could not have been rightfully taken. The Chancellor subsequently adhered to this view, on the hearing of a writ of error to a decision of the Supreme Court in which it had been held, that a party to whom goods are delivered under an obligation to return them, cannot sustain replevin, if he has parted with the actual possession of the goods before the taking, but his opinion was overruled, and the judgment below reversed by the Court of Errors. *Miller v. Adsit*, 16 Wend. 335.

It is every where admitted, that a special property, such as is possessed by a party holding chattels on pawn, or by right of lien, is sufficient to support an action of trover. *Ingersoll v. Van Bokkelen*, 9 Cowen, 680. Thus, where goods are delivered to an auctioneer, for the purpose of sale, he acquires a property coupled with an interest, and may bring trover or replevin against a purchaser who removes them, without payment of the purchase-money. *Tyler v. Freeman*, 3 Cushing, 31. Nor is this right, inconsistent with a co-existing right to maintain this action, or trespass, for the same injury, on the part of the holder of the general property in the same chattels; *Ely v. Ehle*, 3 Comstock, 506; *Root v. Chandler*, 10 Wend. 310; *Spevin v. Mitchell*, 9 Alabama, 744; *Hart v. Hyde*, 5 id. 330; *Thorp v. Burling*, 11 Johnson, 285; *Drake v. Reddington*, 9 New Hampshire, 243; *Tucker v. Gordon*, 9 Vermont, 330, although a recovery by one will be a bar, to any action by the other. *Smith v. James*, 7 Cowen, 329. It is, however, well settled, that trover cannot be maintained on a special property, without possession or the right of possession, and that when goods pledged to one man are subsequently pledged to another, the latter cannot recover for their wrongful conversion by a third person, during the continuance of the lien created by the first pledge. *Bush v. Lyon*, 9 Cowen, 54. And the court expressed the opinion, that the law would have been the same, had the goods been sold to the plaintiff, instead of being pledged, because he would have taken a mere right of property, without either possession or a right to possession. It was said, in like manner, by TILGHMAN, C. J., in *Mathers v. Trinity Church*, 3 S. & R. 512, that although a constructive possession, or a mere right to possession, may be sufficient, when the property is general, yet that when it is special, the possession must be actual. But an opposite dictum, by C. J. EYRE, in *Fowler v. Down*, 1 Bos. & Pul. 45, that actual possession is not necessary if there be a right to possession, and that a factor may sue

in trover, for the goods consigned to him by his principal, before he receives them, seems to present the true rule of law.

But although the right of a party, having either a general or special property in chattels, to bring an action of trover is undoubted, yet this is only because both these forms of property may exist in the same chattel, as present and vested interests, in different persons, at the same time. Thus where property is held by a factor, under a right of lien, or by an agent acting under a special or general authority; the title of the general owner, and the qualified title of the bailee, co-exist simultaneously; and, either, will support the averments of possession and property in the declaration. But where, the owner instead of a bailment, makes a grant in the nature of a lease or hiring for a definite period, the grantee takes the absolute property in the chattel granted, for that period; and although a reversionary interest, equally absolute, exists in the grantor, yet his present property is entirely divested. It is, accordingly, well settled, that where a chattel has been leased, and the owner retains a mere reversionary interest, he cannot maintain trover for its conversion by a third person. *Nations v. Hawkins*, 11 Alabama, 859; *Vincent v. Cornell*, 13 Pick. 296; *Fairbank v. Phipps*, 22 id. 535.

And as trespass must be founded both on property and possession, the same reasoning applies still more strongly against the right to bring trespass. *Fitler v. Shotwell*, 7 W. & S. 14; *Moggridge v. Eveleth*, 9 Metcalf, 233; *Lunt v. Brown*, 1 Shepley, 236. Nor will such a reversionary interest justify a recourse to replevin, which, although founded in property, can only be employed where there is an immediate right to possession. *Wheeler v. Train*, 3 Pick. 258; *Collins v. Evans*, 15 id. 63. The only remedy, therefore, open to the owner during the continuance of the lease, is an action on the case, setting forth the nature of his interest, and claiming damages accordingly. *Ayer v. Bartlett*, 9 Pick. 156. But if the lessee undertake to transfer the title to the chattel by an absolute transfer or sale, he will forfeit his interest under the lease, and the owner will be entitled to bring trover or replevin immediately against the purchaser. *Sanborn v. Colmer*, 5 New Hampshire, 14; *Cooper v. Willomatt*, 1 C. B. 172; *Grant v. King*, 14 Vermont, 367. The effect will be the same, if the chattel be destroyed by the bailee, or any other act done by him which determines his right under the bailment. *Bryant v. Wardell*, 2 Exchequer, 479. *Ripley v. Dolbier*, 6 Shepley, 382. Where, however, the lease of the chattel, is coupled with an executory agreement for an absolute transfer of the title on the fulfilment of certain stipulations, it will take effect as a conditional sale, and the lessee may assign the possession of the chattel, and his interest under the contract, to a third person, without rendering either himself or the assignee liable in trover. *Vincent v. Cornell*. And no sale or conversion of the chattel, however entire or wrongful, can enure as a forfeiture of the lease or authorise the lessor to bring replevin or trover, unless it be the act of the lessee himself or with his assent. And in some of the cases, the lessor has been refused a recovery in trover, notwithstanding an absolute sale or conversion of the chattel by the lessee, and compelled to seek redress in a special declaration in case. *Andrews v. Shaw*, 4 Devereux, 70; *Davis v. Mobly*, 4 Devereux & Battle, 323. It would seem, however, that the owner of a chattel will not be debarred from a recovery in trover or replevin, by

hiring it at a fixed rate of compensation, if he reserve the right to resume possession of it when he thinks fit, instead of departing with his whole interest for the time being. *Drake v. Reddington*, 9 New Hampshire, 243. *Batchelder v. Warren*, 19 Vermont, 171. Nor will the existence of a lease of the realty, defeat the right of the lessor to bring trover for fixtures severed by the tenant, because the mere severance takes them out of the operation of the lease, and entitles the lessor to take possession of them immediately. *Farrant v. Thompson*, 2 Dowling & Ryland, 1.

It follows from what has been said, that although a right of possession as against the defendant, may be sufficient to enable the plaintiff to sustain replevin, and to entitle him to a verdict on a traverse of the averment of property in the declaration, yet, that when he has neither a right of property nor a right of possession at the time of bringing the action, the verdict must be against him. The usual judgment on such a verdict, is for a return in addition to costs and damages, even when the defendant has pleaded property in a stranger, and shown no right or interest in himself. For as the plaintiff cannot be allowed to retain goods, which he has gained by the improper use of legal process, the law restores them to the custody of the party from whom they were taken, without prejudice to the claims of third persons. But where it is apparent, under these circumstances, that an order for a return would defeat the purposes of justice, it will not be made, and the judgment will be entered simply for damages. Thus, when the averment of property in the declaration, is disproved by showing a lease or bailment for a term certain, to the defendant or a third person, which expires before judgment, leaving a present and vested right of property in the plaintiff, the court may refuse to compel a return which would be useless, and confine the defendant to the compensation awarded by the jury, for the unlawful taking and detention of the property under the replevin. *Wheeler v. Train*, 4 Pick. 168. The same principle will apply in every case, where the right relied on as disproving that of the plaintiff, is temporary in its nature, and expires before judgment, as when it consists in an attachment subsisting at the time of action brought, and dissolved afterwards. *Simpson v. McFarland*, 18 Pick. 433. The court may also refuse a return, when it has been rendered impossible by the act of the law, without the default of the plaintiff, as when the property has been sold under the operation of an attachment antecedent to the action, in which case the plaintiff will be discharged on payment of the costs and damages, and the defendant remitted to the fund arising from the sale. But a successful traverse of the property of the plaintiff, gives the defendant a *prima facie* right to a return which cannot be denied, unless injustice would arise from enforcing it. It is not enough, therefore, that the right of property set up in bar of the plaintiff, has expired, it must also be shown that the defendant has a present and vested right, of which he could not avail himself at the trial. Thus, where the plaintiff brought replevin for a yoke of oxen which he had leased to a third person, in whose hands they had been attached by the defendant, the court directed a nonsuit at the trial, on the ground that the plaintiff had no present right to the oxen, by his own showing, at the time when the replevin issued, and afterwards gave judgment for a return, although the lease had expired, because it was not sufficiently plain on the evidence, that the general right of property was in the plaintiff. *Collins v. Evans*, 15 Pick. 53.

Either trover or replevin may be maintained for things which have formed part of the realty, if they are carried away, or converted to the defendant's use, after severance from the freehold. But the plaintiff should have actual or constructive possession of the land; and he cannot recover, if the series of acts, in which the severance and conversion have occurred, have been sufficient to create an adverse possession in the defendant, although during a period short of twenty-one years. To hold the law otherwise, would be to bring the title to land in dispute in a transitory action, when the plaintiff has not previously adopted proper means for reducing his title to possession; for if the general right to the land, unaccompanied by possession, were to be held as giving, first a general property in whatever might be severed from the freehold, and then a consequent constructive possession, the only question in an action of trover or replevin, brought against an actual possessor, would be as to the party, in whom the title to the realty lay. If, however, the land be not in the possession of the defendant, but unoccupied, then evidence of title may be received on the part of the plaintiff; since, in that case, the title draws to it a constructive possession. On the whole, it would seem, that the right to maintain these actions, for things severed from the freehold, must reside in the party who has the possession of land, whether actual or constructive, with this exception, that where there is an actual adverse possession in the defendant, a constructive possession cannot exist in the plaintiff, and, consequently, that the latter is not entitled to recover.

It is well settled, therefore, that although trover or replevin will not lie for chattels severed from land in the adverse possession of the defendant or a third person; *Mather v. Trinity Church*, 3 S. & R. 509; *Barker v. Howell*, 6 id. 476; *Brown v. Caldwell*, 10 id. 114, yet that either of these forms of action or trespass, may be brought after entry by the plaintiff, or a judgment in ejectment in his favour, which reverts the possession by relation from the period at which the right first accrued, and entitles him to recover, for all injuries to the freehold while he was out of possession. *Coke Lit.* 257; *Elliott v. Powell*, 10 Watts, 454; *Heath v. Ross*, 12 Johnson, 140; *Moers v. Waite*, 3 Wend. 104; *Morgan v. Varick*, 8 id. 597; *Baker v. Rich*, 3 Denio, 79. And although a reversioner cannot bring trespass *quare clausum fregit*, for the severance of trees or other fixtures, from the land, while in the possession of a tenant, he may maintain either trespass *de bonis asportatis* or trover, for the things themselves after they are severed, because both the right of possession and the right of property vests in him immediately upon the severance. *Higgon v. Mortimer*, 6 Car. & P. 616; *Farrant v. Thompson*, 2 Dow. & Ry. 1. The distinction, in this respect, between trespass *de bonis asportatis*, and trespass *quare clausum fregit*, seems to have been overlooked, in *Baker v. Rich*, where it was held, that a vendee may maintain trover, for trees cut down and sold by the vendor before the delivery of possession, but not trespass *de bonis asportatis* or replevin.

Neither trover nor replevin can be supported for a chose in action, such, for instance, as a share of stock; *Sewall v. The Lancaster Bank*, 17 S. & R. 285; although they may be well brought, for the paper or certificate under or by which the existence or character of a chose in action is evidenced; *Comparet v. Burr*, 5 Blackford, 419; *Pierce v. Vandyke*, 6 Hill, 613. And when so brought, the amount of the recovery will not be limited to

the value of the paper or document in controversy, when considered with reference to the materials or labour employed in or upon it, but will extend to that of the claim or debt, of which it is the evidence. And although the action is founded on tort, anything tending to reduce the debt by proving a set off, or a failure of consideration, will be admissible in evidence; *Romig v. Romig*, 2 Rawle, 241. This doctrine evidently makes the chattel nominally sued for, a mere incident, and that of which it is the evidence, the true object of the suit. In *Matthews v. Sherwell*, 2 Taunton, 440, trover was brought by the assignees of a bankrupt against the defendant, for a check which the bankrupt had drawn and delivered after the act of bankruptcy, but before the commission had issued. A verdict was given at the trial for the amount of the check, which had been paid to the defendant by the bankers on whom it was drawn. It was contended for the plaintiffs, on a subsequent motion to set aside the verdict and enter a non-suit, that they were entitled to recover the sum received on the check, and if not, at least to nominal damages for the conversion of the paper on which it was written. But the court held, that as the check was void as against the assignees, they were not legally prejudiced by its payment, and that the value of the paper was too inconsiderable to constitute a cause of action. And as an action of trover for an instrument which constitutes the evidence of a debt, may be defeated by disproving the debt, or showing that the plaintiff is not entitled to it, so when this is not done the recovery will extend to the full amount of the debt; *Alsager v. Close*, 10 M. & W. 576; *Ingals v. Lord*, 1 Cowen, 240; *Tilden v. Brown*, 14 Vermont, 164.

The finder of an instrument by which a debt or other chose in action is evidenced, does not ordinarily acquire any interest in the chose itself, or in the contract in which it originated. It is therefore doubtful whether he can maintain trover or replevin, against a third person by whom it is wrongfully detained or taken. In *McLaughlin v. Waite*, 9 Cowen, 670, the plaintiff found a lottery ticket which had drawn a prize, and delivered it for safe keeping to the defendant, who received the amount of the prize and appropriated it to his own purposes. It was held under these circumstances, that the plaintiff could not maintain an action for money had and received, and much doubt was expressed whether he could have recovered in trover. The ground taken by the court was, that finding the ticket did not give the plaintiff an interest in the contract of which it was the evidence, and that the ticket itself was a mere incident to the contract. It would, notwithstanding, appear, that when an instrument payable to bearer, and negotiable by delivery, is wrongfully taken or withheld from the finder, he must be entitled to maintain trespass or trover against the wrong doer.

Trespass cannot be maintained without proof of an injury to possession, and replevin stood, until recently in New York, on the same footing in this respect with trespass. It is, however, universally admitted, that actual possession is not necessary, and that either trespass or replevin may be sustained on a constructive possession. Thus a vendee of goods may recover in trespass, before they are delivered, against any one who takes them from the custody of the vendor; *North v. Turner*, 9 S. & R. 244, because the right of property in chattels personal, is clothed by the law with a constructive possession, even when there never has been any actual possession. And this rule holds good, not only when the actual possession is consistent with

that of the true owner, but when it is adverse. It is well settled, therefore, that the owner of goods may maintain trespass, against any one by whom they are unlawfully taken, whether from his own possession or that of a prior trespasser.

But much doubt has been entertained, whether a defendant can be made liable either in trespass or any other form of action, for simply receiving goods wrongfully delivered to him by the person in actual possession. It was held in *Storm v. Livingston*, 6 Johnson, 44, that where goods are sold by a bailee, the vendee is not liable in trover, without proof of a subsequent conversion, by a refusal to deliver them to the owner on demand or in some other manner. It was subsequently decided in *Marshall v. Davis*, 1 Wend. 111, that as the vendee is not liable under such circumstances in trover, he cannot be so in trespass or replevin. This decision was followed in *Nash v. Mosher*, 19 Wend. 431; and *Barrett v. Warren*, 3 Hill, 350, where it was held, that proof of property in the plaintiff and possession in the defendant, is not sufficient to raise a presumption of an unlawful taking by the latter, or to shift the burden of proof and compel him to show how he came by the possession, and that when the plaintiff is out of possession, he cannot recover without proving that the goods were taken by the defendant, and not delivered to him by the party in possession. But in the subsequent case of *Peirce v. Vandyke*, 6 Hill, 614, it was held, that proof of a rightful possession, and a wrongful taking from that possession, is sufficient to sustain trespass or replevin not only against the first taker, but any third person into whose hands the goods may come subsequently; and to cast on the latter the burden of proving that he obtained them lawfully, and without knowledge of the title of the true owner.

The true rule, therefore, would seem to be that, although the defendant cannot be made liable in any form of action, for simply consenting to receive personal property from a party in possession, when he is ignorant that the latter is guilty of a wrong in delivering it, yet that when he receives it with full knowledge that the delivery is wrongful, he becomes a sharer in the wrong, and will be liable to all the consequences attached to a wrongful taking. In *Barrett v. Warren*, COWEN, J., who dissented from the rest of the court, attempted to narrow the right of exemption still further, and to confine it to those cases where the delivery is made, as the result of a bond fide purchase. But as the doctrine thus contended for, would render a bailee liable in trespass, for receiving goods for transportation or safe keeping, in case the title of the bailor proved defective, it is unnecessarily severe, and was rightly overruled by the majority of the court.

When the sale and delivery of goods are induced by fraud, the vendor may maintain trespass or replevin, against the vendee, or a third person by whom they have been taken from the latter. For, as under these circumstances he is entitled to treat the sale, and all that is done under, it as wholly void, neither the vendee nor those claiming under him, can set it up as a bar to any right which would have been valid had it not been made; *Cary v. Hotailing*, 1 Hill, 311. And it has even been held, that a levy by the sheriff under these circumstances, on the property while in the hands of the vendee, will render him liable in trespass to the vendor; *Acker v. Campbell*, 23 Wend. 372; *Ash v. Putnam*, 1 Hill, 302.

It is, however, well settled, that as a fraudulent sale is voidable only, and not

void, the vendor cannot set it aside to the injury of third persons who have made expenditures under it, on the supposition that it is binding. A purchaser for value and without notice from the vendee, will therefore acquire a good title, and cannot be made liable in any form of action by the vendor; *Buffington v. Gerrish*, 15 Mass. 156; *Mowry v. Walsh*, 8 Cowen, 238. But to produce this effect in New York, there must be an absolute purchase for a new and valuable consideration, and not a mere assignment or transfer, as security for an antecedent debt; *Root v. French*, 13 Wend. 5. The extinguishment or satisfaction of a precedent debt is, however, regarded as a valuable consideration in most of the other states of the Union, and will therefore, no doubt, sustain a bona fide transfer of property to the creditor, even when it has been fraudulently acquired by the debtor. And in *Gilbert v. Hudson*, 4 Maine, 345, a levy on goods fraudulently purchased under an execution issued by a creditor, whose debt was contracted subsequently to the purchase, was held good against the vendor, on the ground that he was not entitled to disaffirm the sale, after third persons had made advances to the vendee under the belief that it was valid. A similar view was taken in *Bradley v. Obear*, 10 New Hampshire, 448.

*COLLINS v. BLANTERN. [153]

EASTER.—7 GEORGE 3. C. B.

[REPORTED 2 WILSON, 341]

Illegality may be pleaded as a defence to an action on a bond.

SHROPSHIRE, *to wit*. Robert Blanter, late of Rodenhurst, in the said county, yeoman, was summoned to answer Edward Collins of a plea, that he render to him seven hundred pounds which he owes to and unjustly detains from him, &c. Whereupon the said Edward Collins, by John Leake his attorney, says, that whereas the said Robert Blanter on the sixth day of April, which was in the year of our Lord 1765, at Rodenhurst aforesaid in the county aforesaid, by his certain writing obligatory acknowledged himself to be held and firmly bound unto the said Edward Collins in the aforesaid sum of seven hundred pounds, to be paid to the said Edward Collins when he should be thereunto required; nevertheless, the said Robert Blanter (although often thereunto required) hath not paid the said seven hundred pounds to the said Edward Collins, but hath hitherto refused and still doth refuse to pay the same to the said Edward Collins, wherefore he says that he is the worse, and hath damages to the value of ten pounds, and therefore he brings suit, and so forth; and he brings here into court the

aforesaid writing obligatory, which testifies the said debt in form aforesaid, the date whereof is the same day and year above mentioned.

And the said Robert, by George Greene, his attorney, comes and defends the wrong and injury, when, &c., and craves *oyer* of the said supposed writing obligatory, and it is read to him in these words: *to wit*, Know all men by these presents, that we, John Walker of Forton in the county of Stafford, yeoman, Thomas Walker of *Draycott-in-the-Moors in the [*155] said county of Stafford, yeoman, and Robert Blantern of Rodenhurst in the county of Salop, yeoman, are held and firmly bound to Edward Collins of Brecond in the said county of Stafford, surgeon, in the sum of seven hundred pounds of good and lawful money of Great Britain, to be paid to the said Edward Collins, or his certain attorney, executors, administrators, or assigns, for which payment, to be well and faithfully made, we bind ourselves and each and every of us jointly and severally, our and each and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals; dated this sixth day of April, in the fifth year of the reign of our sovereign lord George the Third, by the grace of God, of Great Britain, France and Ireland, king, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and sixty-five; he also craves *oyer* of the condition to the said supposed writing obligatory, and it is read to him in these words; *to wit*, The condition of this obligation is such, that if the above-bounden John Walker, Thomas Walker, and Robert Blantern, our heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named Edward Collins, his executors, administrators, or assigns, the full sum of three hundred and fifty pounds of good and lawful money of Great Britain, upon the sixth day of May next, without fraud or further delay, then this obligation to be void and of none effect, or else to remain in full force and virtue; which being read and heard, the said Robert saith, that the said Edward ought not to have his aforesaid action thereof against him the said Robert, because he says that the said supposed *writing obligatory is not his deed*, and of this he puts himself upon the country, &c. And for further plea in this behalf the said Robert, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said Edward ought not to have his aforesaid action thereof against him, because he says that before, and at the time of the making of the above-mentioned supposed writing obligatory, and also before and at the time of the making of the promissory note hereafter mentioned, *to wit*, at Rodenhurst aforesaid, the said John Walker and Thomas Walker [*156] in *the said supposed writing obligatory named, and also one Robert Walker, one Thomas Scillitoe, and one John Cullick, stood respectively indicted in a due course of law on the prosecution of one John Rudge, by five several and respective indictments, for wilful and corrupt perjury, to which said several and respective indictments the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick, had respectively pleaded the several pleas of not guilty before the making of the said supposed writing obligatory, and also before the time of the making of the said note hereafter mentioned; and the traverses of the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick respectively on the respective indictments were, at the time of

the making of the unlawful, wicked, and corrupt agreement hereafter mentioned, and of the note hereafter mentioned, and also of the above supposed writing obligatory, *to wit*, on the day whereon the said supposed writing obligatory was made, about to come on to be tried at the assizes then, *to wit*, on that day, being, and continuing to be, held at Stafford for the county of Stafford, and that the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick, so standing indicted on the prosecution of the said John Rudge, and the said traverses so being about to be tried as aforesaid, it was on the said sixth day of April in the year 1765, in the said writing obligatory mentioned, *to wit*, at Rodenhurst aforesaid, unlawfully, wickedly, and corruptly agreed by and between the said John Rudge, the prosecutor of the indictments aforesaid, the said Edward Collins the plaintiff, and the said John Walker, Thomas Walker, Robert Walker, Thomas Scillitoe, and John Cullick, the defendants in these respective indictments, that the said Edward Collins the now plaintiff should give to the said John Rudge, the prosecutor of the indictments aforesaid, his note in writing, commonly called a promissory note, as and for value received, to bear date on a certain day and in a certain year now past, *to wit*, on the day and year last mentioned, for a large sum of money, *to wit*, the sum of three hundred and fifty pounds, payable to the said John Rudge thereafter, *to wit*, one month after the date thereof, as a consideration for his the said John Rudge's *not appearing to give evidence as prosecutor on the trial of any or either of the traverses aforesaid, against [*157] any or either of the defendants, and that in consideration thereof the said John Rudge should not, nor would appear at the trial of the traverses aforesaid as prosecutor, and should not, nor would give evidence on any or either of the said indictments against any or either of the parties so standing indicted as aforesaid, and that the said John Walker, Thomas Walker, and Robert Blantern the now defendant should seal, and as their deed deliver unto the said Edward Collins their bond or obligation of the same date with the said note in the penal sum of seven hundred pounds, with a condition thereunder written for the payment of three hundred and fifty pounds on the sixth day of May then next and now elapsed, as an indemnity to him the said Edward Collins for the giving of such note; and the said Robert Blantern further saith, that in pursuance and in part performance of the said unlawful, wicked, and corrupt agreement, the said Edward Collins did then and there, before the trial of the said traverses, or of any or either of them, *to wit*, on the said 6th day of April in the year 1765 aforesaid, at Rodenhurst aforesaid, make, give, and deliver unto the said John Rudge his certain note in writing, commonly called a promissory note, bearing date as aforesaid, *to wit*, on the day and in the year last mentioned, for the sum of three hundred and fifty pounds, as for value received, payable to the said John Rudge thereafter, *to wit*, one month after the date thereof, according to the tenor and effect of the agreement aforesaid, as a consideration for his the said John Rudge's not appearing as prosecutor, and for his not giving evidence as prosecutor on the trial of any or either of the traverses aforesaid, against any or either of the parties so indicted as aforesaid; and that in pursuance of the said unlawful, wicked, and corrupt agreement, and according to the tenor and effect thereof, the said John Rudge then and there accepted, had and received the said note of and from the said Edward

Collins for the purpose aforesaid, and in part performance of the aforesaid unlawful, wicked, and corrupt agreement; and that in further pursuance and completion of the said unlawful, wicked, and corrupt agreement, and according to the terms and effect thereof, the said John Walker, Thomas Walker, and Robert Blanterne the now defendant, did then and there immediately *after the giving of the said note, and before the trial of the [*158] traverses aforesaid, or of any or either of them, *to wit*, on the said 6th day of April in the year 1765 aforesaid, seal, and as their deed deliver unto the said Edward Collins the said writing, now brought here into court, with the condition above specified, as an indemnity to him the said Edward Collins for the giving of such note so given for the cause aforesaid; and the said Robert Blanterne further saith, that the said Edward Collins then and there at the time of the giving of the said note to the said John Rudge well knew for what cause and consideration the same was so given, and that the said Edward Collins, at the time of the sealing and delivering to him of the writing now brought here into court, took, accepted, and received the same of and from the said John Walker, Thomas Walker, and Robert Blanterne the now defendant, as an indemnity against the aforesaid note, with this, that the said Robert Blanterne doth aver, that the said supposed writing obligatory now brought here into court was given for such consideration as aforesaid, and no other whatsoever; and that he the said Robert Blanterne and the said John Walker and Thomas Walker mentioned in the said supposed writing obligatory were not, nor were, nor was any or either of them, at the time of the making of the aforesaid note, or at the time of the sealing or delivering of the said supposed writing obligatory to the said Edward Collins, or at the time of his acceptance of the said supposed writing obligatory, in anywise indebted to the said Edward Collins or to the said John Rudge in any sum of money, or in any other respect whatsoever: and so the said Robert Blanterne saith, *that the said supposed writing obligatory* so made and given by them the said Robert Blanterne, John Walker, and Thomas Walker, for the cause aforesaid, *is void in law*, and this he is ready to verify; wherefore he prays judgment if the said Edward Collins ought to have his aforesaid action thereof against him, &c. And for further plea in this behalf, the said Robert Blanterne by like leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said Edward ought not to have his aforesaid action thereof against him, because he says that the said supposed [*159] writing obligatory was given by the said Robert Blanterne, *John Walker, and Thomas Walker, to the said Edward, *to wit*, at Rodenhurst aforesaid, to indemnify the said Edward against a certain note in writing of the said Edward's, commonly called a promissory note, then, *to wit*, on the said sixth day of April in the year 1765 aforesaid, *to wit*, at Rodenhurst aforesaid, given by the said Edward Collins to the said John Rudge, as for value received, bearing date on a certain day and in a certain year now past, *to wit*, on the day and year last aforesaid, whereby the said Edward promised to pay to the said John Rudge a certain sum of money, *to wit*, the sum of three hundred and fifty pounds, as for value received, at a certain time thereafter, *to wit*, one month after the date of the said note, which said note still remains unpaid, and that the said Edward Collins hath not been in anywise damnified by means of the said note, or of the giving

of the same; and this the said Robert Blantern is ready to verify; wherefore he prays judgment if the said Edward ought to have his aforesaid action thereof against him, &c.

JOHN GLYNN.

And the said Edward Collins, as to the said plea of the said Robert by him first above pleaded in bar, and whereof he hath put himself upon the country, says, that he the said Edward doth the same likewise; and the said Edward, as to the said plea of the said Robert by him secondly above pleaded in bar, says that he, by reason of anything by the said Robert above in that plea alleged, ought not to be barred from having and maintaining his said action against the said Robert, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said Edward from having his said action against the said Robert, to which said plea, in manner and form above pleaded, the said Edward Collins hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient plea in this behalf, the said Edward Collins prays judgment and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c.; and the said Edward Collins, as to the said plea of the said Robert by him lastly above pleaded in bar says, that he by reason of anything, by the said Robert, above *in that plea alleged, ought not to be barred from [*160] having and maintaining his said action against the said Robert, because he says that the same plea, in manner and form as the same is above pleaded, and the matters therein contained, are not sufficient in law to bar the said Edward from having his said action against the said Robert, to which said plea, in manner and form above pleaded, the said Edward Collins hath no need, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said Edward Collins prays judgment, and his debt aforesaid, together with his damages, by occasion of the detaining that debt, to be adjudged to him, &c.

G. NARES!

And the said Robert saith, that the said plea by him the said Robert secondly above pleaded in bar, in manner and form as the same is above pleaded, and the matters therein contained, are sufficient in law to bar the said Edward from having his said action against the said Robert, which said plea, and the matters therein contained, he the said Robert is ready to verify and prove, as the said court shall award; and because the said Edward hath not in any manner answered thereto, nor in any wise denied the same, he the said Robert prays judgment, and that the said Edward may be barred from having his said action thereof against him the said Robert, &c., and because the justices here will advise of and upon the premises before that they give judgment thereupon, day is given to the parties aforesaid here until ——— to hear their judgment thereupon, so that the said justices here are not yet ready to give judgment thereon; and the said Robert further saith, that the said plea by him the said Robert lastly above pleaded in bar in manner and form as the same is above pleaded, and the matters

therein contained, are sufficient in law to bar the said Edward from having his said action against him the said Robert, which said plea, and the matters therein contained, he the said Robert is ready to verify and prove, as the court shall award: and because the said Edward hath not in any manner answered thereto, nor in any wise denied the same, he the said Robert prays judgment, and that the said Edward may be barred from having his said action thereof against him the said Robert, &c.

JOHN GLYNN.

[*161] *And because the justices here advise of and upon the premises before that they give judgment thereupon, day is given to the parties aforesaid here until ——— to hear their judgment thereupon, for that the said justices here are not as yet ready to give judgment thereon; and in order to try the issue between the parties aforesaid above joined to be tried by the country, the sheriff is commanded that he cause to come here in eight days of the purification of the blessed Mary, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

COLLINS v. BLANTERN.

THIS case was well argued last Hilary term by Serjeant Nares for the plaintiff and Serjeant Glynn for the defendant, and in this term by Serjeant Burland for the plaintiff, and Serjeant Jephson for the defendant.

On the side of the plaintiff it was insisted that the condition of the bond being singly for the payment of a sum of money, the bond is good and lawful; and that no averment shall be admitted that the bond was given upon an unlawful consideration not appearing upon the face of it, and therefore that the special plea is bad; upon the first argument these cases were cited for the plaintiff, Carth. 252; Comb. 121, Thomson v. Harvey; Lady Downing v. Chapman,† C. B., Mich. 6 Geo. 2 (now depending in error in B. R.); 1 Leon. 73, 203; Jenk. 106; Carth. 300; Comb. 245; Empson v. Bathurst, 1 Mod. 35; Hutton, 52; Vent. 331; Cro. Jac. 248.

For the defendant it was insisted, that the averment of the wicked and unlawful consideration of giving the bond, might well be pleaded, although it doth not appear upon the face of the deed; and that anything which shows an obligation to be void, may well be averred, although it doth not appear on the face of the bond, as *duress*: that it was delivered as an *escrow* to be delivered upon a certain condition to the obligee; *infancy*, *coverture*, or upon a *simoniacal contract*, *maintenance*, &c.; and although it is said there is a difference between bonds being void at common law, and by statute, yet it is otherwise, for the common law was originally by statutes which are not now in being; the general rule that you cannot plead any matter *dehors* the [*162] deed, doth not apply to this case; the true meaning of that rule is, *that you cannot allege anything inconsistent with and contrary to the deed, but you may allege matter consistent with the deed; the bond in the present case is for the payment of money. The plea admits this, and the averment alleges upon what consideration that money was to be paid, and therefore is not inconsistent or contradictory to the condition of the bond; this rule of pleading, applied to the cases of *simony*, *duress*, *cover-*

† This case will be found reported 9 East, 414, in nota.

ture, infancy, &c., is on the side of the defendant in this case. In bonds not to follow a trade the defendant may aver the consideration to avoid the bond. *Downing v. Chapman* is not like this case, that was an averment contradictory to the condition of the bond, and amounted to a defeasance, the present condition is consistent with the condition, which is for payment of money, and only shows the bad consideration upon which the money was to be paid.

Upon the first argument the Lord Chief Justice broke the case, and said that this was very different from the case of *Lady Downing v. Chapman*, and therefore he would consider it wholly independent thereof; and said, as he was then advised, he thought there was no difference between an act being void by statute or the common law, that the principle the judges heretofore have gone upon for making the distinctions (in the books) is not a sound one; for wherever the bond is void at law or by statute, you may show how it is void by plea, and that in truth it never had any legal existence. That the statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing; a statute says such a thing shall be avoided by plea, why therefore may not a deed executed upon a consideration against the common law be avoided by plea? In *duress, simony, infancy, coverture, &c.* the plea discloses that in truth there never was any obligation. The principle, upon which courts of justice must go, is, to enforce the performance of contracts not injurious to society; and it would be absurd to say that a court of justice shall be bound to enforce contracts injurious to, and against the public good. No man shall come into a court and say, "Give me a sum of money which I desire to have contrary to law;" there can be no doubt but that the compounding *a prosecution for wilful and corrupt perjury is a very great offence to the public, and whether it was between some [163] persons who are strangers to this action, it is not material.

Bathurst, Justice, (upon breaking this case,) said, that the case of *Lady Downing v. Chapman* was not like it.†

Gould, Justice, (upon the breaking this case,) said, that he differed with the rest of the court in the judgment given in *Lady Downing v. Chapman*, and that upon the whole of that case he thought the averment that the bond there given was upon a wicked consideration, ought to have been admitted; he said that if this case at bar had been upon a simple contract, the court would not have hesitated a moment, but would have given judgment that it was bad; and shall the court sanctify a deed made upon a wicked consideration because it is sealed? To have a deed which ought to be for a man's good turned to evil purposes, he thought very wrong, and that there was no distinction, whether a deed be void at law or by statute.

Upon the second argument of the case at bar in this term, the Lord Chief Justice delivered the opinion of the whole court (and pronounced judgment for the defendant) to the following effect.

Lord Chief Justice *Wilmut*: Four questions are to be considered:

1st. Whether it doth not appear from the facts alleged in the second plea, that the consideration for giving the bond is an illegal consideration?

2nd. Whether a bond given for an illegal consideration is not clearly void at common law *ab initio*?

3rd. Supposing the bond is void, whether the facts disclosed in the plea to show it void, can by law be averred and specially pleaded?

4th. If they can be pleaded: then whether this second plea is duly, aptly, and properly pleaded?

1. As to the first question, it hath been insisted for the plaintiff that he was not privy to the bargain and agreement, so, as to him there appears to be nothing illegal done by him. But we are all clearly of opinion, that the whole of the transaction is to be considered as one entire agreement; for the bond and note are both dated upon the same day, for payment of the same sum of money on the same day; the manner of the transaction was to [*164] gild over *and conceal the truth; and whenever courts of law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and show the transactions in their true light. This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies. The promissory note was certainly void; what right then hath the plaintiff to recover upon this bond, which was given to indemnify him from a note that was void? They are both bad, the consideration for giving them being wicked and unlawful.

2. As to the second point, we are all of opinion that the bond is void *ab initio*, by the common law, by the civil law, moral law, and all laws whatever; and it is so held by all writers whatsoever upon this subject, except in one passage in Grotius, lib. 2, cap. 11, sect. 9, where I think he is greatly mistaken, and differs from Puffendorf, lib. 3, cap. 8, sect. 8, who, in my opinion, convicts the doctrine of Grotius. In Justin. Instit. lib. 3, tit. 20, *de turpi causa*, sect. 23. *Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.* And Vin-
 nius, in his commentary, carries it so far as to say, you shall not stipulate or promise to pay money to a man not to do a crime, *Si quis pecuniam, promiserit, ne furtum aut cædem faceret, aut sub conditione, si non fecerit, adhuc dicendum stipulationem nullius esse momenti; cum hoc ipsum flagitiosum est, pecuniam pacisci quo flagitio abstineas.* Dig. lib. 1, tit. 5. Code, lib. 4, tit. 7, to the same point.

This is a contract to tempt a man to transgress the law, to do *that* which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. *You shall not stipulate for iniquity.* All writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch [*165] it back again, you shall not have a right of action *when you come into a court of justice in this unclean manner to recover it back. *Procul O! procul este profani.* See Doct. & Stud. fo. 12, and chap. 24.

3. The third point is, Whether this matter can be pleaded? It is objected against the defendant that he has no remedy at law, but must go and seek

it in a court of equity: I answer, we are upon a mere point of common law, which must have been a question of law long before courts of equity exercised that jurisdiction which we now see them exercise; a jurisdiction which never would have swelled to that enormous bulk we now see, if the judges of the courts of common law had been anciently as liberal as they had been in later times: to send the defendant in this case into a court of equity, is to say there never was any remedy at law against such a wicked contract as this is: we all know when the equity part of the Court of Chancery began. I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem*: and I say, *est boni judicis ampliare justitiam*; therefore, whenever such cases as this come before a court of law, it is for the public good that the common law should reach them and give relief. I have always thought that formerly there was too confined a way of thinking in the judges of the common law courts, and that courts of equity have risen by the judges not properly applying the principles of the common law, but being too narrowly governed by old cases and maxims, which have too much prevented the public from having the benefit of the common law. It is now objected as a maxim, that the law will not endure a fact *in pais de hors* a specialty to be averred against it, and that a deed cannot be defeated by any thing less than a deed, and a record by a record, and that if there be no consideration for a bond it is a gift. I answer, that the present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such a manner as shews, that, in truth, the bond never had any legal entity, and if it never had any being at all, then the rule or maxim that a deed must be defeated by a deed of equal strength doth not apply to this case. The law will legitimate the showing it void *ab initio*, and this *can only be done by pleading. Nothing is due [*166] under such a contract, then the law gives no action, the *debitum* never existed; as much as if it had been said it shall be void because there is no debt; but if this wicked contract be not pleadable, it will be good at law, be sanctified thereby, and have the same legal operation as a good and an honest contract, which seems to be most unreasonable and unrighteous, and therefore, unless I am chained down by law to reject this plea, I will admit it, and let justice take place. What strange absurdity would it be for the law to say that this contract is wicked and void, and in the same breath for the law to say, You shall not be permitted to plead the facts which clearly shew it to be wicked and void! I am not for stirring a single pebble of the common law; and without altering the least tittle thereof, I think it is competent, and reaches the case before us. For my own part, I think all the cases upon acts of parliament, with respect to making bonds, &c., void, do warrant the receiving this plea and averment; there is no direction in such acts of parliament given for the form and manner of pleading in those cases; the end directs and sanctifies the means; I think there is no difference between things made void by act of parliament, and things void by the common law: statute law and common law both originally flowed from the same fountain, the legislature: I am not for giving any preference to either, but if to either, I should be for giving it to the common law. If there had ever been any idea or imagination, that such a contract as this could have

stood good at common law, surely the legislature would have altered it. There has been a distinction mentioned between a bond being void by statute, and at common law; and it is said, that in the first case if it be bad, or void in any part, it is void *in toto*; but that at common law it may be void in part, and good in part,† but this proves nothing in the present case. The judges formerly thought an act of parliament might be eluded if they did not make the whole void, if part was void. It is said, the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest.‡ 1 Mod. 35, 36. The case of a simoniacal contract may be reached by a plea; this proves the contract in the present case is to [*167] *be avoided at common law. The two cases in Leon. I set one against the other, and lay no stress upon either; *infancy, coverture, duress, &c.*, apply directly to this case; the plea shews a fact, which, if true, the bond never had any legal existence at all: as to a bond being a gift, that is to be repelled by shewing it was given upon a bad consideration; you may thereby repel the presumption of donation. It has been objected, that the admission of such plea as the present will strike at securities by deed; the answer is, that such a plea in the case of *infancy, gaming, duress, &c.*, &c., is admissible; what is the plea of non est factum? ninety-nine in one hundred of them are false; why then is such a plea to be received, and not the present plea? I see no reason why. I want no case to warrant my opinion, it is enough for me if there be no case against me, and I think there is not. In 1 Hen 7, 14, 16, b, Brian was then the Chief Justice, and his opinion there is founded upon what I have now said: Brian says, "I do not see in any case in the world how a man can avoid a specialty by a bare matter of fact concerning the same deed, *if so be that the deed was good at the commencement*;"§ but the present deed was never good. Moor, 564, is a simoniacal contract pleaded to a bond, which was held a bad plea, because *simony* was not *then* considered as contrary to our law, but at this day, *simony* being against our law, such a plea would be good. The case in Comb. 121, is nothing but an obiter dictum of a judge, to which I pay very little regard.

4. As to the fourth point, I think, the plea is rightly pleaded, and concludes very properly in saying, "And so the said bond is void." It seems to me that non est factum could not have been properly said at the conclusion of this plea after the special matter before alleged; non est factum means nothing but that, "I did not seal and deliver the bond;" and why non est factum may be pleaded by a feme covert I do not clearly see the reason, unless the law unites the husband and wife so closely, that it considers them as one and the same person, so that she without the husband cannot execute the deed. If two be jointly bound, and only one sued, he cannot plead non est factum, but ought to plead that another was bound with him. 5 Rep. 119, a. b. It is fair to tell the party what is your [*168] defence, upon what *point you put your case: I think the right way is to conclude the plea as it is, *And so the said writing obligatory is void, et hoc, &c.*, and so pray judgment if the plaintiff ought to have his action, &c., and do not see how he could say *non est factum*, when

† See post, in notis, p. 169.

‡ 1 Lev. 209. Hard. 464.

§ Cr. Eliz. 623, 697. Jenk. 108. Moor, 564.

he sealed; but supposing the plea might have been more aptly concluded, yet it is well enough upon a general demurrer, as this is,[†] and we are all of opinion that judgment may be for the defendant; that the averment pleaded is not contradictory, but explanatory of the condition; that the bond was void *ab initio*, and never had any existence. Judgment for the defendant *per totam curiam*.

The principle established in *Collins v. Blantern*, viz. that illegality may be pleaded as a defence to an action on a deed, has been so often recognised, and is so well settled as law, that it would be useless to enter upon any long discussion respecting it. "Since the case of *Pole v. Harrobin*, E. 22 G. 3, B. R., reported 9 East, 416, n., it has been generally understood that an obligor is not restrained from pleading any matter which shews that the bond was given upon an illegal consideration, *whether consistent or not with the condition of the bond*." Per Lord Ellenborough, L. C. J., *Paxton v. Popham*, 9 East, 421, 2. This, it will be remarked, carries the doctrine a step further than *Collins v. Blantern*, where the illegality averred in the plea was consistent with the condition. So too, a covenant that lands on which an annuity was secured were worth more than the annuity, does not estop grantor from shewing the reverse. *Doe d. Chandler v. Ford*, 3 A. & E. 654. See further *Prole v. Wiggins*, 3 Bing. N. C. 230. In *Paxton v. Popham*, the condition of the bond on which the action was brought stated that the defendants had borrowed of the plaintiff a sum of money, which was to run at *respondentia* interest on the security of certain goods shipped from Calcutta to Ostend, for the repayment of which on the arrival of the ship the bond was conditioned. *Plea*, that the bond was given to cover the price of goods sold by the plaintiffs [*168a] to defendants for the purpose of an illegal traffic from the East Indies, and that the plaintiffs knowingly assisted in preparing the goods for carriage upon such illegal voyage. On demurrer the court gave judgment for the defendants. *Accord. Greville v. Atkins*, 9 B. & C. 462. But the illegality must be made to appear clearly and with certainty upon the face

of the *plea*. *Hill v. Manchester and Salford Waterworks Company*, 2 B. & Ad. 552. [*Mittleholzer v. Fullarton*, 6 Q. B. 989; *Smith v. Mawhood*, 14 M. & W. 452; *Simpson v. Lord Howden*, 9 Cl. & Fin. 61; *Jones v. Waite*, 9 Cl. & Fin. 88.] Thus, if the statute of 9 Anne, cap. 14, against gaming, be pleaded to a bond, the *plea* must shew at what game the money was lost. *Colborne v. Stockdale*, 1 Str. 493.

With respect to the different species of illegality pleadable to an action on a bond, it is impossible to do more than particularise a few of those which have actually come under discussion in reported cases. They may be divided into two classes, viz., 1. Where the illegality exists at common law; and 2. Where it is occasioned by the enactments of some statute. Under the first class are comprehended Bonds the conditions of which militate against public policy: such, for instance, as bonds in general restraint of trade: the leading case on which subject, *Mitchel v. Reynolds*, will be found in this collection. See also *Coppock v. Bower*, 4 M. & W. 361, where an agreement to withdraw an election petition, in consideration of money, was held void. [As was also in *Kirwan v. Goodman*, 9 Dowl. 330, a warrant of attorney given by an attorney to induce a party to forbear proceeding against him on a penal rule; see *Exp. Critchley*, 3 Dowl. & L. 527; *Ward v. Lloyd*, 6 Man. & Gr. 85; 7 Scott, N. R. 499, S. C. In *Kerr v. Leeman*, 6 Q. B. 308, it is laid down that a prosecution merely for an offence which might be made the subject of a civil action, for instance a common assault, may legally be compromised; but that if the offence be in the whole or in part of a public nature, no agreement to stifle a prosecution for it can be valid; as, for instance, if the prosecution be for an assault and riot. And a promissory

[†] By St. 4 Anne, c. 16.

note given as an inducement to forbear such a prosecution, *e. gr.*, for cheating at cards, would be ordered by a court of equity to be given up; *Osbaldiston v. Simpson*, 13 Sim. 513. In order, however, to invalidate a contract on such grounds, the intention to interfere with the course of public justice must distinctly appear; *Ward v. Lloyd*, *supra*. In *Simpson v. Lord Howden*, 10 Ad. & El. 793; 9 Clk. & Fin. 61, an agreement between shareholders of a proposed Railway Company and a peer, that he should withdraw all opposition and give his assent to the line, and that they [*168*b*] should endeavour to alter the *course of the line, and if the bill were passed in the then session, should in six months after it received the royal assent, pay him 5000*l.* as compensation for the damage which his property would sustain, was holden valid; it not being shewn that the money was promised as a consideration for the peer's vote being given or withheld, or that the parties to the agreement intended to conceal it from other landholders on the line, or from the legislature, or that any fraud was committed or intended to be committed on any body.] A deed made in consideration of a *future* separation between husband and wife is void, *Hindley v. M. of Westmeath*, 6 B. & C. 200; [*Cocksedge v. Cocksedge*, 14 Sim. 244.] though it may be otherwise where the consideration is an immediate one. See *v. Thurlow*, 2 B. & C. 541.] In *Jones v. Wate*, 6 B. N. C. 341, the Court of Exchequer Chamber agreed that a husband cannot legally sell his consent to a separation, though there was a difference of opinion on the question, whether the facts stated upon that record amounted to such a sale. [But where separation is inevitable, a contract settling the terms on which it is to take place is lawful, *Wilson v. Muskett*, 3 B. & Ad. 743; *Jones v. Waite*, 9 Cl. & Fin. 68; *Papps v. Webster*, Cam. Scac. 149; and specific performance of such a contract may be decreed though there be no covenant by the trustees to indemnify the husband against the wife's debts, *Frampton v. Frampton*, 4 Beav. 257; *Clough v. Lambert*, 10 Sim. 174; *Jodrell v. Jodrell*, 9 Beav. 45; *Wilson v. Wilson*, 14 Sim. 405, where part of the consideration was to put an end to a suit for nullity of marriage on the ground of impotency of the husband; and the Vice-Chancellor Sir

Lancelot Shadwell decreed a specific performance, and restrained the husband by injunction from compelling the wife to proceed with the suit in the Ecclesiastical Court, though it was suggested that by the practice of that court no restitution of conjugal rights could be obtained pending the suit for nullity except by a proceeding in that suit. And, upon appeal to the House of Lords, notwithstanding an attack of the most general character and conducted with consummate ability upon the policy of separation deeds, the decree of the Vice-Chancellor was affirmed, and the law it is to be hoped at length finally settled, 1 House of Lords' Cases, 535.] Bonds given on an immoral consideration, *ex. gr.* to induce the obligee to live with the obligor in a state of fornication; *Walker v. Perkins*, 3 Burr. 1568; 1 Bl. 517; though it is otherwise, where the bond is given in consideration of past seduction, *Turner v. Vaughan*, 2 Wils. 339; *Nye v. Mosely*, 6 B. & C. 133; [even though the obligor does not cease to cohabit with the obligee. *Hall v. Palmer*, 3 Hare, 532.] A bond conditioned to procure subscriptions for 9000 shares in a patent, which, by its terms, was assignable to no greater number than five persons, has been held void for *illegality. *Duvergier v. Fel- lowes*, 10 B. & C. 827; 5 Bing. [*169] 248. In *Pole v. Harrobin*, 9 East, 416, n., the bond was to secure money agreed to be given for the discharge of a person unlawfully impressed, and was held void. [And so in *Arkwright v. Cantrell*, 7 A. & E. 565, was a grant conferring a judicial office on a person interested in the matters to be decided.]

The illegality is equally fatal when created by statute; thus a bond will be void for contravening the provisions of 9 Anne, cap. 14, sec. 1, against gaming; see *Colborne v. Stockdale*, 1 Strange, 493; *Mazzinghi v. Stephenson*, 1 Campbell, 291: those of 5 & 6 Edw. 6, c. 16, secs. 2 & 3, against the sale of certain offices; *Layng v. Paine*, Willes, 571; *Godolphin v. Tudor*, Salk. 468; *Law v. Law*, 3 P. Wms. 391; [*Hopkins v. Prescott*, 4 C. B. 678]: those of the statutes of 31 Eliz. cap. 6, and 12 Anne, stat. 2, cap. 12, against *simony*. See the great case of *Ffytche v. The Bishop of London*, 1 East, 437, et notas; *Fletcher v. Lord Sondes*, 3 Bing. 501; and see st. 7 & 8 G. 4, c. 25, and 9 G. 4, c. 94; see also the whole subject elabor-

ately discussed, *Fox v. Bishop of Chester*, 6 Bing. 1. So a bond is void, if it infringe the provisions of the statutes against Usury. See the notes to *Ferrall v. Shaen*, 1 Wms. Saund. 294. A contract to perform at an unlicensed theatre is void, *Levy v. Yates*, 8 A. & E. 129; and a contract may be illegal, although not in contravention of the specific directions of a statute, if it be opposed to the general policy and intent thereof, see *Staines v. Wainright*, 6 Bing. N. C. 174.

It is laid down in some of the older cases, that where there are several conditions to a bond, and any one of them is void by statute, the whole bond is void. *Norton v. Syms*, Moore, 856; *S. C. Hobart*, 14; *Lee v. Colshill*, Cro. Eliz. 599; *Layng v. Payne*, Willes, 571. In *Norton v. Syms*, a distinction is taken in this respect between covenants or conditions void by common law, and those that are void by statute. It is said, that when some covenants in an indenture are void *by common law*, and the others good, a bond for the performance of all the covenants may be good, so far as respects the covenants that are good. But otherwise, if any of the covenants be void by statute, there the bond is void *in toto*. See also 1 Mod. 35, 36; and per Buller, J., 2 T. R. 139; the expressions of the Lord Chief Justice in the text; see also *Newman v. Newman*, 4 M. & S. 68, and 5 Taunt. 746. However, the expressions used in the books, [*169a] which lay down that if one of the conditions of a bond be void by statute, the whole bond is void, must be understood to apply only to cases where the statute enacts that all instruments containing any matter contrary thereto shall be void, for otherwise the common law rule will apply, and that part only will be void which contravenes the provisions of the statute; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 87; *How v. Synge*, 15 East, 440; provided the good part be separable from, and not dependant on, the illegal part. *Biddell v. Leader*, 1 B. & C. 327; *Kerrison v. Cole*, 8 East, 231; see *Wood v. Benson*, 2 Tyrwh. 97. It is indeed clear that if a contract be made on several considerations, one of which is illegal, the whole promise will be void. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Waite v. Jones*, 1 Bing. N. C. 662; *Shackell v. Rosier*, 2 Bing. N. C. 646. [See acc. *Howden v. Haigh*,

11 A. & E. 1036.] And that whether the illegality be at common law, or introduced by statute. Per *Tindal, C. J.*, in *Shackell v. Rosier*. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the conditions (if it be a bond), or promises (if it be a contract of any other description), are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another. [See *Mallan v. May*, 11 M. & W. 653. *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 15 M. & W. 346.]

It may be here observed, that though the illegality of one of the considerations vitiates the contract, yet it is otherwise if one or more of them be merely void and nugatory, as, for instance, a promise by a man to pay his own just debts; for then the void consideration is a nullity, and the others which remain support the contract. See *Jones v. Waite*, 5 Bing. N. C. 341, and the authorities cited there by *Ellis arguendo*.

In order that a bond or other contract may be void for disobedience to a statute, it is not necessary that the statute should contain words of positive prohibition. "The principle," said *Tindal, C. J.*, in *De Begnis v. Armistead*, 10 Bing. 110, "is very clearly expressed by *Holt, C. J.*, in *Bartlett v. Vinor*, Carth. 252. 'Every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflict a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'" Accord. *Ferguson v. Norman*, 5 Bing., N. C. 80 [Cun-
dell v. Dawson, *4 C. B. 376]; [*169b] see too *Gas Light Comp. v. Turner*, 6 Bing. N. C. 324, 5 Ib. 666, where it was held that the covenants in a lease, expressed to be granted for a purpose forbidden by statute, could not be enforced, [and it was there made a question, whether the landlord could ever recover the land, which, however, it would seem he might, see *Tregoning v. Attenborough*, 7 Bing. 97; but see *Scarfe v. Morgan*, 4 M. & W. 270], and *Cope v. Rowlands*,

2 M. & W. 157, where the court also negated an idea that had existed, viz. that there was a difference between the stringency of a statute for the protection of the subject and one for the protection of the revenue.

[Nice questions of construction however sometimes arise in determining whether the intention of a statute prescribing under penalties the mode of carrying on a particular trade according to certain rules for the protection of the revenue, is merely to protect and increase the revenue by enforcing the penalties against a trader who does not comply with the rules, or to render the contracts entered into by such trader illegal. See *Johnson v. Hudson*, 11 East, 180. In *Smith v. Mawhood*, 14 M. & W. 452, it was laid down in conformity with the cases above cited, that where the intent of a statute is to prohibit a contract, although that be only by the imposition of a penalty and for purposes of revenue, the contract is void and cannot be enforced by action; but upon the construction of the statute then under consideration, the Excise License Act, 6 Geo. 4, c. 81, it was helden that the sections 25 and 26, which enforce penalties upon any manufacturer, or dealer in, or seller of tobacco, who shall not have his name painted on his entered premises, or shall not have obtained a license, had not the effect of avoiding a sale made by one who had not conformed to their provisions, or of defeating an action for the price.

A contract will not become illegal by *relation* which was not so when made, although the party making it was bound by law under a penalty to do a subsequent act, which has however been neglected; thus where an attorney neglected to enter his certificate he was permitted to recover for work done before the expiration of the time allowed for entering it, *Eyre v. Shelley*, 6 M. & W. 270. And there may occur cases in which a contract, the performance of which could not have been enforced because the contract itself was forbidden, will become available if executed, because the policy of the statute which prohibits its enforcement while in an executory statute was to secure its execution, *McCallan v. Mortimer*, 9 M. & W. 640, where the seller of stock recovered the price of stock actually transferred, although at the time of the contract to transfer the seller was not actually possessed of or

entitled to the stock, and so the contract while executory, as it is said, was incapable of being enforced by reason of the provisions of the Stock Jobbing Act, 7 Geo. 2, c. 8, s. 8.

It seems, that a contract is not illegal or void, simply because private rights are interfered with by the act stipulated for; *e. g.*, where the consideration is a breach of contract or of private trust, the contract may be enforced, and the persons injured by its performance are left to the ordinary means of redress; *Walker v. Richardson*, 10 M. & W. 284; per Parke, B., *Jackson v. Cobbin*, 8 M. & W. 797; per Vaughan, C. J., *Rudyard's case*, 2 Vent. 23.]

A question sometimes arises, whether, when a statute points out a particular mode for the performance of some act therein commanded, its enactments shall be taken to be *imperative*, or only *directory*; in *the former only of which [*170] cases an act done in a different mode from that pointed out by the statute would be void. In *Pearce v. Morrice*, 2 Ad. & Ell. 96, the following rule for distinguishing between imperative and merely directory enactments, is given by Mr. J. Taunton, "A clause is *directory* where the provisions contain mere matter of direction, and no more; but not so when they are followed by words of positive prohibition." See *Rex v. Grave-send*, 3 B. & Ad. 240; *Rex v. St. Gregory*, 2 Ad. & Ell. 106; *Brooks v. Cock*, 3 A. & E. 138: [*Southampton Dock Company v. Richards*, 1 Man. & Gr. 445; *Scott, N. R., S. C., R. v. Birmingham*, 6 B. & C. 29; *Cole v. Green*, 7 Scott, N. R. 682, where a particular mode of signature of a contract was directed.] "It is (said Parke, B., in *Gwynne v. Burnell*, 2 Bing. N. C. 39) by no means any impediment to construing a clause to be *directory*, that if it is so construed there is no remedy for non-compliance with the direction. Thus, the statutes which direct the quarter sessions to be held at certain times in the year, are construed to be directory. *Rex v. Justices of Leicester*, 7 B. & C. 6. And the sessions held at other times are not void. Yet it would be difficult to say that there would be any remedy against the justices for appointing them on other than the times prescribed by the statute." [*Thames Haven Dock Company v. Rose*, 4 Man. & Gr. 552, *Scott, N. R., S. C.*]

In *Gillow v. Lillie*, 1 Bing. N. C. 696,

the question was discussed, whether a joint deed executed by two persons, one of whom laboured under a statutory disability, would be void as against both, or only as against the one rendered incapable by statute; but the point was not decided, as the court held that, the deed being several as well as joint, the defendant's several liability was sufficient to maintain the action.

It is laid down in Whelpdale's case, 5th Rep. 119, a., *Stead v. Moon*, Cro. Jac. 152, and ever since held, that illegality must be *pleaded* in answer to a bond or other deed, and cannot be taken advantage of under a plea of *non est factum*. See *Mestayer v. Biggs*, 4 Tyrwh. 471, 1 C. M. & R. 110, where it was held that non-compliance with the provisions of the annuity act must be pleaded. And so must fraud. *Edwards v. Stephen*, 1 Tyrwh. 209. In *Hill v. Manchester and Salford Waterworks Company*, 5 B. & Ad. 874, a corporation was empowered by statute to raise money by bonds under their common seal, and the act directed that the issue of all such bonds should be sanctioned by the resolution of a meeting of proprietors, constituted in a particular way. Certain bonds were issued by the agent, and sealed with the seal of the corporation, but not in pursuance of the resolution of any such meeting as the statute directed. The court held that the bonds were void, and that the non-compliance with the provisions of the statute need not be pleaded, but

might be given in evidence under *non est factum*. This case proceeded on the ground that as the corporation was the creature of the act, and had no powers but those which the act gave it, a bond not executed in conformity to the act was not in point of fact executed by the corporation at all. See *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433. The illegality too must be clearly shewn, for it is a thing not to be presumed upon a dubious state of pleading, *Jones v. Waite*, 5 Bing. N. C. 350; 9 Cl. & Fin. 88, S. C.

With respect to *fraud*, that has been always considered pleadable as well as illegality, and it is pleadable only and cannot be given in evidence under *non est factum*, *Edwards v. Brown*, 1 C. & Jerv. 307. In a late case at N. P., Lord Abinger held that where the party knows the effect of what he executes, proof that it was executed in consequence of previous fraud is not evidence under a plea of fraud, *Mason v. Ditchbourne*, 1 M. & Rob. 460. A new trial was moved for, and the Court of Exchequer made the rule absolute in order that the question might be more distinctly raised, *ibid.* in *notis*, 2 C. M. & R. 720, n.

[Where it is sought to invalidate a deed on the ground of fraud, evidence of a consideration different from that expressed may be given for the purpose of supporting the deed, *Gale v. Williamson*, 8 M. & W. 405; *Pott v. Todhunter*, 2 Col. C. C. 76.]

It seems, that fraud could not be pleaded, or given in evidence at common law, as a defence to an action on a specialty, unless it attached directly to the execution of the instrument, and not merely to the transaction in which the instrument originated. A grantor or obligor might, therefore, avoid his own deed by showing, that it was misread, or its purport falsely declared at the time when it was executed; *Thoroughgood's case*, 2 Coke, 4; *Den v. Farlee*, 2 Zabriskie, 289; *Jackson v. Rayner*, 12 Johnson, 469; *The Farmers and Mechanics' Bank v. Whinfield*, 24 Wend. 419; *Anthony v. Wilson*, 14 Pickering, 303; *The Chesnut Hill Reservoir Company v. Chase*, 14 Connecticut, 123; but not that he had been induced to execute it, by fraudulent representations, as to the nature or value of the consideration on which it is founded; *Vrooman v. Phelps*, 2 Johnson, 177; *Dale v. Roosevelt*, 9 id. 307; *Dorr v. Munsell*, 13 id. 430; *Franchot v. Leach*, 5 Cowen, 506; *Stevens v. Judson*, 4 Wend. 471; *Taylor v. King*, 6 Munford, 358; *Wyck v. Macklin*, 2 Randolph, 426; *Burrows v. Alter*, 7 Missouri, 424;

Mordecai v. Tankerly, 1 Alabama, 100; Donaldson v. Barton, 4 Dev. & Bat. 435. Thus it was held in Stevens v. Judson, 4 Wendell, 471, that a plea alleging, that the execution of the bond, on which suit had been brought, had been induced by the fraudulent misrepresentations of the plaintiff, was bad after verdict, and that judgment must be entered against the defendant, notwithstanding a finding by the jury in his favour. An opposite course was notwithstanding pursued in Massachusetts, where it was held, that a contract vitiated by fraud, cannot be enforced at law by the guilty party, even when it is under seal, and when the fraud consists in misrepresentations as to the consideration, and not, as in Thoroughgood's case, with regard to the purport of the contract itself; Bliss v. Thompson, 4 Massachusetts, 92; Boynton v. Hubbard, 7 id. 119; Somes v. Skinner, 16 id. 348. "Where fraud is proved, or admitted," said STORY, J., in Boynton v. Hubbard, "no good reason can be assigned why relief should not be obtained in a court of law, although not always in the same way, in which it might be obtained in a court of equity." And it was subsequently held in Hazard v. Irwin, that where a sale is made, and a bond given for the purchase-money, fraud in the sale is a good answer to an action on the bond.

A similar view prevails in Virginia, and some other parts of the Union; Chew v. Moffitt, 6 Munford, 120; Tomlinson v. Mason, 6 Randolph, 169. And the rigor with which the common law enforced obligations under seal, has been mitigated in many of the states by statute, and fraud, or failure of consideration, rendered a good defence to a sealed instrument; Case v. Boughton, 11 Wend. 108; Greathouse v. Dunlap, 3 McLean, 303; Leonard v. Bates, 1 Blackford, 172.

Whatever may be the effect of a seal at common law, when the transaction is fraudulent as between the parties, it cannot give effect to any transaction which contravenes the general policy of the law. A deed may, therefore, be avoided in all cases by showing, that it is founded upon an illegal consideration; Bruce v. Lex, 4 Johnson, 210; Boyle v. Cooper, 2 Murphy, 286; or that it was executed in violation of some rule of common or statute law; Fox v. Mensch, 3 Watts & Sergeant, 444.

All defences to a specialty founded on the transaction in which it was given, and collateral to the specialty itself, must be set forth specially, and nothing can be given in evidence under the plea of *non est factum*, which does not defeat, or disprove the execution of the instrument; Greathouse v. Dunlap, 3 McLean, 303. Illegality, or fraudulent failure of consideration must, therefore, be specially pleaded, whether the defence be made under the common or statute law; Taylor v. King, 6 Munford, 358; Chew v. Moffitt, id. 120; Tomlinson v. Mason, 6 Rand. 169; Huston v. Williams, 3 Blackford, 170; The Commissioners of the Poor v. Harrison, 1 Nott & McCord, 554; The United States v. Sawyer, 1 Gallison, 87.

And it would even appear, that if the defendant admit of sealing and delivery of the instrument, and seek to avoid their effect by showing, that they were induced by a fraudulent statement at the time of execution, he must set forth his defence in full on the record, and cannot take advantage of it under the general issue; Edwards v. Brown, 1 Cr. & J. 307; Thoroughgood's case. The law was, however, held the other way in Van Valkenburgh v. Rouk, 12 Johns. 337, where it was said, that the defendant might prove under *non est factum*, that one instrument had been fraudu-

lently substituted for another at the time of execution, because this would show, that his assent had never been legally, or actually given to the former. And it was said in like manner by STORY, J., that the existence of fraud or undue influence had, in common with lunacy, rendered the deed wholly void, and might, therefore, be given in evidence under the plea of *non est factum*. The point was not, however, actually decided on either occasion.

All matters which would entitle the defendant in an action brought on a specialty, to relief in a court of equity, will be a good defence in a court of law in Pennsylvania, where both systems of jurisprudence are administered by the same tribunals, through the medium of legal forms. Fraud or failure of consideration may, therefore, either be specially pleaded to a suit brought on a bond, or taken advantage of at the trial, under a plea of payment, with notice of the special matter to be given in evidence; *Stubb v. King*, 14 Sergeant & Rawle, 206. In *Carpenter v. Groff*, 5 Sergeant & Rawle, 162, this doctrine was applied where the bond had been obtained, through the fraudulent misrepresentations of the obligee; and in *Solomon v. Kimmel*, 5 Binney, 232, where the consideration failed in consequence of the failure of title to the land, for which the bond was given.

Previously to this, the law had been authoritatively established, in the case of *Baring v. Shippen*, 2 Binney, 154, and want of consideration and fraud on the part of the obligee, at the time of the delivery of the bond, held a valid defence against a subsequent assignee, who brought suit in his own name under the provisions of a local enactment. There has consequently been but little occasion in Pennsylvania, to discuss what would be good common law pleas to a bond, and few cases are to be found on the subject. Every thing which *ex æquo et bono*, should prevent the obligee from recovering, if not capable of being pleaded under the rules of the common law, may be taken advantage of, either under the plea of payment, with notice of the special matter to be given in evidence, or by the aid of a special plea, which, if not good in law, will yet, if set forth with sufficient precision, be supported by the courts on equitable grounds. The law of South Carolina seems to be substantially on the same footing; *Caldbirn v. Matthews*, 2 Richardson, 386; *Gray v. Hankinson*, 1 Bay, 278; *The State v. Gallard*, 2 id. 11; *Adams v. Wylie*, 1 Nott & McCord, 78; *Mears v. Barkett*, 2 Hill, 657; *Raysdale v. Thomas*, McCullan, 335.

II.

[*172] *MITCHEL v. REYNOLDS.

HIL. 1711, B. R.

[REPORTED 1 P. WILLIAMS, 181.(a)]

A bond or promise to restrain oneself from trading in a particular place, if made upon a reasonable consideration, is good. Secus, if it be on no reasonable consideration, or to restrain a man from trading at all.

DEBT upon a bond. The defendant prayed *oyer* of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in Liquorpond Street, in the parish of St. Andrew's, Holborn, for the term of five years : now if the defendant should not exercise the trade of a baker within that parish, during the said term, or, in case he did, should within three days after proof thereof made, pay to the plaintiff the sum of fifty pounds, then the said obligation to be void. *Quibus lectis et auditis*, he pleaded, that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus* the said bond was void in law, per quod he did trade, *prout ei bene licuit*. Whereupon the plaintiff demurred in law.

And now, after this matter had been several times argued at the bar, Parker, C. J., delivered the resolution of the court.

The general question upon this record is, whether this bond, being made in restraint of trade, be good ?

And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good ; and that the true distinction in this case is, not between promises and bonds, but between contracts *with* and *without* consideration ; and that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained ; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place ; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by and by.

The resolutions of the books upon these contracts seeming to disagree, I will endeavour to state the law upon this head, and to reconcile the jarring opinions ; in order whereunto, I shall proceed in the following method.

- 1st. Give a general view of the cases relating to the restraint of trade.
- 2ndly. Make some observations from them.

(a) 10 Mod. 27. 85. 130. Fort 296. Resolution of the court of B. R.

3dly. Shew the reasons of the differences which are to be found in these cases; and

4thly. Apply the whole to the case at bar.

As to the cases, they are either first, of involuntary restraints against, or without, a man's own consent; or secondly, of voluntary restraints by agreement of the parties.

Involuntary restraints may be reduced under these heads,

1st. Grants or charters from the crown.

2ndly. Customs.

3dly. By-laws.

Grants or charters from the crown may be,

1st. A new charter of incorporation to trade generally, exclusive of all others, and this is void. 8 Co. 121.

2ndly. A grant to particular persons for the sole exercise of any known trade; and this is void, because it is a monopoly, and against the policy of the common law, and contrary to Magna Charta. 11 Co. 84.

3dly. A grant of the sole use of a new invented art, and this is good, being indulged for the encouragement of ingenuity; but this is tied up by the statute of 21 Jac. 1, cap. 3, s. 6, to the term of fourteen years; for after that time it is presumed to be a known trade, and to have spread itself among the people.(†)

Restraints by custom are of three sorts,

1st. Such as are for the benefit of some particular persons, who are alleged to use a trade for the advantage *of a community, which are goods, 8 Co. 125. Cro. Eliz. 803. 1 Leon. 142. Mich. 22 H. 6, [*173] 614. 2 Bulst. 195. 1 Roll. Abr. 561.

2dly. For the benefit of a community of persons who are not alleged, but supposed to use the trade, in order to exclude foreigners.(‡) Dyer, 279, b. W. Jones, 162. 8 Co. 121. 11 Co. 52. Carter, 68, 114, held good.

3dly. A custom may be good to restrain a trade in a particular place, though none are either supposed or alleged to use it; as in the case of Rippon. Register, 105, 106.

Restraints of trade by by-laws are these several ways.

1st. To exclude foreigners; and this is good, if only to enforce a precedent custom by a penalty. Carter, 68. 114. 8 Co. 125.(a) But where there is no precedent custom, such by-law is void. 1 Roll. Abr. 364. Hob. 210. 1 Bulst. 11, 3 Keb. 808.(b) But the case in Keble is misreported; for there the defendants did not plead a custom to exclude foreigners, but only generally to make by-laws, which was the ground of the resolution in that case.

2dly. All by-laws made to cramp trade in general, are void. Moor, 576. 2 Inst. 47. 1 Bulst. 11.

3dly. By-laws made to restrain trade, in order to the better government

(†) See the further regulations introduced by st. 5 & 6 W. 4, c. 83; 2 & 3 V. c. 57; 7 & 8 V. c. 69.

(‡) Restraints of this kind, whether by custom or by law, are now abolished in all boroughs by st. 5 & 6 W. 4, c. 76, s. 14. This act does not affect London.

(a) Wolley v. Idle, 4 Burr. 1951.

(b) Vide Harrison v. Godman, 1 Burr. 12. Hesketh v. Braddock, 3 Burr. 1856.

and regulation of it, are good, in some cases, (c) viz. if they are for the benefit of the place, and to avoid public inconveniences, nuisances, &c. Or for the advantage of the trade, and improvement of the commodity. Sid. 284. Raym. 288. 2 Keb. 27. 873, and 5 Co. 62, b., which last is upon the by-law for bringing all broad-cloth to Blackwell-hall, there to be viewed and marked, and to pay a penny per piece for marking; this was held a reasonable by-law; and indeed it seems to be only a fixing of the market; for one end of all markets is, that the commodity may be viewed; but then they must not make people pay unreasonably for the liberty of trading there.

In 2 Keb. 309, the recent case is upon a by-law for restraining silk-throwsters from using more than such a certain number of spindles, and there the by-law would have been good, if the reasons given for it had been true.

Voluntary restraints by agreement of the parties are either,

1st. General, or

2dly. Particular, as to places or persons.

* General restraints are all void, whether by bond, covenant or [174] promise, &c., with or without consideration, and whether it be of the party's own trade, or not. Cro. Jac. 596. 2 Bulst. 136. Allen, 67.

Particular restraints are either, 1st. without consideration, all which are void by what sort of contract soever created. 2 H. 5, 5. Moor, 115, 242. 2 Leon. 210. Cro. Eliz. 872. Noy, 98. Owen, 143. 2 Keb. 377. March, 191. Show. 2. (not well reported.) 2 Saund. 155.

Or 2dly, particular restraints are with consideration.

Where a contract for restraint of trade appears to be made upon a good and adequate consideration, so as to make it a proper and useful contract, it is good. 2 Bulst. 136. Rogers v. Parry. Though that case is wrongly reported, as appears by the roll which I have caused to be searched, it is B. R. Trin. 11 Jac. 1. Rot. 223. And the resolution of the judges was not grounded upon its being a particular restraint, but upon its being a particular restraint with a consideration, and the stress lies on the words, as the case is here, though, as they stand in the book, they do not seem material. Noy, 98. W. Jones. 13 Cro. Jac. 596. In that case, all the reasons are clearly stated, and, indeed, all the books, when carefully examined, seem to concur in the distinction of restraints general, and restraints particular, and with or without consideration, which stands upon very good foundation; *Volenti non fit injuria*: a man may, upon a valuable consideration, by his own consent, and for his own profit, give over his trade; and part with it to another in a particular place.

Palm. 172. Bragg v. Stanner. The entering upon the trade, and not whether the right of action accrued by bond, promise or covenant, was the consideration in that case.

Vide March's Rep. 77, but more particularly Allen's 67, where there is a very remarkable case, which lays down this distinction, and puts it upon the consideration and reason of the thing.

Secondly, I come now to make some observations that may be useful in the understanding of these cases. And they are,

1st. That to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law.

(c) Wannell v. Chamber of the City of London, 1 Stra. 675. The King v. Harrison, 3 Burr. 1322. Pierce v. Bartram, Cowp. 269.

* 2dly. That when restrained to particular places or persons, (if lawfully and fairly obtained), the same is not a monopoly. [*175]

3dly. That since these restraints may be by custom, and custom must have a good foundation, therefore the thing is not absolutely, and in itself, unlawful.

4thly. That it is lawful upon good consideration for a man to part with his trade.

5thly. That since actions upon the case are actions *injuriarum*, it has been always held, that such actions will lie for a man's using a trade contrary to custom, or his own agreement; for there he uses it *injuriusly*.

6thly. That where the law allows a restraint of trade, it is not unlawful to enforce it with a penalty.

7thly. That no man can contract not to use his trade at all.

8thly. That a particular restraint is not good without just reason and consideration.

Thirdly, I proposed to give the reasons of the differences which we find in the cases; and this I will do,

1st. With respect to involuntary restraints, and

2dly. With regard to such restraints as are voluntary.

As to involuntary restraints, the first reason why such of these, as are created by grants and charters from the crown and by-laws, generally, are void, is drawn from the encouragement which the law gives to trade and honest industry, and that they are contrary to the liberty of the subject.

2dly. Another reason is drawn from Magna Charta, which is infringed by these acts of power; that statute says, *nullus liber homo, &c., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, &c.*, and these words have been always taken to extend to freedom of trade.

But none of the cases of customs, by-laws to enforce these customs, and patents for the sole use of a new invented art, are within any of these reasons; for here no man is abridged of his liberty, or disseised of his freehold; a custom is *lex loci*, and foreigners have no pretence of right in a particular society, exempt from the laws of that society; and as to new invented arts, nobody can be said to have a right to that which was not in being before; and therefore it is but a reasonable reward to ingenuity and uncommon industry.

* I shall show the reason of the differences in the cases of voluntary restraint. [*176]

1st. Negatively.

2dly. Affirmatively.

I. *Negatively*; the true reason of the disallowance of these in any case, is never drawn from Magna Charta; for a man may, voluntarily, and by his own act, put himself out of the possession of his freehold; he may sell it, or give it away at his pleasure.

2dly. Neither is it a reason against them, that they are contrary to the liberty of the subject; for a man may, by his own consent, for a valuable consideration, part with his liberty; as in the case of a covenant not to erect a mill upon his own lands. *J. Jones*, 13 Mich. 4 Ed. 3, 57. And when any of these are at any time mentioned as reasons upon the head of voluntary restraints, they are to be taken only as general instances of the favour and indulgence of the law to trade and industry.

3dly. It is not a reason against them, that they are against law, I mean, in a proper sense, for in an improper sense they are.

All the instances of conditions against law in a proper sense, are reducible under one of these heads.

1st. Either to do something that is *malum in se*, or *malum prohibitum*. 1 Inst. 206.

2dly. To omit the doing of something that is a duty. Palm. 172. Hob. 12, Norton v. Sims.

3dly. To encourage such crimes and omissions. Fitzherb. tit. Obligation, 13. Bro. tit. Obligation, 34. Dyer, 118.

Such conditions as these, the law will always, and without any regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes; and therefore, as in 1 Inst. 206, a feoffment shall be absolute for an unlawful condition, and a bond void. But from hence I would infer,

1st. That where there may be a way found out to perform the condition, without a breach of the law, it shall be good. Hob. 12. Cro. Car. 22. Perk. 228.

2dly. That all things prohibited by law may be restrained by condition; and therefore these particular restraints of trade, not being against law, in a [*177] proper sense, *as being neither *mala in se*, nor *mala prohibita*, and the law allowing them in some instances, as in those of customs and *assumpsits*, they may be restrained by condition.

II. *Affirmatively*; the true reasons of the distinction upon which the judgments in these cases of voluntary restraints are founded are, 1st. the mischief which may arise from them, 1st. to the party, by the loss of his livelihood, and the subsistence of his family; 2dly. to the public, by depriving it of a useful member.

Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them lest they should prejudice them in their custom, when they come to set up for themselves.

3dly. Because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London, what another does at Newcastle? and surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The *Roman* law would not enforce such contracts by an action. See Puff., lib. 5, c. 2, sect. 3. 21 H. 7, 20.

4thly. The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as to prevent a town from being overstocked with any particular trade: or in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, than by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer.

5thly. The law is not so unreasonable as to set aside a man's own agree-

ment for fear of an uncertain injury to him, and fix a certain damage upon another; as it must do, if contracts with a consideration were made void. *Barrow v. Wood*, March Rep. 77. Mich. 7 Ed. 3, 65. Allen, 67. 8 Co. 121.

*But here it may be made a question, that suppose it does not appear whether or no the contract be made upon good consideration, or be merely injurious and oppressive, what shall be done in this case? [*178]

Resp. I do not see why that should not be shown by pleading; though certainly the law might be settled either way without prejudice; but as it now stands the rule is, that wherever such contract *stat indifferenter*, and, for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad, and that for these reasons:

1st. In favour of trade and honest industry.

2ndly. For that there plainly appears a mischief, but the benefit (if any) can be only presumed; and in that case, the presumptive benefit shall be overborne by the apparent mischief.

3rdly. For that the mischief (as I have shown before) is not only private, but public.

4thly. There is a sort of presumption, that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, every body is affected thereby; for it is to be observed, that though it be not shown to be the party's trade or livelihood, or that he had no estate to subsist on, yet all the books condemn those bonds, on that reason, viz., as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.

As, 1st, That all contracts, where there is a bare restraint of trade and no more, must be void; but this taking place, only where the consideration is not shown, can be no reason why, in cases where the special matter appears, so as to make it a reasonable and useful contract, it should not be good; for there the presumption is excluded, and therefore the courts of justice will enforce these latter contracts, but not the former.

2ndly. It answers the objection, that a bond does not want a consideration, but is a perfect contract without it; for the law allows no action on a *nudum pactum*, but every contract must have a consideration, either expressed, as in *assumpsits*, or implied, as in *bonds* and *covenants*, but these latter, though they are perfect as to the form, yet may be void as to the matter; as in a covenant to stand seised, *which is void without a consideration, though it be a complete and perfect deed. [*179]

3rdly. It shows why a contract not to trade in any part of England, though with consideration, is void; for there is something more than a presumption against it, because it can never be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime.

4thly. This shows why promises in restraint of trade have been held good; for in those contracts, it is always necessary to show the consideration, so that the presumption of injury could not take place, but it must be governed by the special matter shown. And it also accounts not only for all the resolutions, but even all the expressions that are used in our books

in these cases; it at least excuses the vehemence of Judge Hull in 2 H. 5, fol. quinto; for suppose (as that case seems to be) a poor weaver, having just met with a great loss, should, in a fit of passion and concern, be exclaiming against his trade, and declare that he would not follow it any more, &c., at which instant, some designing fellow should work him up to such a pitch, as, for a trifling matter, to give a bond not to work at it again, and afterwards, when the necessities of his family and the cries of his children send him to the loom, should take advantage of the forfeiture, and put the bond in suit; I must own, I think this such a piece of villainy, as is hard to find a name for; and therefore cannot but approve of the indignation that judge expressed, though not his manner of expressing it. Surely it is not fitting that such unreasonable mischievous contracts should be countenanced, much less executed by a court of justice.

As to the general indefinite distinction made between bonds and promises in this case, it is in plain words this, that the agreement itself is good, but when it is reduced into the form of a bond, it immediately becomes void; but for what reason see 3 Lev. 241. Now, a bond may be considered two ways, either as a security, or as a compensation; and,

1st. Why should it be void as a security? Can a man be bound too fast from doing an injury? which I have proved the using of a trade contrary to custom or promise, to be.

[*180] *2ndly. Why should it be void as a compensation? Is there any reason why parties of full age, and capable of contracting, may not settle the *quantum* of damages for such an injury? Bract, lib. 3, c. 2, s. 4.

It would be very strange, that the law of England, that(*a*) delights so much in certainty, should make a contract void, when reduced to certainty, which was good, when loose and uncertain; the cases in March's Rep. 77, 191, and also Show. 2, are but indifferently reported, and not warranted by the authorities they build upon.

1st *Object*. In a bond the whole penalty is to be recovered, but in *assumpsit* only the damages.

Resp. This objection holds equally against all bonds whatsoever.

2nd *Object*. Another objection was, that this is like the case of an infant, who may make a promise but not a bond, or that of a sheriff who cannot take a bond for fees.

Resp. The case of an infant stands on another reason, viz., a general disability to make a deed, but here both parties are capable; neither is it the nature of the bond, but merely the incapacity of the infant, which makes a bond by him void, since there a surety would be liable; but it is otherwise here.

Also the case of a sheriff is very different; for at common-law he could take nothing for doing his duty, but the statute has given him certain fees; but he can neither take more, nor a chance for more, than that allows him.

3rd *Object*. It was further objected, that a promise is good, and a bond void, because the former leaves the matter more at large to be tried by a jury; but what is there to be tried by a jury in this case?

(*a*) Post, *Grantham v. Gordon*, 614.

Resp. 1st. It is to be tried whether upon consideration of the circumstances the contract be good or not? and that is matter of law, not fit for a jury to determine.

2ndly. It is to ascertain the damages; but *cui bono* (say they) should that be done? Is it for the benefit of the obligor?

Resp. Certainly it may be necessary on that account, for these reasons:—

1st. A bond is a more favourable contract for him than a promise; for the penalty is a re-purchase of his trade ascertained before-hand,^(a) and on payment thereof he *shall have it again; he may rather choose to be bound not to do it under a penalty, than not to do it all. [*181]

2ndly. However it be, it is his own act.

3rdly. He can suffer only by his knavery, and surely courts of justice are not concerned lest a man should pay too dear for being a knave.

4thly. Restraints by custom may (as I have proved) be enforced with penalties which are imposed without the party's consent; nay, by the injured party without the concurrence of the other; and if so, then *à fortiori* he may bind himself by a penalty.

Object. It may perhaps be objected, that a false recital of a consideration in the condition may subject a man to an inconvenience, which the law so much labours to prevent.

Resp. But this is no more to be presumed than false testimony, and in such a case I should think the defendant might aver against it; for though the rule be, that a man is estopped from averring against anything in his own deed, yet that is, supposing it to be his deed; for where it is void, it is otherwise, as in the case of a usurious contract.†

The application of this to the case at bar is very plain. Here the particular circumstances and consideration are set forth, upon which the court is to judge, whether it be a reasonable and useful contract.

The plaintiff took a baker's house, and the question is whether he or the defendant shall have the trade of this neighbourhood? The concern of the public is equal on both sides.

What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, viz., the term of five years.

To conclude. In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

For these reasons, we are of opinion, that the plaintiff ought to have judgment.

“THE general rule is, that all restraints of trade, which the law so much favours, if nothing more appear, are bad. This is the rule which is laid down *in the famous case of *Mitchel v. Reynolds*, which is well reported in 1 P. [*182]

(a) Sed vide *Hardy v. Martin*, 1 Bro. Cha. Rep. 419, note.

† Accord. *Collins v. Blantern*, ante, p. 154, et notas.

Wms. 181, in which Lord Macclesfield took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered: but to this general rule there are some exceptions; as, *first*, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained. A contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of *Mitchel v. Reynolds*. Per Willes, C. J., in the *Master, &c. of Gunmakers v. Fell*, Willes, 388. See *Stuart v. Nicholson*, 3 Bing. N. C. 113. The same principles are recognised in the judgment of the court in *Gale v. Reed*, 8 East, 83, in a variety of cases, both previous and subsequent, particularly in *Chesman v. Nainby*, 2 Str. 739; 3 Bro. P. C. 349, which received the successive decisions of the King's Bench, Common Pleas, and House of Lords. The reader will find all the authorities collected in *Young v. Timmins*, 1 Tyrwh. 226, 1 C. & J. 331, and the rule to be collected from them all is stated in that case by Vaughan, B., p. 241, viz., "any agreement by bond or otherwise in *general restraint* of trade, is illegal and void. But such a security given to effect a *partial restraint* of trade may be good or bad, according as the consideration is adequate or inadequate." In order, therefore, that a contract in restraint of trade may be valid *at law* (for even then equity is loth to enforce it specifically, if the terms be at all hard, or even complex, *Kimberly v. Jennings*, 1 Sim. 340, though in some cases it will do so, per V. C., *Kemble v. Kean*, 6 Sim. 335 [*Whittaker v. Howe*, 3 Beav. 383]), the restraint must be *first* partial; *secondly*, upon an adequate, or as the rule now seems to be, not on a mere colourable consideration; and there is a third requisite, namely, that it should be *reasonable*, the meaning of which shall be presently considered.

First, the restraint must be *partial*. It was decided so early as the reign of Henry V. that a contract imposing a general restraint on trade is void. Indeed, Hall, J., flew into a passion at the very sight of a bond imposing such a condition, and exclaimed, with more fervour than decency: "A ma intent vous purres aver demurre sur luy que l'obligation est voide eo que le conditione est

encounter common ley, *et per Dieu, si le plaintiff fuit icy, il irra al prison tanq il ust fait fine au Roy*." "The law," said Best, C. J., in *Homer v. Ashford*, 3 Bing. 328, "will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any *useful undertaking *in the king-* [*182a] *dom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade, or to act in a profession, in a particular place, proper." Such partial restraints were upheld in *Chesman v. Nainby*, in *Clerk v. Comer*, Cas. temp. Hardw. 53, where a bond was conditioned not to carry on trade within the city of Westminster, or bills of mortality; in *Davis v. Mason*, 5 T. R. 118, and in *Bunn v. Guy*, 4 East, 190, where an attorney bound himself not to practise *within London, and 150 miles from thence*. See remarks on this case in *Bozon v. Farlow*, Meriv. 472. [In *Whittaker v. Howe*, 3 Beav. 383, a case which seems to go further than any other, and the correctness of which notwithstanding the elaborate reasoning whereon the judgment proceeded may perhaps be questioned, the agreement was by attorneys and solicitors not to practise in Great Britain for the space of twenty years without the consent of the gentleman to whom they had sold their business, and Lord Langdale, M. R., "having regard to the nature of the profession, to the limitation of time, and to the decision that the distance of 100 miles does not describe an unreasonable boundary," upheld the contract. In *Proctor v. Sargent*, 2 Man. & Gr. 31, 2 Scott, N. R. 289, S. C., the contract was that the defendant, who was about to enter the service of the plaintiff, a cowkeeper and milkman, should not during the service, or within two years after quitting or being discharged therefrom, carry on the business of a cowkeeper, milkman, milkseller, or milk-carrier within five miles of Northampton-square. In *Rannie v. Irvine*, 8 Scott, N. R. 674, 7 Man. & Gr. 969, S. C., it was against soliciting the custom of, or knowingly supplying bread or flour to any of the customers then dealing at a baker's shop, the lease and good-will of which were sold.] In *Leighton v. Wales*, 3 Mee. & W.

545, the restraint was against running any coach on a particular road. In *Gage v. Reed*, 8 East, 79, the restraint was partial in a different way. There the defendant covenanted not to exercise the business of a ropemaker during his life, except on government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be ordered of him by his friends or connexions. The plaintiffs were to allow him twoshillings per cwt. on the cordage made on his recommendation for such of his friends or connexions whose debts should turn out to be good; and were not to be compelled to furnish goods to any whom they should be disinclined to trust. The court held this agreement good, considering that they must construe the whole of it together, and that, construing it together, it appeared not to be the intention of the plaintiffs to restrain the defendant from supplying such of his connexions as they themselves did not think fit to trust. In *Ward v. Byrne*, 5 M. & W. 561, a bond conditioned not to follow or be employed in the business of a coal merchant for nine months was held void. [So was a covenant not to carry on the business of a brewer, or merchant, or agent, for the sale of ale, in S. or elsewhere, or in any other manner soever be concerned in the said business during a term of ten years, in *Hinde v. Gray*, 1 M. & Gr. 195, 1 Scott, N. R. 123, S. C. But perhaps that might now be considered a valid covenant so far as it related to S., though void as to the rest, *Price v. Green*, 16 M. & W. 396.]

Where the restraint is partial in respect of space, the proper way of measuring the distance is to take the nearest [*183] mode of *access to the point whence it is to be reckoned; *Leigh v. Hind*, 9 B. & C. 774, 4 Man. & Ryl. 597, S. C.; {by any of the usual public ways; *Atkins v. Kinnier*, 4 Exchequer, 776.}

Upon the second point, namely, the *adequacy of the consideration* [some confusion, rather verbal than substantial, had at one time crept into the judgments, thus] it was held in *Young v. Thomas*, 1 Tyrwh. 226, that where Ireland bound himself to work exclusively for certain persons for his and their lives, they not undertaking to find him full employ, but, on the contrary, reserving to themselves liberty to employ others, the contract was void for want of *adequacy of consideration*, though it con-

tained a proviso, under which Ireland was allowed to take and execute the orders of persons residing in London, or within six miles thereof. "If I could find," said Bayley, B., "any obligation on the defendants to find the bankrupt a supply of work sufficient to keep him and his workmen in an adequate and regular course of employ, that might be a good consideration for the restraint he thus imposes on himself. Accord. *Wallis v. Day*, 2 M. & W. 273. [*Pilkington v. Scott*, 15 M. & W. 657.] But if no such thing exists, but, on the contrary, I find it possible that no employ might, for a considerable time, be given to him, then there is no adequate consideration." "The restraint on one side meant to be enforced," said Lord Ellenborough, in *Gale v. Reed*, 8 East, 86, "should in reason be co-extensive only with the benefits meant to be enjoyed on the other."

In the late case of *Hitchcock v. Coker*, in the Exchequer Chamber, in error from K. B., 6 A. & E. 439, it was contended that the court could not inquire into the *adequacy* of the consideration when once shown to possess some bona fide legal value. That case perhaps turned less on *adequacy* than *reasonableness*. In the course of the argument, Alderson, B., observed, that "if the consideration were so small as to be colourable, the agreement would be bad." In *Leighton v. Wales*, 3 M. & W. 551, Parke, B., is reported to have said, that "it is clear since the case of *Hitchcock v. Coker*, that the court cannot inquire into the extent or adequacy of the consideration;" and in *Archer v. Marsh*, 6 A. & E. 966, the judgment in which was delayed to await the decision of *Hitchcock v. Coker*, the Queen's Bench finally pronounced that case to have decided that the parties *must act on their own view as to the adequacy of the compensation*. [And again in *Pilkington v. Scott*, 15 M. & W. 657, (where the contract was not under seal) the same doctrine was emphatically repeated, and the law then stated by Alderson, B., may now be considered settled, viz., that "if it be an unreasonable restraint of trade, it is void altogether; but if not, it is lawful; the only question being whether there is a consideration to support it, and the adequacy of the consideration the court will not inquire into, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock v. Coker*, a notion prevailed

that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain." {See also *Hartley v. Cummings*, 5 C. B. 247, and *Sainter v. Ferguson*, 7 Id. 716, which again declares that the adequacy of the consideration is never to be looked at.}

If there be objected to this view an inconsistency with the decisions that to create a valid restraint of trade some consideration is necessary, even in the case of a contract under seal, *Hutton v. Parker*, 7 Dowl. 739, (which in general wants no consideration, *Cooch v. Goodman*, 2 Q. B. 530), the answer is easy; it is this, that consideration is here required for a different reason from that whereon the ordinary law of contracts without consideration rests, the reason being that it would be *unreasonable* for a man to enter into such a stipulation without some consideration, though it must be left to his sense of his own interest to determine what should be the amount or nature of that consideration. And this appears to have been the view taken by Parke, B., in *Wallis v. Day*, 2 M. & W. 277, and by the Court of Exchequer in *Mallan v. May*, 11 M. & W. 665, where Parke, B., in delivering judgment, recognised the proposition of Tindal, C. J., in *Horner v. Graves*, 7 Bing. 744, that "contracts in restraint of trade are in themselves, if nothing shows them to be *reasonable*, bad in the eye of the law;" and proceeded to add, that "therefore if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place without any recital in the deed, and without any averments showing circumstances which rendered such a contract *reasonable*, the instrument is void." And it seems not improbable, now that the doctrine of *adequacy of consideration* is overturned by *Hitchcock v. Coker*, and *Archer v. Marsh*, that several of the contracts [*183a] which formerly would have been *open to the objection of inadequacy of consideration, may be held upon the same grounds obnoxious to that of *unreasonableness*: for instance, the contract in *Young v. Timmins* would probably be held an *unreasonable* one, and the decision sustained on that ground. In the case of a contract under seal, if the above observations be correct, it may

be thought to follow that any consideration on which a man might reasonably act, though not sufficient to sustain a promise not under seal, ought to be held to satisfy the rule acted on in *Hutton v. Parker*, provided always that the deed be not open to either of the other objections mentioned in the note. But the decisions, it must be admitted, do not expressly warrant that conclusion, and it is so hard to conceive of a *reasonable* contract of this nature without some consideration, that the precise question seems unlikely to arise.]

Lastly, it is not sufficient that the restraint should be *partial*, and founded upon consideration. The agreement must be reasonable. "We do not see (says Tindal, C. J., in *Horner v. Graves*, 7 Bing. 743.) how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interest of the public is void, on the grounds of public policy. No certain precise boundary can be laid down, within which, the restraint would be reasonable, and beyond which excessive. In *Davis v. Mason*, 5 T. R. 118, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable; and in one of the cases 150 miles was considered as not an unreasonable distance, where an attorney had bought the business of another who had retired from his profession. But it is obvious that the business of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence or by agents. And unless the case were such that the restraint was plainly and obviously unnecessary, the court would not feel itself justified in interfering. It is to be remembered, however, that contracts in restraint of trade are, if nothing more appears to show them reasonable, bad in the eye of the law." In *Horner v. Graves*, an agreement that the defendant, a surgeon dentist, would abstain from practising within 100 miles of York, was held void, on the ground that the distance rendered

[*1836] it unreasonable. *Instances in which the distance has been held not too large, and the contract consequently reasonable, may be found in *Chesman v. Nainby*, *Clerk v. Comer*, *Davis v. Mason*, and *Bunn v. Guy*, [and *Whitaker v. Howe*], above cited. See also *Leighton v. Wales*, 3 M. & W. 545, and *Hitchcock v. Coker*, 6 Ad. & Ell. 439, where A. in consideration of B. employing him as his assistant at a salary, in the business of a chemist, agreed not to carry on business within 3 miles of T., it was urged that this was *unreasonable*, because not limited to B.'s life or continuance in trade. But held good, for per Tindal, C. J., "it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee or executor. And the only effectual mode of doing so appeared to be by making the restriction of the servant's setting up the trade within the given limit co-extensive with the servant's life." {See also *Hastings v. Whitley*, 2 Exch. 611.} See *Archer v. Marsh*, 6 A. & E. 966, and *Ward v. Byrne*, 5 M. & W. 548, where a condition not to *follow* or *be employed* in the business of a coal-merchant for nine months was held unreasonable.

[In the cases of *Mallan v. May*, 11 M. & W. 653, 13 M. & W. 511, *Green v. Price*, 13 M. & W. 695, *Price v. Green*, 16 M. & W. 346, but more especially in the highly instructive judgment of the Court of Exchequer in *Mallan v. May*, the doctrine of the principal case was much discussed and fully confirmed. In *Mallan v. May*, 11 M. & W. 653, the agreement was one by which the defendant was to become assistant to the plaintiffs in their business of dentists for four years; the plaintiffs were to instruct him in the business; and the defendant covenanted not, after the expiration of the term, to carry on the same business in London or in any of the towns or places in England or Scotland where the plaintiffs or the defendant on their account might have been practising before the expiration of the service. Parke, B., in delivering the judgment of the court, pointed out, that contracts for the partial restraint of trade are in fact, in many cases, beneficial to the public; and he instanced the case of a tradesman selling his shop with a contract not to carry on

the trade in the same place, which is in effect the sale of a good will, "and offers an encouragement to trade by allowing a party to dispose of all the fruits of his industry," and also that of a manufacturer or professional man taking an assistant into his service, with a stipulation that he shall not carry on the same business within certain limits. "In such a case," said his lordship, "the public derives an advantage in the unrestrained choice which such a stipulation gives to the *employer of able assistants, [*183c] and the security it affords that the master will not withhold from the servant instruction on the secrets of his trade and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." And the covenant was, in that case, adjudged to be divisible, and to be not an unreasonable restriction so far as it related to not practising in London, though it was stated on the record that London had more than a million of inhabitants; and the court doubted the propriety of taking the comparative populousness of particular districts, the number of men of the same profession, the habits of the people in the neighbourhood, or other like matter of a fluctuating and uncertain character into consideration, and expressed an opinion "that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for did not exceed that, to pronounce the contract to be valid." On the other hand, the rest of the covenant, relating to not practising in any of the towns or places in England or Scotland where the plaintiff or the defendant on their account might have been practising before the expiration of the service, was holden unreasonable and void, as going beyond what the protection of the plaintiff's interests could reasonably require, and putting into their hands the power of preventing the defendant from practising anywhere. In *Green v. Price*, 13 M. & W. 695, a perfumer sold to his co-partner his share of the business of the firm, and covenanted not to carry on the same business in the cities of London and Westminster or within 600 miles from the same respectively, binding himself to performance in a sum of £5000 by way of liquidated damages, and not of penalty. The Court of Exchequer, acting upon the authority of *Mallan v. May*, held the

covenant valid as to practising in London and Westminster, and merely void as to the residue, and the defendant being shown to have practised in London, judgment was given for the plaintiff for the whole amount of the £5000, which judgment was affirmed in the Exchequer Chamber, *Price v. Green*, 16 M. & W. 346. It may be worth noticing, that in *Mallan v. May*, 13 M. & W. 511, the word "London" in the contract was considered to mean the city of London, that being its strict and proper meaning, and there being nothing in the contract to prevent its being so construed. It seems, however, open to explanation in each case, in what sense the word is used. See *Beckford v. Cantwell*, 1 Mo. & Rob. 187, 5 C. & P. 242, S. C.; *Smith v. Smyth*, 10 Bing. 406. [In *Atkins v. Kinnier*, 4 Exch. 776, a covenant by a surgeon not to practise nor reside at any time within two and a half miles of the plaintiff's residence in London, was held valid, and it was declared to be no objection that the restriction continued during the life of the covenantor, for that might enable the good will of the business to become a subject of sale; and to the same effect is *Sainter v. Ferguson*, 7 C. B. 716.]

Under the same head as contracts in restraint of trade, may be classed, those by which the services of individuals are secured for a specified time, or for life, to a particular master. There seems to be no objection to such contracts, even when they extend over the whole period of the life of the servant, though in some countries a restraint so extensive has been considered inconsistent with individual liberty, and accordingly forbidden. The question, however, appears to have been long since settled in our law, without regard to considerations which seem to embrace a shadow. See *Wallis v. Day*, 2 M. & W. 277. And in *Pilkington v. Scott*, 15 M. & W. 657; and *Hartley v. Cummings*, 5 C. B. 246, agreements whereby, in substance, workmen engaged to serve for a term of years, certain persons or their firm and no others, at a certain scale of wages, subject to determine in the event of sickness or incapacity of the men, or cessation of business by the employers, with power to the employers to dismiss the workmen in certain events, or on certain notice, were considered open, neither to the objection of want of mutuality, or of interference with public policy.

Here may be noticed a dictum in *Wallis v. Day*, 2 M. & W. 281, that according to 15 Vin. 323, Master and Servant, (N.) 5, "in order to maintain an action against a person who contracts to serve for life, the contract must be by deed." However, all that was necessary in *Wallis v. Day*, was to show that such a contract was not illegal, and not that it must be under seal, and on reference to the authority mentioned in the passage from Vin. viz., H. 2 Il. 4, fol. 14, pl. 12, the point there really decided will be found to be, that an action of *debt* on simple contract was not then, (as it is now, by 3 & 4 W. 4, c. 42, s. 14, see *Barry v. Robinson*, 1 N. R. 293,) maintainable against *executors*, and the passage in Vin. itself does not relate to the subject of Master and Servant generally, but to the construction of the statute of labourers; so that the dictum in *Wallis v. Day* can hardly be considered, what it seemingly was not intended to be, an authority for the proposition that a contract to serve for life must be under seal.

In *Calder and Hebble Navigation v. Pulling*, 14 M. & W. 76, a bye-law of a canal company directed against Sunday trading and travelling, was held void upon the construction of the local act, which, though very general in its terms, was considered not to give the company any power to restrain the traffic on the canal, for the purpose of enforcing the proper observance of religious duties.]

On the same reason with bonds and contracts in restraint of trade, stand *perpetuities*; attempts to create which are never permitted by the law to succeed, on account of the tendency of such limitations to paralyse trade, by shackling property, and preventing its free circulation for the purposes of commerce: for *trade* consists in the free application of labour to the free circulation of property, and any restraint laid upon the one would be as injurious to its interests as if imposed upon the other. This *doctrine of perpetuities*, as it is called, is of comparatively modern introduction. Its objects were indeed, at a very ancient period of English law, in some degree accomplished by a maxim which is recognised by our earliest writers, viz. that property has certain inseparable incidents, among which is the right of aliening it by the assurances appropriated by the law to that purpose, of which incidents it cannot be deprived by any

private disposition. One of the earliest cases in which this doctrine was maintained is reported by Littleton, sect. *720, who tells us that "a certain Justice of the Common Place dwelling in Kent, called Richel, had issue divers sons and his intent was that his eldest son should have certain lands and tenements to him and the heirs of his body begotten, and, for default of issue, the remainder to the second son, &c., and so to the third son, &c.; and because he would that none of his sons should alien or make warrantie to bar or hurt the others that should be in the remainder, &c., he causeth an indenture to be made to this effect, viz., that the lands and tenements were given to his eldest son, upon such condition, that if the eldest son alien in fee, or in fee tail, &c., or if any of the sons alien, &c., that then their estates should cease, and be void, and that then the same lands and tenements immediately should remain to the second son, and the heirs of his body begotten, *et sic ultra*, the remainder to his other sons; and livery of seisin was made accordingly." This device, however, was held void; and Mr. Butler remarks, in a learned note to Co. Litt. 379, b. the perusal of which is strongly recommended to readers desirous of pursuing this subject, that "this was one of the many attempts which have been made to restrain that right of alienation which is inseparable from the estate of tenant in tail. The chief of them are stated in a very pointed manner by Mr. Knowler, 1 Burr. 84." Upon the same principle, viz., that property cannot by any private disposition be robbed of its incidents, of which the power of alienation is one, proceeds the case put by Littleton, at sect. 360, viz.: "Also if a feoffment be made on this condition, *that the feoffee shall not alien the land to any*, this condition is void; because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person, by the law. For, if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason; and therefore such a condition is void." On which Lord Coke observes that "the like law is of a device in fee on condition that the devisee shall not alien; the condition is void; and so it is of a grant, release, confirmation, or any other conveyance, whereby a fee simple doth pass; for it is absurd

and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien: and and so it is if a man be possessed of a lease for years, or of a horse, or of any other chattel, real or personal, and give or sell his whole interest and property therein, upon condition that the donee or vendee shall not alien the same, the same is void; because his whole interest and property is out of him, so as he hath no possibility of a reverter, *and it is against trade and traffic, and bargaining and contracting between man and man.*" On this doctrine, viz., that property cannot be deprived of the power of alienation legally incident to it, by any private disposition, equity has ingrafted one exception, by allowing married women to be restrained from aliening, by way of anticipation, property limited to their sole and separate use during the coverture. The precise extent to which this equitable doctrine may be carried was long in incerto, and this uncertainty has given rise to a great deal of interesting discussion, a full account of which will be found in a very clearly and ably written pamphlet published by Mr. Hayes, upon that subject. See now Tullett v. Armstrong, before the L. C., an account of which [in its earlier stages] will be found in the last edition of Hayes on Conveyancing. [By the judgment in that case, and in Scarborough v. Borman, both reported 4 Myl. & Cr. 377, the doctrine of equity respecting property given to the separate use of a woman with a prohibition against anticipation, has been definitively settled upon reasoning which applies equally where the property is a fee or less estate, realty or personalty; see Baggett v. Meux, 1 Phil. 627. The result of the above cases is, that where property of any kind is given or settled to the separate use of a woman for any estate, and she is prohibited against anticipating it, she will, although discoverte when the gift or settlement takes effect, be effectually prevented from anticipating the property during any subsequent coverture to which she may become subject. Also, see Brown v. Bamford, 1 Phil. 620.]

To return the head of Perpetuities. It was in time found that the interests of commerce were by no means sufficiently guarded by the assertion of the maxim, that property could not be robbed of the

quality of transferability; for it would have been easy to limit particular estates in such a manner as to postpone the actual enjoyment of the fee so long as to create what would have been virtually, though not nominally, a strict entail; had not the courts, proceeding on the maxim of law, *Quodcumque prohibetur fieri ex directo prohibetur et per obliquum*, established as an inflexible rule, "that though an estate may be rendered inalienable during the existence of a life, or of any number of lives in being, and twenty-one years after; *Cadell v. Palmer*, 10 Bing. 140; or, possibly even, for nine months beyond the twenty one years, in case the person ultimately entitled to the estate should be an infant in ventre sa mere at the time of its accruing to him; yet, that all at- [*185] tempts to postpone the enjoyment *of the fee for a longer period are void; and therefore in the famous case of *Spencer v. Duke of Marlborough*, 3 Bro. P. C. 232, Eden, 404, where John Duke of Marlborough devised to trustees and their heirs, to the use of his daughter for life, remainder to Lord Ryalton for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Lord Ryalton in tail male, remainder to Lord Robert Spencer for life, remainder to trustees to preserve contingent remainders, &c., remainder to Charles Spencer in the same manner; and inserted a clause, empowering his trustees, on the birth of each son of Lord Ryalton, Lords Robert and Charles Spencer, to revoke and make void the respective uses limited to their respective sons in tail male, and in lieu thereof, to limit the premises to the use of such sons for their lives, with immediate remainder to the respective sons of such sons severally and respectively in tail male, Lord Northington declared the clause void as tending to a perpetuity; and on appeal to the Lords, the judges were unanimously of the same opinion. See Cruise's Digest, title 32, c. 23; Beard v. Westcott, 5 B. & A. 801; *Cadell v. Palmer*, ubi supra; and Mr. Butler's note, Co. Litt. 379, b.

Lord Coke has laid it down, 1 Inst. 206, that "if a feoffee be bound in a bond that the feoffee and his heirs shall not alien, this is good, for he may notwithstanding alien, if he will forfeit his bond that he himself hath made." And in *Freeman v. Freeman*, 2 Vern. 233, a father settled lands on his son in tail,

and took a bond from him that he would not dock the entail. On a bill to be relieved against this bond, the court held it good, because, if the son had not agreed to give his bond, the father might have made him only tenant for life.

It seems, however, that the above opinion of Lord Coke cannot be supported: for, if a general restraint on alienation be, as it unquestionably is, contrary to public policy, there is no more reason for supporting a bond made to enforce it, than for supporting a bond in general restraint of trade. And in a case where A., having limited lands to B. in tail, took a bond from him not to commit waste, it was decreed to be delivered up to be cancelled, the court saying that it was an idle bond. *Jervis v. Bruton*, 2 Vern. 251. So, where an elder brother enfeoffed his second brother in tail, remainder to a younger brother in the like manner, and made each of them enter into a statute with the other that he would not alien; because these statutes were in substance to make a perpetuity, they were ordered to be cancelled by the Court of Chancery, with the advice of Lord Coke himself. *Poole's case*, Moore, 810.

It only remains to remark, that trusts for accumulation, which, being thought to partake of the objectionable nature of perpetuities, were formerly bounded by the same limits, (see *Thellusson v. Woodford*, 4 Ves. jun. 227,) are now regulated by a statute of their own, 39 & 40 G. 3, c. 98, which enacts that no person, after the passing of that act (28th July, 1800), shall, by any deed or will, "settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlers, or the term of 21 years from the death of any such grantor or grantors, settlor or testator, or during the minority or respective minorities of any person or persons who shall be living or in ventre sa mere at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will, or other assurance directing such accumulations, would, for the time being, if of full age, be entitled to the rents, issues, profits, and produce of such property so

directed to be accumulated. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to accumulate contrary to the provisions of this act, go to and be received by such *person [186] or persons as would have been entitled thereto, if such accumulation had not been directed.

"Provided always, that nothing in that act contained should extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or any provision for raising portions for any child or children of any person taking any interest under

any such conveyance, settlement, or devise, or to any direction touching the produce of any timber or wood upon any lands or tenements, but that all such provisions and directions may and shall be made and given as if that act had not passed." See, on the construction of this statute, *Griffiths v. Vere*, 4 Ves. jun. 127; *Longden v. Simson*, 12 Ves. 295; *Southampton v. Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Haley v. Bannister*, 4 Madd. 275; *Shaw v. Rhodes*, 1 Myl. & Cr 135. [S. C. on appeal, 5 Cl. & F. 114, nom. *Evans v. Hellier*; *Pride v. Fooks*, 2 Beav. 430; *Webb v. Webb*, *ibid.* 493; *Ellis v. Maxwell*, 3 *id.* 587; *Boughton v. James*, 1 Coll. 26; *A. G. v. Poulden*, 3 Hare, 555; *Elborne v. Good*, 14 Sim. 165.]

IN *Pierce v. Fuller*, 8 Massachusetts, 223, a covenant with liquidated damages, by which the defendant, in consideration of one dollar, agreed not to run a stage between Boston and Providence, in opposition to the plaintiff, was decided, on demurrer, to be valid: the court, per SEDGWICK, J., said: That contracts, to restrain trade in general, are unquestionably bad; but that contracts for a limited restraint of trade, if made on sufficient and reasonable consideration, and under circumstances appearing to be fair and honest, of which the court are to judge, are valid: if it does not appear whether the contract was or was not on good consideration, so that the contract *may* be either good or bad, it is, *prima facie*, a presumption of law that the contract is bad, because it is to the prejudice of honest industry, and is of apparent mischief to the public, and because the injury to one party is certain, and the benefit only presumptive; and therefore all contracts barely in restraint of trade, where no consideration is shown, are bad; and to make them valid, the consideration, and special circumstances inducing the arrangement, must be shown to the court, and approved of by it. In this case, the agreement appearing to be a reasonable and honest one, the court decided that the consideration of one dollar, having been fixed and adopted by the parties, as adequate, was sufficient in law. In *Palmer et al. v. Stebbins*, 3 Pickering, 188, a penal bond to enforce a similar restraint was held good on similar grounds; and in this case, WILDE, J., delivering the opinion of the court, certainly inclined to form no very strong presumption against such restraints; and see in support of the validity of limited restraints of trade; *Nobles v. Bates*, 7 Cowen, 307; *Pierce v. Woodward*, 6 Pickering, 206. To be valid, the restraint must be partial, and there must be such valuable consideration for the contract, as is necessary in other contracts; but if the restriction as to space be not unreasonable, the cir-

cumstance that it is indefinite as to time, does not invalidate the contract; *Bowser v. Bliss*, 7 Blackford, 344, 346.

In *Chappel v. Brockway*, 21 Wendell, 158, which was debt on a penal bond, the circumstances of the contract being similar to those in *Pierce v. Fuller*, except that the consideration was large, the court laid down the same principles as those above noted from *Pierce v. Fuller*; that contracts in general restraint of trade, on whatever consideration made, are void; that as to contracts for a limited restraint, the courts start with the presumption that they are bad; but they will be upheld if they are shown to have been made upon adequate consideration, and upon circumstances reasonable and useful; and that in such case a penal bond is as valid as a covenant or promise: and with regard to the extent of the restraint, they considered the rule to be, that a restraint is reasonable, if it be not larger than is necessary to afford a fair protection to the other party in the enjoyment of his trade, which must depend mainly on the nature of the trade or business. In *Ross v. Sadgbeer*, *id.* 166, in debt on bond, conditioned that the defendant should not exercise the business of manufacturing pot and pearl ashes, &c., for ten years, and within forty miles of the village of L., the plaintiff demurred, and the court adjudged the declaration bad, because it showed no sufficient consideration or good reason for making the bond; and said, that though the seal imported a consideration, so that *some* consideration, and perhaps one indefinitely large might be implied from the bond, yet it did not afford a presumption of such circumstances and reasons as are required to uphold this sort of contract: they thought also, that if the bond did not set forth the circumstances, the plaintiff might have averred them in the declaration, and, if good, they would have sustained the agreement; but on this point they would not pass definitely. In both of these cases, doubts were expressed by BRONSON, J., whether the nominal consideration in *Pierce v. Fuller* was properly decided to be sufficient.

H. B. W.

[*187]

*SIMPSON v. HARTOPP.

MICH. 18 GEO.—1 C. B.

[REPORTED WILLES, 512.]

Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises. But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

THE opinion of the court was delivered, as follows, by

Willes, Lord Chief Justice. *Trover*. This comes before the court on a special verdict found at the Leicester assizes, held at Leicester, on the 3rd of August, 1743.

The plaintiff declared against the defendant, for that on the 20th October, 1741, he was possessed of one frame for the knitting, weaving, and making of stockings, value 20*l.*, as of his own proper goods, and being so possessed, he lost the same, and that afterwards, *to wit*, on the 18th of August 1742, it came to the hands of the defendant, who knowing the same to be the goods of the plaintiff afterwards, *to wit*, on the 19th day of the same month of August, converted the same to his own use; damage 30*l.*

The defendant pleads *not guilty*; and the jury find that the plaintiff on the 27th of March, 1741, was possessed of one frame for knitting, weaving, and making stockings, value 8*l.* as his own proper goods. That upon that day he let the said frame to John Armstrong, at the weekly rent of 9*d.*, and so from week to week, as long as they the said Nathaniel Simpson, the plaintiff, and John Armstrong, should please; by virtue of which letting, the said John Armstrong was possessed of the said frame, at the said rent, until the time after-mentioned, when the same was seized *as [*188] a distress for rent by the defendant. That the said John Armstrong is by trade a stocking-weaver, and used the said stocking-frame as an instrument of his trade, and continued the use thereof, and his apprentice was using the said stocking-frame at the time thereafter mentioned, when the same was seized by the defendant as a distress for rent. That the said John Armstrong held of the defendant a certain messuage and tenement in the parish of Woodhouse and county of Leicester, by virtue of a lease to him the said John Armstrong thereof granted by the defendant under the yearly rent of 35*l.* for a term of years not yet expired, and was in the actual possession of the same when the said stocking-frame was distrained for rent by the defendant. That on the 19th of December, 1741, John Armstrong was indebted to the defendant in 53*l.* for arrears of rent of the said messuage and tenement; and that the said stocking-frame was then upon the said messuage in the possession of the said John Armstrong, and that there were not goods or chattels by law distrainable for rent in the said messuage without the said stocking-frame sufficient to satisfy the said rent so in arrear, at the time when the said stocking-frame was seized as a distress for the said rent. That on the said 19th of December the defendant entered in the said messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said John Armstrong's apprentice was then weaving a stocking on the same frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the said court should be of opinion that it was not, they assess the damages of the plaintiff at 8*l.*, &c.

Upon this special verdict three questions arise :—

First, Whether a stocking-frame has any privilege at all as being an in-

strument of trade, or whether it be generally distrainable, for rent as other goods are, even though there was sufficient distress besides.

[*189] Secondly, Though it may be so privileged as not to *be distrainable if there be other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable:

1st. Things annexed to the freehold.

2nd. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.

3rd. Cocks or sheaves of corn.

4th. Beasts of the plough and instruments of husbandry.

5th. The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt *sub modo*, that is, upon a supposition that there is sufficient distress besides.

Things annexed to the freehold, as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade to be carried, wrought, or manufactured in the way of his trade, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5, (which was made in favour of landlords), because they could not be restored again in the same plight and condition that they were before [*190] upon *a replevin, but must necessarily be damaged by being removed.

Beasts of the plough, &c., were not distrainable, in favour of husbandry (which is of so great advantage to the nation), and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in Co. Lit. 47, a., b., and many other books which are there cited; and there are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privi-

leged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides. These are the words in Carth. 358, in the case of Vinkinstone v. Ebden, "the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame's being actually in use at the time of the distress gives any further privilege, is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent, for these two plain reasons:

1st. Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damaged in removing, for the weaving of the stocking would at least be stopped, if not quite spoiled, which is the very reason of the case of corn in cocks, &c.

2ndly. Whilst it is in the custody of any person, and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons, that even if it were quite a new case, I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in Co. Lit. 47, a., that a horse whilst *a man is riding upon him, or an axe in a man's hand cutting wood, and the like, cannot be distrained for rent. In Braeton, and several other old books, there is a distinction made between *catalla otiosa* and things which are in use. It was held in P. 14 H. 8, pl. 6, that if a man has two millstones, and only one is in use, and the other lies by not used, it may be distrained for rent. In Read's case, Cro. Eliz. 594, it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any more than a net in a man's hand, or a horse on which a man is riding. So in Moor, 214, The Viscountess of Bindon's case, it is said that if a man be riding on a horse, the horse cannot be distrained, but if he hath another horse, on which he rides sometimes, this spare horse may be distrained.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case seems to look the contrary way, which is the case of Webb v. Bell, 1 Sid. 440, where it was holden that two horses and the harness fastened to a cart loaden with corn might be distrained for rent. But in the first place, I am not clear that this case is law; and besides, it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a *quære* is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises, and therefore judgment must be for the plaintiff.

This is usually cited as a leading case, whenever a question arises respecting the exemption of property from distress, and deservedly so, for it would be difficult to find a clearer summary of the authorities, as they existed at the time when it was decided, than is contained in the judgment of the Lord Chief Justice. "It is," said Buller, J., 4 T. R. 563, "a case of great authority, because it was twice argued at the bar; and Lord [1792] Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress."

There are, according to his lordship, five sorts of property privileged from distress for rent by the common law, and to these the judgment in the principal case authorizes us to add a sixth. The list then will stand thus:—

Things absolutely privileged at common law.

1. Things annexed to the freehold.
2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or mannaed in the way of his trade or employ.
3. Cocks and sheaves of corn.
4. Things in actual use.

With respect to the first class, *viz. fixtures*. It was always held for clear law, that they were not distrainable, for the reason stated by the Chief Justice; see 4 T. R. 567; and there is a distinction in this respect between a distress and an execution; for, under the latter, fixtures, which would be removable by the defendant, as between him and his lessor, may be seized; Poole's case, 1 Sal. 368. See 3 Atk. 13, 3 B. & C. 368; [Place v. Fagg, 4 Man. & Ry. 277]; and so may growing corn, *Ibid.*, though neither the tenant's fixtures, nor the growing corn, would at common law have been distrainable, [Darby v. Harris, 1 Q. B. 695; Dalton v. Whitten, 3 Q. B. 961]. However, as respects the growing corn, the law is now altered by st. 11 G. 2, c. 19, s. 8, which enacts that landlords or their bailiffs, or other persons empowered by them, may distrain corn, grass, or *other product* growing on any part of the land demised. The words *other product* have been explained to apply only to other product of a nature similar to the things specified, that is to say, product to which the process of ripening, and being cut, gathered, made, and laid up when ripe, is incidental. Therefore, trees or shrubs

growing in a nursery ground are not distrainable under this statute. Clark v. Gaskarth, 8 Taunt. 431. See, too, the further qualifications introduced by 56 G. 3, cap. 50, sec. 6, and see Wright v. Dewes, 1 A. & E. 641; and see 1 M. & Wels. 448. In a late case in the Court of Exchequer, where A. T. had granted to B. H. an annuity, charged on certain premises, and empowered him to distrain for the arrears, and "to detain, manage, sell, and dispose of the distresses in the same manner, in all respects, as distresses for rents reserved upon leases for years, and as if the said annuity was a rent reserved upon a lease for years," the court thought that these words did not empower the grantee to distrain growing crops, but only conferred upon him the powers given to landlords by stat. 2 W. & M. cap. 5. Miller v. Green, 2 Tyrwh. 1, 2 C. & J. 143, 8 Bing. 92. [See Johnson v. Faulkner, 2 Q. B. 923.]

2d. *Things delivered to a person exercising a public trade to be carried, wrought, worked up, or managed in the way of his trade or employ.* That this class of property is exempt from distress has never been questioned. See Gisbourn v. Hurst, Salk. 249; 1 Inst. 47, a.; [and Gibson v. Ireson, 3 Q. B. 39, in which the meaning of the phrase "public trade" was discussed.] But the dispute has always been in ascertaining whether the goods in each particular case were so circumstanced as to fall within it. The examples commonly cited as being clearly within the rule, are those of cloth bailed to a tailor to make a garment, or a horse standing in a smith's shop to be shod; so, too, goods of the principal in the factor's hands cannot be distrained by the factor's landlord; Gilman v. Elton, 3 B. & B. 75; for the advancement of trade as much requires that goods should be placed in a factor's hands for sale, as in a carrier's for carriage; and, on the same principle, goods deposited for safe custody in a warehouse or a wharf would not be distrainable for rent due in respect thereof. Thompson v. Mashiter, 1 Bingham. 253. Mathias v. Mesnard, 2 C. & P. 353. Lately, also, it has been decided that goods deposited on the premises of an auctioneer, for the purpose of sale, are privileged from a distress for rent due in respect of those premises; Adams v. Grane, 3 Tyrwh. 326; 1 C. & M. 390; for, to use the words of Bayley, B., "*Interest reipub-*

licæ to bring buyers and sellers together at fixed places, where goods may be brought for the purposes of sale and exchange. This privilege is, therefore, of great importance to the owners of goods, who should not be exposed to the risk of losing them, from the default of the parties on whose premises they may be deposited for that purpose." [And the Court of Queen's Bench have applied the same law to the case of a commission agent. *Finden v. McLaren*, 6 Q. B. 891.] In *Brown v. Shevill*, 2 Adol. [*193] & Ell. 138, a beast was *sent to the premises of Woodham, to be slaughtered, and after it had been slaughtered, the carcass was seized for rent due by Woodham. The Court of King's Bench held that it was not distrainable. This species of privilege, as is remarked by Bayley, B., in his judgment in *Adams v. Grane*, "has been from time to time increased in extent, according to the new modes of dealing established between parties by the change of time and circumstances, one of which modern modes of dealing is the case of a factor." His lordship, in the same case, cites and approves an observation made by Mr. J. Blackstone, in his Commentaries, that "the exemption from liability to distress, in a case of this sort, occasions no hardship, because the privilege is generally applicable to goods which no man could possibly suppose to be the property of the individual from whom the rent is due." In *Muspratt v. Gregory*, 1 M. & Wels. 633, it was held by the Exchequer, Parke, B., dissentiente, and confirmed in *Error*, 3 Mee. & W. 678, that a barge, which a person meaning to purchase salt sent to the Salt-works to carry it home, was not privileged from distress for the arrears of a rent-charge. Vide tamen, as to the case of a carriage actually containing privileged goods. *Rede v. Barley*, Cro. Eliz. 596; *Gisbourn v. Hurst*, Salk. 243. [The same court subsequently held in *Joule v. Jackson*, 7 M. & W. 450, that brewers' casks left according to the usage of trade on a publican's premises with beer were not privileged.]

In the case of *Francis v. Wyatt*, 1 Bl. R. 483, 3 Burr. 1498, the court seemed strongly inclined to think that a carriage standing in the yard of a livery stable was distrainable for rent due to his landlord by the keeper of the livery stable; [and that opinion was approved and acted upon in *Parsons v. Gingell*, 4

C. B. 545. And in *Wood v. Clarke*, 1 Tyrwh. 314, 1 C. & J. 484, it was held that, though materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home, were privileged from distress for rent due from the weaver to his landlord, [See *Gibson v. Ireson*, 3 Q. B. 39.] yet that a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged, unless there were other goods upon the premises sufficient to satisfy the rent due. "This case," said Lord Lyndhurst, delivering the judgment of the court, "does not turn upon the privilege of a workman with respect to the implements and machinery by which his trade is to be carried on, but upon the privilege of the person by whom the workman is employed. The plaintiffs, who were the employers, furnished the workman not only with the materials on which he was to work, but also with the machinery by which the materials were to be worked up. The question is as to the extent of the employer's privilege, whether it is confined to the materials which he supplies, or applies also to the machinery by which the working-up is effected. It appears to us that it is confined to the materials, and does not include the machinery." . . . "None of the cases go beyond this: that the material to be worked up is privileged; that the conveyance by which it is carried to and from the place of manufacture is privileged; that it is privileged in the hands of the carrier while he is carrying it, in the hands of the factor to whom it is consigned, and in the hands and warehouse of a wharfinger, where it is lodged and deposited by the factor. There is no case or dictum that the machinery by which it is to be manufactured is included in the privilege." This decision is approved in *Fenton v. Logan*, 9 Bing. 676.

[As to the mode of pleading this class of exemption see *Gibson v. Ireson*, 3 Q. B. 39.]

3. *Cocks and sheaves of corn.*

See *Wilson v. Duckett*, 2 Mod. 61. The reason for this exemption was, that the distress being at common law merely a pledge, things were held not to be distrainable which could not be restored in the same plight as they were in at the time of taking them. But by 2 W. &

M. c. 5, sheaves or cocks of corn, or loose corn and hay lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed, to the damage of the owner, from such place; and the landlord has, as it would seem, no option, but *must* sell at the expiration of five days, per Parke, B., 1 M. & Wels. 448. [The benefit of this statute, at all events since 4 Geo. 2, c. 23, s. 5, extends to the grantee of a rent charge, though, according to Miller v. Green, above cited, st. 11 G. 2, c. 19, s. 8, does not. Johnson v. Faulkner, 2 Q. B. 923.]

4. Things in actual use.

These, as the text informs us, are privileged in order to prevent the breach of the peace which might be occasioned by an attempt to distrain them. [See Field v. Adames, 12 A. & E. 652, where a replication that the things were in actual use was held good; and Bond v. Kennington, 1 Q. B. 679, where it was bad for want of sufficient *averments*.]

The above four sorts of property are the only sorts where absolute freedom from distress could be deduced from Simpson v. Hartopp; it is, however, proper to observe, that there are two other descriptions of goods absolutely privileged from distress at common law: 1st, Animals *feræ naturæ*, and other things, wherein no valuable property is in any person. Finch, 176; *Bro. [*194] Abr., Property, pl. 20; Com. Di. Dist. C.; Keilway, 30, b.; Co. Lit. 47, a.; 1 Rolle's Abr. 666. But deer in an enclosed ground [not being a park] do not fall within this exemption, Davies v. Powell, Willes, 47. 2ndly, Things in the custody of the law, such as property already taken damage feasant or in execution. 1 Inst. 47, a.; Gilb. Dist. ed. 1757, p. 44; Eaton v. Southby, Willes, 131; Peacock v. Furvis, 2 B. & B. 362; Wright v. Dewes, 1 Ad. & El. 611. [Goods seized] by the messenger under a fiat, are not considered to be in

custodiâ legis, for this purpose, Briggs v. Sowry, 8 M. & W. 729.]

Next with respect to *property conditionally privileged*. Of this the Chief Justice enumerates two classes:

1. Beasts of the plough and instruments of husbandry. [See Davies v. Aston, 1 C. B. 746.]

2. The instruments of a man's trade or profession.

These two species of property are privileged, provided that there be other distress upon the premises. See 1 Inst. 47, a., b., Fenton v. Logan, 9 Bingham. 676; Gorton v. Falkner, 4 T. R. 565. It is, however, settled that beasts of the plough may be distrained for poor rates, though there are other distrainable goods on the premises, more than sufficient to answer the value of the demand, Hutches v. Chambers, 1 Burr. 579. This decision proceeded on the analogy between such a distress and an execution. It must further be observed, with respect to things privileged *sub modo*, that, even though there be a sufficient distress besides, yet if that distress consist of growing crops, which are only distrainable by statute, and are not immediately productive, the landlord is not bound to avail himself of it, but may distrain the things privileged *sub modo*, Pigott v. Birtles, 1 M. & Wels. 441. And possibly the principle of this decision may hereafter be thought to extend to every case of a distress given by statute but not liable to precisely the same rules of treatment as a distress at common law.

To the above exceptions it may be well to add, that if a landlord either expressly or impliedly consent that chattels placed by a stranger on the tenant's land shall be exempt from his distress, it appears from Horsford v. Webster, 5 Tyrwh. 409, 1 C. M. & R. 696, S. C. that he will be a trespasser if he detain them. In that case Parke, B., differed from the rest of the court, conceiving that the consent was not made out under the circumstances. [See Walsh v. Rose, 6 Bing. 638.]

The general rule is, that all chattels found on the demised premises during the term, are liable to a distress for rent due the landlord, whether they are the property of the tenant or of a stranger; Kissler v. McConachy, 1 Rawle, 435; Shearer v. McGowen, 13 Wend. 256; Stevens v. Lodge, 7

Blackford, 59; Harris v. Boggs, 5 id. 489; Haskins v. Paul, 4 Halsted, 113; Reeves v. McKentic, 1 Bailey, 497; Herrie v. Wickham, 6 Leigh, 236; Elford v. Clark, 2 Brevard, 88. But there are certain exceptions to this rule, arising either from the nature or position of the chattels themselves, or from the circumstances under which they have been brought within the reach of the distress.

The most general ground on which property is exempted from the right of distress, is founded on the nature of the right itself, which originally went no further than to entitle the landlord to take and withhold possession, as a means of compelling the payment of the rent, and contemplated a return to the tenant as soon as the rent was paid. Hence nothing could be distrained which was insusceptible of being restored in the same plight as when taken. And although the law has now made a power of sale, as incident to a distress, yet this has not altered the relations between the parties, because the tenant may still replevy or redeem the goods before they are sold; Given v. Bland, 3 Blackford, 64; Darby v. Harris, 1 Q. B. 895. Thus, it was held, in Given v. Bland, that cocks and sheaves of corn are not distrainable, because they cannot be removed and restored without loss. And in Morley v. Pencombe, 2 Exchequer, 101, the carcasses of slaughtered animals were held within the same principle, as being manifestly incapable of being kept for any time without putrefaction.

Fixtures are emphatically within the operation of this principle, because a large part of their value necessarily consists in their adaptation to the place where they are erected, and the special purpose for which they are used. And as they are, moreover, attached to the land, and part of the freehold, they have the character of realty rather than of personalty, and are not within the definition of things distrainable. Hence, nothing is better settled, than that they cannot be taken down or removed by the landlord for the purpose of a distress, even where they are of such a character as to be removable by the tenant at the end of the term, or to pass to the executor, and not to the heir; Darby v. Harris, 1 Q. B. 895; Reynolds v. Shuler, 5 Cowen, 323. If, however, their connexion with the realty be severed for any other than a temporary purpose, and with a view to replace them, they will acquire the character of chattels, and as such may be distrained by the landlord on the premises, or off them, if fraudulently removed by the tenant; Reynolds v. Shuler.

Goods may also be exempt from distress, in consequence of the peculiarity of their position, which renders a distress improper, or inconvenient. Goods in actual use cannot, therefore, be distrained, because the attempt to exercise the right of distress under such circumstances, might give rise to a breach of the peace, and the private right is consequently postponed to considerations of general policy. Thus, in Field v. Adames, 1 A. & E. 449, a replication that the horse and wagon distrained, were in the actual possession of the plaintiff, and in use by him at the time of the distress, was held sufficient to show that the distress was wrongful, although a similar replication was held insufficient in Bunch v. Kennington, 1 Q. B. 679, with regard to a dog, apparently because use does not imply manual possession in the one case as it does in the other. And it is well settled, that goods which have been seized under an execution or attach-

ment, are in the custody of the law, and, therefore, beyond the reach of a distress; *Hamilton v. Reedy*, 3 McCord, 38; *Pierce v. Scott*, 4 W. & S. 344; and this doctrine was applied in *Milliken v. Selye*, 6 Hill, 623, to goods seized under a writ of replevin, but left on the premises. This exemption will enure in favour of a purchaser under the execution; *Peacock v. Purvis*, 2 Brod. & Bing. 362, notwithstanding the omission of the sheriff to pay a year's rent to the landlord, agreeably to the provisions of the statute 8 Anne, c. 14; *Wharton v. Naylor*, 12 Q. B. 673; but may be forfeited by a failure to remove the goods from the premises, within a reasonable time after the sale; *Gilbert v. Moody*, 17 Wend. 354.

The exemptions from distress, hitherto considered, are founded upon the nature or position of the property exempted, and apply equally, whether it belongs to the tenant or a third person. But there is another ground of exemption, which only applies where the goods of third persons are placed in the hands of the tenant, in the way, or for the purposes of his trade or business. This right of exemption is well established, both in this country and England, although the courts here apply it in some cases, which are held not to admit of its application there, (*supra*.)

It is held in both countries, that goods sent to a manufacturer in the way of his business; *Haskins v. Paul*, 4 Halsted, 13, or deposited with a factor, or auctioneer, for sale, are within this exception; *Connah v. Hale*, 23 Wend. 462; *Himely v. Wyatt*, 1 Bay, 102; *Walker v. Johnson*, 4 McCord, 552; and the same thing has been held as to merchandise deposited in a warehouse for safekeeping, and not for sale; *Owen v. Boyle*, 22 Maine, 47; *Brown v. Sims*, 17 S. & R. 138. So far the English and American decisions accord with each other. But in deciding the case of *Brown v. Sims*, GIBSON, C. J., expressed the opinion, that where the landlord is aware that the course of the tenant's business must necessarily put him in possession of the goods of third persons, he ought not to be allowed to distrain them for rent. It was accordingly held, in *Riddle v. Welden*, 5 Wharton, 9, that the effects of a boarder in a lodging-house, could not be seized for the rent due by the keeper of the house; and it was said that every thing put on rented premises by a customer in the way of the tenant's business, is exempt from distress. It was held, in like manner, in *Youngblood v. Lowry*, 2 McCord, 39, that a horse placed in the hands of a livery-stable keeper, in the way of his business, was not liable to a distress.

The goods of a lodger in a boarding-house are exempted from distress, in New York, by the provisions of the Revised Statutes. But it was held, in *Stone v. Matthews*, 1 Hill, 575, that these provisions do not apply, where the goods are in the use and occupation of the keeper of the house, with the consent of the lodger. The Court of Errors subsequently differed in opinion on this point, and the case was finally reversed on another; *Stone v. Matthews*, 7 Hill, 428.

It is generally admitted, that the purpose with which goods are deposited in the hands of a tenant, will not protect them, unless it be one which accords with the course of his business, instead of being peculiar to the transaction in which the deposit is made; *Bevan v. Crooks*, 7 W. & S. 452. But in *Connah v. Hale*, 23 Wend. 462, the right of exemption was held to be sufficiently made out, by showing, that although the tenant was a wine-

merchant, he was in the habit of receiving goods for storage and sale on commission, and appropriated a room in his store especially to that purpose.

H.

*OMICHUND v. BARKER.

[*195]

IL. 18 GEO. 2.—IN CHANCERY.

[REPORTED WILLES, 538.]

The depositions of witnesses professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a commission out of Chancery, admitted to be read as evidence.

SEVERAL persons resident in the East Indies, and professing the Gentoo religion, having been examined on oath administered according to the ceremonies of their religion, under a commission sent there from the Court of Chancery, it became a question whether those depositions could be read in evidence here: and the Lord Chancellor conceiving it to be a question of considerable importance, desired the assistance of Lee, Lord Chief Justice, B. R., Willes, Lord Chief Justice, C. B., and the Lord Chief Baron Parker, who, after hearing the case argued, were unanimously of opinion that the depositions ought to be read.

The case is shortly reported in 1 Wils. 84, and more fully in 1 Atk. 21. The following opinion was delivered by Willes, Lord Chief Justice, C. B. "I could satisfy myself by merely saying that as to the present question I am of the same opinion as the Lord Chief Baron; but as this is in a great measure a new case, as it is a question of great importance, and as so much has been said by the counsel on both sides, I believe it will be expected that I should give my reasons for the opinion which I am going to give, though in the course of my argument I must necessarily touch upon many things that have been already better expressed by the Lord Chief Baron.

Though it be necessary only to give my opinion whether the depositions taken in the present case can be read or not, *yet it may be proper, [*196] in order to come at this particular question, in the first place to consider the general question, whether an infidel, I mean one who is not a Christian, for in that sense Lord Coke certainly meant it, can be admitted as a witness in any case whatsoever. If I thought with my Lord Coke that he could not, I must necessarily be of opinion, that the depositions in the present case could not be read as evidence. On the other hand, if I thought

that infidels, in all cases and under all circumstances, ought to be admitted as witnesses, the consequence would be as strong the other way, that these depositions ought to be read. But if I should be of opinion (and I shall certainly go no further) that some infidels, in some cases and under some circumstances, may be admitted as witnesses, it will then remain to be considered, whether these infidels, who are examined in the cause under the circumstances in which they appear in this court, are legal witnesses or not.

As to the general question, Lord Coke has resolved it in the negative, Co. Lit. 6, b., that an infidel cannot be a witness; and it is plain by this word "infidel" he meant Jews as well as Heathens, that is, all who did not believe the Christian religion. In 2 Inst. 507, and many other places, he calls the Jews infidel Jews; and in the 4 Inst. 155, and in several other passages of his books, he makes use of this expression, infidel pagans, which plainly shows that he comprised both Jews and Heathens under the word infidels; and, therefore, Serjeant Hawkins (though a very learned pains-taking man) is plainly mistaken in his History of the Pleas of the Crown, 2 vol. p. 434, where he understands Lord Coke as not excluding the Jews from being witnesses, but only heathens. But Lord Chief Justice Hale understood this in another sense in that remarkable passage of his, which I shall mention more particularly by-and-by. I shall, therefore, take it for granted that Lord Coke made use of the word infidels here in the general sense; and that will, I think, greatly lessen the authority of what he says; because long before his time, and of late, almost ever since the Jews have returned into England, they have been admitted to be sworn as witnesses. But, I think, the counsel for the defendant seemed to mistake the reason upon which Lord Coke went. For he certainly did not go upon this reason, [*197] that an infidel could not take a *Christian oath, and that the form of the oath cannot be altered but by act of parliament; but upon this reason, though, I think, a much worse, that an infidel was not *fide dignus*, nor worthy of credit; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in Calvin's case, 7 Co. 17, b., that "all infidels are in law perpetual enemies; for between them, as with the devils, whose subjects they are, and the Christians, there is perpetual hostility, and can be no peace. For as the apostle saith, 2 Cor. 6, v. 15; '*quæ conventio Christi cum Belial? Quæ pars fidei cum infidei? Infideles sunt Christi et Christianorum inimici.*' And herewith agreeth the book in 12 H. 8, fol. 4, where it is holden that a pagan cannot maintain any action at all." But this notion, though advanced by so great a man, is, I think, contrary not only to the scripture but to common sense and common humanity. And I think that even the devils themselves, whose subjects he says the heathens are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion, and would at once destroy all that trade and commerce, from which this nation reaps such great benefits. We ought to be thankful to Providence for giving us the light of Christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to do good unto all men, and not only unto those who are of the household of faith. And St. Peter saith, Acts 10, v. 34, 35, that "God is no respecter of persons, but in every

nation he that feareth him and worketh righteousness is accepted with him." It is a little mean narrow notion to suppose that no one but a Christian can be an honest man. God has implanted by nature on the minds of all men true notions of virtue and vice, of justice and injustice, though heathens perhaps more frequently act contrary to those notions than Christians, because they have not such strong motives to enforce them. But, as St. Peter says, there are in every nation men that fear God and work righteousness; such men are certainly *fide digni*, and very proper to be admitted as witnesses. I will not repeat what was said by Sir George Treby, in the case of monopolies, in the State Trials, vol. 7, p. 402, of this notion of Lord Coke's, and which was cited *by one of the counsel; but I think [*198] that it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion that an infidel cannot be a witness. For though it may be founded upon some general sayings in Bracton, Fleta, and Briton, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and in the next place because these great authors lived in very bigoted popish times, when we carried on very little trade, except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man the Lord Chief Justice Fortescue, in his book De Laudibus, b, 26, that witnesses are to be sworn on the Holy Evangelists; he is speaking only of the oath of a Christian, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's, besides what I have already said, I will oppose the practice of this kingdom, before the Jews were expelled out of it by stat. 18 E. 1. For it is plain, both from Madox's History of the Exchequer, p. 167 and 174, and from Seld. vol. 2, p. 1469, that the Jews here, in the time of King John and Henry the Third, were both admitted to be witnesses, and likewise to be upon juries in causes between Christians and Jews, and that they were sworn upon their own books or their own roll, which is the same thing. I will likewise oppose the constant practice here almost ever since the Jews have been permitted to come back again into England; viz., from the 19 Car. 2, (when the cause was tried which is reported 2 Keble, 314,) down to the present time, during which I believe not one instance can be cited in which a Jew was refused to be a witness, and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord Hale, 2 vol. 279. And though this has often been mentioned by the counsel, it is so full of law, of good sense, and the spirit of Christianity, that I think it cannot be repeated too often: *decies repetita placebit*. "It is said by Lord Coke, that an infidel is not to be admitted as a witness; the consequence of which would be that a Jew, who only *owns the Old Testament, could not be a witness. But [*199] I take it, that although the regular oath, as it is allowed of by the laws of England, is *tactis sacrosanctis Dei Evangeliiis*, which supposeth a man to be a Christian, yet in cases of necessity, as in foreign contracts between merchant and merchant, which are many times transacted by Jewish brokers, the testimony of a Jew *tacto libro legis Mosaicæ* is not to be rejected, and is used, as I have been informed, amongst all nations. Yea, the oaths

of idolatrous infidels have been admitted by the municipal laws of many kingdoms, especially *si juraverint per verum Deum creatorem*; and special laws are instituted in Spain touching the forms of the oaths of infidels; *vid. Covarruviam*, tom. 1, p. 1, *de juramenti formâ*." And he mentions a case where it would be very hard if such an oath should not be taken by a Turk or Jew, which he holds binding; "for possibly he might think himself under no obligation if he were sworn according to the usual form of the Courts of England: but then it must be agreed that the credit of such testimony must be left to the jury." Upon this citation of Lord Hale, out of Covarruviam, I shall say, once for all, that I do not lay any great stress on the citations out of the civil law books; not only because I think the present case does not want them, but likewise because they only show that there are particular laws and edicts in other countries which determine this question there; and, therefore, they are not so applicable to the present case, since it is not pretended that there is any act of parliament which has settled this matter. This use indeed, and this only, can be made of these citations, to show that the opinion of the legislature in other countries has been for admitting this sort of evidence.

The last answer that I shall give to this assertion of Lord Coke's, as explained in Calvin's case, are his own words in his 4th Inst. p. 155. "*Fœdus pacis or commercii*," saith he, "though not *mutui auxilii*, may be stricken between a Christian prince and infidel pagan; and as these leagues are to be established by oath, a question will arise whether the infidel or pagan prince may swear in this case by false gods, since he thereby offendeth the true God by giving worship to false gods. This doubt," saith he, "was [*200] moved by Publicola to St. Augustine, who thus resolveth the *same: 'He that taketh the credit of him who sweareth by false gods not to any evil but good, he doth not join himself to that sin of swearing by devils, but is partaker with those lawful leagues, wherein the other keepeth his faith and oath: but if a Christian should anyways induce another to swear by them, he should grievously sin. But seeing that such deeds are warranted by the word of God, all incidents thereto are permitted.' " This is, I think, as inconsistent as possible with his notion that an infidel is not *fide dignus*, and a full answer to what he said in Calvin's case on this head; and, therefore, I shall leave him here, having, I think, quite destroyed the authority of his general rule, that none but a Christian ought to be admitted as a witness.

I shall now proceed to explain the nature of an oath, which will, I think, contribute very much towards the determination of the general, as well as the present question. If an oath were merely a Christian institution, as baptism, the sacrament, and the like, I should be forced to admit that none but a Christian could take an oath. But oaths were instituted long before Christianity was made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. *Juramentum*, according to Lord Coke himself, *nihil aliud est quam Deum in testem vocare*; and, therefore, nothing but the belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take the oath. We read of them, therefore, in the most early times. If we look into the sacred history, we have an account in Genesis, c. 26, v. 28 and 31; and again Genesis, c. 31, v. 53, that the contracts

between Isaac and Abimelech, and between Jacob and Laban, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form. It would be endless to cite the places in the Old Testament where mention is made of taking an oath upon solemn occasions, and how great a reverence was always paid to it. I shall only take notice of three: one in Numb. 30, 2, "He that sweareth an oath bindeth his soul with a bond;" another in Deut. c. 6, v. 13, "Thou shalt fear the Lord thy God, and swear by his name;" and another, Psalms 15, v. 5, where a righteous man is described in this *manner, "One [*201] who sweareth unto his neighbour and disappointeth him not, though it were to his own hindrance."

From the passages of the New Testament, where mention is made of an oath, it is plain that it continued to be used in the same manner, and to be had in the same, if not greater veneration, after the coming of our Saviour. The nature of an oath was not at all altered, only as the promise of rewards and punishments in another world was then more clearly revealed, the obligation of an oath grew much stronger, and those who were really Christians were under a greater apprehension of breaking it. "An oath for confirmation," saith St. Paul, "is an end of all strife." Heb. c. 16. And I cannot forbear mentioning one passage more out of the New Testament, to show what great reverence was paid to an oath, even by the most wicked men; and under what great apprehensions they were of breaking it. It is in Matt. c. 14, v. 6 to 9, and it is related in the same manner by St. Mark, c. 6, v. 23 to 26, that Herod having sworn to Herodias, whatsoever she asked of him he would give it her, though he was exceeding sorry when she asked of him the head of St. John the Baptist, yet for his oath's sake, and the sake of them who sate with him, he would not reject her. And I cannot help likewise, in this place, though a little out of course, taking notice of what is said by Lactantius on this subject, that some in his time, who were so very wicked as not to be afraid even of committing murder, yet had such a veneration for an oath, and such a dread of being foresworn, that when purged upon their oath, they durst not deny the fact.

If we look into profane authors, we shall find pretty much the same account of an oath. I shall mention only two or three of the most ancient and best of them. It appears in several places in Homer, that not only his heroes, but likewise his gods, whom he represents as gods of the second rank subject to one supreme being, frequently confirmed their promise or threats with an oath, and they were then looked upon as unalterable. In two places in Hesiod, the one in his book *De Generatione Deorum*, and the other in another book, it is said that horrible misfortunes and punishments will befall those who swear falsely. So in the beginning of Pythagoras's *Golden Verses*, considering an oath as very sacred and as a sort of religious worship. And Hierocles, who is very large in his comment on this passage, says *an oath was looked upon by the ancient fathers as one of the most solemn acts of religion. I shall conclude with Cicero, who [*202] never speaks of an oath but with the greatest reverence, and as the strongest tie which can be laid upon men. *Nullum vinculum* (says he) *ad astringendam fidem majores nostri arctius jurejurando crediderunt*. To these great authorities I shall only beg leave to add the sentiments of two modern writers, but writers of very great credit; I mean Grotius *de Jure Belli et*

Pacis, lib. 2, c. 13, s. 1. His words are, *Apud omnes populos et ab omni ævo circa pollicitationes promissa et contractus maxima semper vis fuit jurisjurandi*. And Tillotson's Sermons, vol. i. p. 241, where he says that "It is the general practice of mankind, which has universally obtained in all ages and nations, to confirm things by an oath in order to the ending of differences."

It is very plain from what I have said that the substance of an oath has nothing to do with Christianity, only that by the Christian religion we are put still under great obligations not to be guilty of perjury; the forms, indeed of an oath have been since varied, and have been always different in all countries according to the different laws, religion, and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say. Grotius in the same chapter, sect. 10, says, *forma jurisjurandi verbis differt, re convenit*. There are several very different forms of oaths mentioned in Selden, vol. ii. p. 1470, but whatever the forms are, he says, that is meant only to call God to witness to the truth of what is sworn; "*sit Deus testis*," "*sit Deus vindex*," or "*ita te Deus adjuvet*," are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied, as "*ita te Deus adjuvet tactis sacrosanctis Dei Evangelis*;" "*ita, &c., et sacrosancta Dei Evangelia*:" "*ita, &c., et omnes sancti*." And now we keep only these words in the oath, "so help you God," and which indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the bramin's hand and foot at Calcutta, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity to the taking of it, and *to express the assent of the party to the oath, [203] when he does not repeat the oath itself: but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness: as is clear from these words of our Saviour, in Matthew, chap. 23, v. 21 and 22, "Whoso sweareth by the temple sweareth by it, and by him that dwelleth therein; and he that sweareth by heaven sweareth by the throne of God, and by him that sitteth thereon." As to what was said by the counsel, that Christianity is part of the law of England, which is certainly true, as it is here established by laws; and that, therefore, to admit the oath of a heathen is contrary to the law of England; it appears from what I have already laid down that there is nothing in that argument, since an oath is no more a part of Christianity than of every other religion in the world. There is likewise as little in another argument, which was made use of, that an oath cannot be altered but by act of parliament; for the form of an assertory oath here hath been frequently varied, as I have already observed. And what Lord Coke says in the 2 Inst. 479, and 3 Inst. 165, that an oath cannot be altered, nor a new one imposed, but by authority of parliament, plainly relates only to promissory oaths, or oaths of office, as those of privy chancellors, judges, sheriffs, and the like, and not at all to oaths taken by witnesses. As to the passage mentioned out of the State Trials, where the Lord Chief Justice asked if the witness were a Christian or not, who appeared to be otherwise by his mien and dress, and was going to take the common oath, and as to what was said that Lord Chief

Justice Eyre once refused to swear a man on the Evangelists, who was not a Christian, and that Lord Chief Baron Gilbert did the same to one who, when asked whether he believed in Christ, declared that he did not know who Christ was; very little can be inferred from either of these instances, since it does not appear that the fact, to which the witness was going to be sworn, arose in a foreign country, or that it was a mercantile cause, or that it was ever insisted on by the counsel that the witness should be examined in any other manner than in the common form upon the Holy Evangelists.

Having now, I think, sufficiently shown that Lord Coke's rule is without foundation, either in scripture, reason, or law, that I may not be understood in too general a sense, *I shall repeat it over again, that I [*204] only give my opinion that such infidels who believe a God, and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this, though a Christian country. And, on the other hand, I am clearly of opinion, that such infidels, if any such there be, who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case, nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. I therefore entirely disagree with what is reported to have been said by Lord Chief Justice Ley, in 2 Rol. Rep. 346, Tr. 21 Jam. 1, B. R., that in the trials of matters arising beyond sea we ought to allow such proof as they beyond sea would allow. This would be leaving this point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted. Nor can I agree with the resolution in the case of *Alsop v. Bowtrel*, Cro. Jac. 541, 2, M. 17 J. 1, B. R., where it was holden, that a certificate, under the seal of the minister at Utrecht, and of the said town, of the marriage of two persons there, and that they cohabited together as man and wife, was a sufficient proof. To admit the certificate of the minister of the fact of the marriage, at a place where there is no bishop, might, perhaps, be equal, and be resembled to the certificate of the bishop here, which is in some cases conclusive evidence of a marriage. But I am clearly of opinion that the certificate of their cohabiting together ought not to have been admitted. For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. Even the certificate of the King, under his sign manual, of a matter of fact, (except in one old case in Chancery, Hob. 213,) has been always refused; and it would be strange if we should give greater credit to the certificate of a minister at Utrecht than to that of the King himself. Besides, it is not the best evidence that the nature of the thing will admit, but the proper and usual evidence of a fact, arising beyond sea, is an affidavit or deposition, *taken before a public notary, and certified to be so, under the seal of the place, or [*205] the principal officer of the place, which has been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission. Before I conclude this head, I must beg leave again to take notice of what is said by Lord Hale, that it must be left to the jury what credit must be given to these infidel witnesses. For I do not think that the same credit ought to be given either by a court

or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth. The distinction between the competency and credit of a witness is a known distinction, and many witnesses are admitted as competent, to whose credit objections may be afterwards made. The rule of evidence is, that the best evidence must be given that the nature of the thing will admit. The best evidence which can be expected or required, according to the nature of the case, must be received; but if better evidence be offered on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean: suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end. To come nearer to the present case: supposing an infidel, who believes a God, and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath, as I think he may, and, on the other side, to contradict him, a Christian is examined, who believes a future state, and that he shall be punished in the next world as well as in this if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation.

I have now done with the general question. And what I have said upon that must plainly show of what opinion I am in respect to the present question; and, therefore, I shall be very short as to that. I think, after what I have already said, I need say nothing more to determine this point than barely to state the facts relating to it, as they stand now before the court.

[*206] * It is admitted that the cause is concerning a mercantile affair, which was transacted in a foreign heathen country, at Calcutta. It must be agreed that it is greatly to the advantage of this nation to carry on a trade and commerce in foreign countries, and in many countries inhabited by heathens, and particularly in this town, in which we have established a factory for that purpose. A trade was accordingly carried on there between the plaintiff, a heathen and subject of that country, and a Christian merchant, a subject of England. It is insisted by the plaintiff, that the English merchant, being greatly in his debt, withdrew into England, and consequently was not amenable to the courts of justice in that country, where, if he could have tried his cause, this evidence, which is now in dispute, would have certainly been admitted. He followed his debtor into England, which was the only remedy that he had left, and filed his bill against him in the Court of Chancery here. No one will, I believe, now say that he had not a right to bring such a suit, or that he is not entitled to justice. For, though there was such an old notion in popish times, and for some little time afterwards, till the Reformation was fully established, that even an alien friend, especially if he were an infidel, could not sue in a court of justice here, this most absurd, wicked, and unchristian notion has, God be thanked, been long since exploded, and will, I hope, never be revived again. It being admitted that he may bring his suit here, and consequently that he is entitled to justice, it follows that he must be at liberty to produce his evidence here, in order to make out his case. And if he produce his evidence, it must be upon oath; for it would be absurd to give an infidel more credit than a Christian, which we must do, if an infidel's evidence be neces-

sary, in order to do justice, and yet he cannot be examined upon oath : he must, therefore, be examined upon oath in some shape or other. In order to obtain justice, the plaintiff in this cause laid his case properly before the Court of Chancery, and prayed a commission to Calcutta ; and the Court of Chancery, I think, very rightly, and with great justice, ordered a commission to go, and that the words “on the Holy Evangelists” should be omitted, and the word “solemnly” inserted in their room : and likewise very *prudently directed that the commissioners should certify upon the return [*207] of the commission, in what manner the oath was administered to the witnesses examined on the commission ; and what religion they were of. The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in England, which fully answers the objection, (if there was any thing in it,) that the form of the oath cannot be altered ; and they certified that after the oath was read and interpreted to them, they touched the bramin’s hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the Gentoo religion, and in the same manner in which oaths are usually administered to persons who profess the Gentoo religion, on their examination as witnesses in the courts of justice, erected by virtue of his Majesty’s letters-patent at Calcutta ; and they further certified that the witnesses so examined were all of the Gentoo religion. This certificate, I think, fully answers the objection, that it does not appear that the witnesses believe a God, or that he will punish them if they swear falsely ; which, as I have already said, I admit to be requisite, absolutely necessary to qualify a person to take an oath. I do not at all rely upon the books which were cited, and which give an account of the Gentoo religion. But it is plain, from the certificate itself, that they believe and worship a God, and that they have priests for that purpose, which would be of no use, if they did not believe that he would reward or punish them, according to their deserts. The certificate likewise answers this objection, that the oath being only read to the witnesses, it does not appear that they said or did any thing which signified their assent to it ; for touching the hand or foot of the priest, after these words, “so help me God,” it being their usual form, is as much signifying their assent as kissing the book is here, where the party swearing likewise says nothing. And the case cited by the Lord Chief Baron, from 2 Sid. 6, Mich. 1657, plainly proves this, where Chief Justice Glyn was of opinion that Doctor Owen’s holding up his right hand was sufficient, without touching the book. And Lord Stair, in his institutes of the Laws of Scotland, p. 692, confirms this, where he says, “It is the duty of *judges, [*208] in taking the oaths of witnesses to do it in those forms that will most touch the conscience of the swearers, according to their persuasion and custom ; and though Quakers and fanatics, deviating from the common sentiments of mankind, refuse to give a formal oath, yet, if they do that which is materially the same, it is materially an oath.”

The only objection that remains against admitting this evidence is, that these witnesses will not be liable to be indicted for perjury ; because they are not sworn *supra sacrosancta Dei Evangelia*, which words, as was insisted, are necessary, in every indictment ; and therefore, they are not under the same necessity to swear truly as Christian witnesses are. But this objection has been in a great measure already answered by the Chief Baron, and it

may receive two plain answers; first that these words, "*supra sacrosancta Dei Evangelia*," or "*tactis sacrosanctis Dei Evangelis*," are not necessary to be in an indictment for perjury. They have been omitted in many indictments against Jews, of which several precedents have been laid before us; and they are not in the precedents of such indictments, which I find in an ancient and very good book, entitled West's Simboleography; but it is only said there, "*supra sacramentum suum dixit et deposuit*," or *affirmavit et deposuit*." Besides: this argument, if it prove any thing, proves a great deal too much; for, if there were any thing in it, many depositions even of Christians have been admitted, and many more must be admitted, or else there will be a manifest failure of justice, where the witnesses are certainly not liable to be indicted; for when the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if they do, cannot be indicted for perjury, because the fact was committed in another country. Those, therefore, who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses, and so there is an end of this objection.

From what I have said it is plain that my opinion is that these depositions ought to be read in evidence.

[*209] *The rule of law upon this subject was anciently supposed to be that *infidels*, i. e., persons not professing the Christian faith, were incompetent as witnesses, Gilb. Ev. 142. The principal case has, however, settled the contrary; and it was ruled by Buller, J., in *R. v. Taylor, Peake*, 11, that the proper question to put to a witness, in order to ascertain his competency as to religious principle, is, *whether he believes in a God, the obligation of an oath, and a future state of rewards and punishments*. It would appear, however, from some of the observations of the Chief Justice in the principal case, that it is sufficient if the witness believe in a God who will reward or punish him *in this world*. In *White's case*, 1 Leach, 430, the witness stated that he had heard there was a God, and believed that people who told lies would come to the gallows, but was ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, and what became of wicked people after death. His testimony was rejected. In this case the witness seems to have had an idea that falsehood would be punished by God in this world, but not of the peculiar solemnity of an oath, and of the sinfulness of perjury beyond that of any other species of falsehood. [Indeed it does not appear

at all clearly from the report, that the witness believed the punishment of sin, even in this world, to be part of God's government, without which he did not fall within what was said by Willis, C. J., in the principal case.] It has been held that where an infant witness in a criminal case appeared to have no notion of the obligation of an oath, the trial might be postponed till he should be instructed, 1 Leach, 430, n. But it was held differently where the witness was an adult, and of sufficient intellect. *Wade's case*, 1 Moo. C. C. 86. [Also, where the child was incompetent to take an oath, by reason of her tender years, and not from neglected education, Pollock, C. B., observing that "more would probably be lost in memory than would be gained in any other way." His lordship, however, expressly guarded himself against being supposed to lay down any general rule, as there might be cases where a postponement would be proper. *R. v. Nichols*, 2 Car. & Kir. 246.]

Quakers and Moravians were formerly incompetent in criminal cases, but their disability is now removed by St. 9 G. 4, c. 15, s. 1. [3 and 4 W. 4, c. 49, 1 and 2 V. c. 77; as is that of Separatists by 3 and 4 W. 4, c. 82.] Excommunicated persons were also incapable of giving evidence at common law, but are now by

St. 53 G. 3, cap. 127, sect. 3, exempted from all civil disabilities. [And this seems equally applicable to excommunication *ipso facto*, as to that pronounced by an ecclesiastical court. *Escott v. Martin*, 4 Moore (Privy Council) 104. Lord Denman's Act, 6 & 7 V. c. 85, removes the effect of incapacity from crime; but it has been made a question whether its provisions extend to the courts Christian. *Sanders v. Wigston*, 1 Robert. 460.]

With respect to the principal case, the following account of the determination of the Chancellor upon it is extracted from 1 Wilson, 84. "It was held by the Lord Chancellor that an infidel, pagan, idolater, may be a witness, and that his deposition, sworn according to the custom and manner of the country where he lives, may be read in evidence." [See *Reg. v. Entremahn*, 1 C. & M. 245. 1 & 2 V. c. 105.]

IN the case of *Jackson v. Gridley*, 18 Johnson, 103, the competency of a witness as affected by his religious creed, was made to rest upon the question of his belief in the existence of a God, and a state of reward and punishment in the world to come; thus excluding those persons who confine the operation of divine justice within the limits of the life of man in this world. The law was held the same way in *Wakefield v. Ross*, 5 Mason, 16; *Curtis v. Strong*, 4 Day, 51, and *Atwood v. Weston*, 7 Connecticut, 66. In the latter case, the witness was excluded on the ground, that as he believed that all mankind would be made happy immediately after death, no sanction could be added to his oath by his faith in a future state of existence. The distinction was also taken in argument, and supported by the authority of the court, that as the important point was, not what the witness thought as to the future condition of others, but as to his own, he would have been equally incompetent, had he believed himself to be included among the number of the elect under the doctrine of predestination, irrespectively of the character of his actions while in this state of existence.

A belief in God and in a future state of existence, was held essential to competency, in *Wakefield v. Ross*, 5 Mason, 16, and *Noble v. The People*, Breese, 29; but in the latter case it was held, that if these points were embraced in the creed of the witness, his belief in future punishment was immaterial. The good sense of this decision will be evident, on comparing it with the theological subtlety of the discussion in *Attwood v. Weston*.

As the witness whose competency was in question in *Jackson v. Gridley*, had expressed his disbelief in the existence of God, as well as of a future state, the opinion of the court as to the effect of scepticism on the latter point, apart from the former, must be considered as a dictum rather than a decision. It was subsequently held in two cases at Nisi Prius, reported, 2 Cowen, 433, 573, that a belief in the existence of God and providential punishment for crime, whether in this world or the next, is sufficient to render a witness competent. In *Butts v. Swartwood*, 2 Cowen, 432, SUTHERLAND, J., said, that the true test of the competency of a witness was, "whether he believed in the existence of a God, who would punish him if he swore falsely;" thus adopting the words of WILLIS, C. J., in the case of *Omichund v. Barker*, as the definition of the law. Although this opinion

was expressed generally, the question, whether a belief in a punishment confined to this life, will be sufficient, was not raised on the record, nor expressly decided by the court, who merely held, that the witness was rendered incompetent by his disbelief in the eternal duration of future punishments.

The case of *Cubbison v. McCreary*, 2 W. & S. 262, set the law at rest on this point in Pennsylvania, by deciding that a belief in a future state of rewards and punishments, is not necessary to the competency of a witness. It was again said, that the true test of his competency is the existence of a belief in a God, who will punish him if he swear falsely. It is held in like manner in most of the other States of the Union, that the disbelief of a witness in a future state, goes only to his credibility, not his competency; and that his testimony should be admitted, if he believe in the existence of God, and in the divine punishment of crime; *Hunseom v. Hunseom*, 15 Mass. 184; *Brock v. Milligan*, 10 Ohio, 121; *Blockie v. Brenness*, 2 Alabama, 354; *The United States v. Kennedy*, 3 McLean, 175; *Jones v. Harris*, 1 Strobbart, 150. But the inclination of the courts in most of these cases seems to have been, that unless a witness believe that the justice of God awards temporal or future punishment, he is incompetent to testify.

However this may be, it is well settled throughout the greater part of this country, that a witness who has deviated so far from the laws of his moral and intellectual nature, as to have lost his belief in the existence of God, cannot be allowed to give evidence in a court of justice. *The People v. McGarren*, 17 Wend. 460; *Norton v. Ludd*, 4 New Hampshire, 444; *Smith v. Coffin*, 6 Shepley, 167; *Arnold v. Arnold*, 13 Vermont, 362; *Scott v. Hooper*, 14 Id. 555. And in *Arnold v. Arnold*, it was said that a witness who does not believe in a Divine existence, must be incompetent, so long as the sanction of an oath, or of some form equivalent to an oath, is necessary to the validity of evidence. "If the witness," said the court "does not believe in any Supreme Governor of the universe, who will reward virtue, and punish vice, there is no mode known to us, by which an oath can be made binding upon his conscience. If a man sincerely believe himself to belong to the highest order of intelligences, it may be his misfortune, and not his fault; but he cannot be sworn by the greater, and if sworn at all, he must be allowed to swear by himself." It was further said, that if the witness believed in God, it was not necessary that he should believe in a future state of existence, or in punishment in a future life.

It has, notwithstanding, been held in Virginia, that a scrutiny into the religious belief of a witness, and still more his disqualification on the ground of his want of belief, is a violation of the constitution of that state, and an invasion of the freedom of opinion and equality of legal right, to which all men are entitled under the letter and spirit of the constitution of the United States; *Perry v. Case*, 3 Grattan, 162.

It was held in *Jackson v. Gridley*, that when the past expressions of the witness are given in evidence, for the purpose of proving his disbelief and excluding his testimony, he cannot restore his competency, by stating that his views have undergone a change, and that he has become a believer. This decision has been followed in most of the subsequent cases; and the general rule, that a witness who is shown to be *prima facie* incompetent by extrinsic evidence, cannot be heard in support of his own competency,

has been held to apply, where the disqualification consists in his alleged want of religious belief, as well as when it grows out of his interest in the controversy; *Curtis v. Strong*, 4 Day, 51; *Scott v. Hooper*, 14 Vermont, 555. *The State v. Townsend*, 2 Harrington, 543; *Smith v. Coffin*, 6 Shepley, 157; *The Commonwealth v. Wyman*, Thacher's Crim. Cases, 191. It was said in these cases, that when the question is as to whether an oath is binding on the conscience of the witness, it is absurd to swear him on his *voir dire*, and that his declarations not under oath, cannot rebut the case made out against him, and are not admissible as evidence for any purpose. It is undoubtedly true, that the declarations of a person who has not been sworn, cannot be received as evidence of other facts, but when they are themselves material facts, and the best evidence as to the point in controversy, they should be taken into consideration by the court and jury, whether brought forward directly, or through the medium of witnesses. Thus admissions made in open court by the parties, are as much evidence of the points admitted, as if they were made antecedently, and proved by the relation of those who heard them. And where the sanity of a third person is in issue, although his declarations out of court may undoubtedly be given in evidence, yet his language and statements, when in court, not only may, but ought to be regarded as important elements of decision. The same rule must apply, whether the question is as to belief or sanity, because expression is in both cases the best and primary evidence of mental condition. If this were not so, the declarations of the witness as to his belief, could not be proved in court, when uttered out of it; for what is not evidence in itself, cannot be made so by the channel through which it is communicated. The whole question, therefore, is reduced to one of two things: either the expressions of a party are not original facts, representing his impressions or belief, and should not be received when proved by the testimony of others, or they do belong to that class of facts, and may therefore be brought directly before the court, as the best evidence which the nature of the case admits of. And the argument that no weight can be given to the statements of a witness, when his competency is in question, either proves too much, or fails altogether. For if no credit can be given to his declarations when affirming his belief, why should they be credited when they deny it? The only reason which can be assigned for believing his statements at one time rather than another, is the difference of the circumstances under which they are made. It is perhaps true, that a witness may be induced to give a false account of his religious opinions at a trial, by various motives, which would not exist on other and less public occasions. But the influence of circumstances, either on the present or past declarations of the witness, would seem to go to their credibility, rather than their competency. And it is evident that justice cannot be done in an investigation into the mental condition either of a party or witness, without taking into view the account which he gives of himself at the time, as well as that which he has given previously. See *Cubbison v. McCreary*, 2 W. & S. 262.

H.

[*210] *SCOTT v. SHEPHERD.

EASTER, 13 GEO. 3.—C. P.

[REPORTED 2 BLACKSTONE, 892.]

Trespass and assault will lie for originally throwing a squib, which, after having been thrown about in self defence by other persons, at last put out the plaintiff's eye.

TRESPASS and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last summer assizes at Bridgwater, when the jury found a verdict for the plaintiff with 100*l.* damages, subject to the opinion of the court on this case: On the evening of the fair-day at Milbourne Port, 28th October, 1770, the defendant threw a *lighted squib*, made of gunpowder, &c., from the street into the market-house, which is a covered building supported by arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled: which lighted squib, so thrown by the defendant fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the the said standing, and then threw it *across* the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said lighted squib from off the said standing, and then threw it to another part of the said market-house, and in so throwing it struck the plaintiff, then in the said market-house, in the face therewith, and the combustible matter then bursting, *put out one of the plaintiff's eyes. [*211] Qu. If this action be maintainable?

This case was argued last term by *Glyn*, for the plaintiff, and *Burland* for the defendant: and this Term, the Court being divided in their judgment, delivered their opinions *seriatim*.

Nares, J., was of opinion that trespass would lie well in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has, by statute W. 3, been since made a nuisance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate: 11 Hen. 7, 28, is

express that *malus animus* is not necessary to constitute a trespass. So, too, 1 Stra. 596. Hob. 134. T. Jones, 205. 6 Edward 4, 7, 8. Fitzh. Trespass, 110. The principle I go upon is what is laid down in Reynolds v. Clarke, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Hardr. 60. Reg. 108, 95. 6 Ed. 4, 7, 8. 1 Ld. Raym. 272. Hob. 180. Cro. Jac. 122, 43. F. N. B. 202, [91 G.] I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean, it is sufficient. *Qui facit per aliud facit per se*. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in King v. Huggins, 2 Lord Raym. 1574. Parkhurst v. Foster, 1 Lord Raym. 480. Rosewell v. Prior, 12 Mod. 639. And it was declared by this court, in Slater v. Baker, *M. 8 Geo. 3, 2 Wils. 359, that they would not [*212] look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion that an action of *trespass* did not lie for Scott against Shepherd, upon this case. He took the settled distinction to be, that where the injury is *immediate*, an action of *trespass* will lie; where it is only *consequential*, it must be an action on the *case*: Reynolds v. Clarke, Lord Raym. 1401, Stra. 634; Haward v. Bankes, Burr. 1114; Harker v. Birkbeck, Burr. 1159. The *lawfulness or unlawfulness* of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case. But this cannot be the general rule; for it is held by the court in the same case, that if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over, and is hurt, an action on the case only lies, it being a *consequential* damage; but if in throwing it I hit another man, he may bring trespass, because it is an *immediate* wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per POWELL, J., 11 Mod. 180. Yet here the original act was unlawful,

and in the nature of trespass. So that *lawful* or *unlawful* is quite out of the case; the solid distinction is between *direct* or *immediate* injuries on the one hand, and *mediate* or *consequential* on the other. And trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was *immediate* or *consequential* only; [*213] and I hold it to be the latter. *The original act was, as against Yates, a trespass; not as against Ryal or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the *vis impressa*, is continued, though diverted. Here the instrument of mischief was at rest, till a new *impetus* and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act! nay, it may be extended *in infinitum*. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's windows, shall he have *trespass* against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether *case* would lie against Shepherd for the *consequential* damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection [*214] in removing the danger from themselves. The *throwing it across the market-house, instead of brushing it down, or throwing [it] out of the open sides into the street (if it was not meant to continue the sport, as it is called,) was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person;—nothing but inevitable necessity; *Weaver v. Ward*, Hob. 134. *Dickenson v. Watson*, T. Jones, 205; *Gilbert v. Stone*, Al. 35, Styl. 72. So in the case put by Bryan, J., and assented to by Littleton and Cheke, C. J., and relied on in Raym. 467, "If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a

lawful act in endeavouring to defend myself. But none of these great lawyers ever thought that trespass would lie, by the person struck, against him who first assaulted the striker. The cases, cited from the Register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.—But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater v. Barker* was first a motion for a new trial *after verdict*. In our case the verdict is suspended till the determination of the court. And though *after verdict* the court will not look with eagle's eyes to spy out a variance, yet when a question is put by the jury upon such a variance, and it is made the very point of the cause, the court will not wink against the light, and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain *trespass*, may also *frequently maintain *case*, but not *e converso*. *Every action of trespass with a "per quod" includes an* [*215] *action on the case. I may bring trespass for the immediate injury, and subjoin a "per quod" for the consequential damages;—or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited.†* But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; *Gates and Bailey, Tr. 6 Geo. 3, 2 Wils. 313*. It is said by Lord Raymond, and very justly, in *Reynolds and Clarke*, "we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion." As I therefore think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained,) I am of opinion that in this action judgment ought to be for the defendant.

Gould, J., was of the same opinion with *Nares, J.*, that this action was well maintainable. The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between *case* and *trespass* upon these occasions: I am persuaded there are many instances wherein both or either will lie. I agree with Brother *Nares*, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. But, exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon *Willis* and *Ryal* excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What *Willis* and *Ryal* did

† *Wells v. Ody*, 5 Dowl. 95.

was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers; 1. from the general mischievous intent; 2. from the obvious and natural consequences of such an act: which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether [*216] *lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Hardr. 69; Courtney v. Collet, 1 Lord Raym. 272. I shall not go over again the ground which Brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C. J.—This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.—They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, &c. But the true question is, whether the injury is the direct and immediate act of the defendant: and I am of opinion that in this case it is. The throwing the squib was an act unlawful, and tending to affright the bystander. So far mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it;—*Eyreditur personam*, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter; Post. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and 2 Lev. 172, that it need not be laid *scienter*. I look upon all that was done subsequent to the original throwing as a continuation of the first force and [*217] first act, *which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95, a, for trespass in maliciously cutting down a head of water, which thereupon flowed down to and overwhelmed another's pond, shows that the immediate act needs not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but

acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares that the present action is maintainable.

Postea to the plaintiff.

It is perfectly clear, that if an injury be done to A., by the *immediate* force of B., the former *may* bring trespass; and it is equally clear that if the injury be not immediate, but merely consequential, he *cannot* sue in trespass; and that his remedy, if any, is by action on the case for consequential damages; these two propositions are well illustrated by the case put in the text of a man throwing a log into the highway. If the log strike A. in its fall, he may sue in trespass; but if, after it is lodged, and rests upon the ground, he stumble over it, and so receive an injury, case is his only remedy. See Com. Di. Pleader Action on the case, (A.) *ibid.* (B. 6); *Leame v. Bray*, 3 East, 593; *Covell v. Laming*, 1 Camp. 697; *Chandler v. Broughton*, 1 Cr. & Mee. 29; 3 Tyrwh. 220. [*Hartley v. Monham*, 3 Q. B. 701; *West v. Nibbs*, 4 C. B. 172, where a mere detainer of goods (by locking them up, and refusing access to them) was held to be no *trespass*. But the continuance of a trespass, though without fresh violence, is a new trespass; thus, in the case above put, if the log were thrown upon A.'s land, so as to be a trespass to the realty, he might, after having recovered damages in trespass for placing it there, sue in trespass again for its continuance. *Holmes v. Wilson*, 10 A. & E. 503; *Thompson v. Gibson*, 7 M. & W. 456. For there is a legal obligation upon the wrong doer to discontinue a trespass or remove a nuisance; though there is no such obligation upon a trespasser to replace what he has destroyed, albeit he is liable in one action of trespass to compensate in damages the loss which he has occasioned. *Clegg v. Dear-den*, 12 Q. B. 576.]

However, although trespass lies wherever the injury done to the plaintiff results from the immediate force of the defendant, still there are many instances in which the plaintiff, though he may adopt that form of action, is not bound to do so, but may sue in *case*. In *Moreton v. Hardern*, 4 B. & C. 224, the declaration stated that the defendants

drove their coach so negligently and carelessly that the wheel ran with great force against the plaintiff, whereby one of his legs was broken. It was proved that one of the defendants was personally driving when the accident occurred; and it was thereupon urged that the action should have been *trespass*, not *case*. The court, however, decided that the case would lie, and Bayley, J., gave the following historical account of the progress of the law upon this subject. "It was long," said his lordship, "*vexata quæstio*, whether case could be brought when the defendant was personally present, and acting in that which occasioned the mischief. Early in my professional experience, case was the form of action usually adopted for such injuries. In Lord Kenyon's time a doubt was raised upon the point, and he thought that, where the act was immediately injurious, trespass was the only action that could be maintained for that injury. *Leame v. Bray* was an action of trespass. On the trial, Lord Ellenborough thought it should have been case, but on further consideration this court was of opinion that trespass was maintainable, but they did not decide that an action on the case would have been improper. Looking at the other cases on the subject, it is difficult to say that an action on the case will not lie for an injury sustained by [*218] the negligent*driving of a coach, though one of the proprietors was the person guilty of that negligence. In *Ogle v. Barnes*, 8 T. R. 188, which was an action for negligently steering a ship, the declaration alleged that the ship was under the care of Barnes, one of the defendants, and of certain servants of the defendants, and that through their negligence the injury was sustained: and it was never urged that the action should have been trespass and not case, because one of the defendants was on board, but on the ground of the injury being immediate. In *Rogers v. Imbleton*, 2 N. R. 117, which was decided after *Leame v. Bray*, it was alleged that the defendant was driving a cart, and took such bad

care of the cart and horse, that it ran with great force against the plaintiff's horse. To that there was a demurrer upon the authority of *Leame v. Bray*, the action being in case; but the court was clearly of opinion that case would lie, and the demurrer was overruled. In *Huggett v. Montgomery*, 2 N. R. 446, although the defendant was on board, yet the ship was not under his immediate care and management, but under that of a pilot; and on that ground case was held to be the proper form of action. It is not necessary to say that trespass could not, in this case, have been sustained against Hardern; no doubt that action lies where an injury is inflicted by the wilful act of the defendant; but there is no doubt that case also lies where the act is negligent, and not wilful." This judgment has been cited at some length, because it contains a complete history of the progress of the law up to the decision in *Moreton v. Hardern*. The right of the plaintiff to bring case, where the act for which he sues, although committed with immediate force, is negligent, not wilful, is fully established in *Williams v. Holland*, 10 Bingh. 113, where all the previous cases having any bearing on the subject, will be found collected in the argument of Jones, Sergeant. The declaration charged that the defendant so carelessly, unskillfully, and improperly drove his gig, that through the carelessness, negligence, unskillfulness, and improper conduct of the defendant, the said gig struck with great violence against the cart and horse of the plaintiff. The jury having found a verdict of guilty on the ground of negligence, it was objected that the action should have been trespass, not case; but the Court of Common Pleas were of opinion that *Moreton v. Hardern* had "laid down a plain intelligible rule, that where the injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act is immediate, so long as it is not a wilful act." See also *Wheatly v. Patrick*, 2 Mee. & Welsb. 651; and there are other instances in which the plaintiff has his choice of case and trespass as where one man builds his house overhanging that of another, so that the rain falls on it, *Wells v. Ody*, Judgment of Parke, B., 1 M. & W. 462; *Raine v. Alderson*, 4 Bing. N. C. 702. [*Fay v. Prentice*, 1 C. B. 828.) It is,

however, clear from *Leame v. Bray*, and *Chandelor v. Broughton*, 1 Cr. & Mee. 29, 3 Tyrwh. 220, that the plaintiff may, if he please, bring trespass, whenever the injury is immediate, even though it be not wilful; and it is equally clear that, where the injury, *which forms the gist of the action*, is both wilful and immediate, trespass is the only remedy. *Savignac v. Roome*, 6 T. R. 125; *Day v. Edwards*, 5 T. R. 648; *Wheaton v. Woodcock*, 7 Dowl. 853, 2 M. & W. 587, S. C. The words "*which forms the gist of the action*" are printed in italics, because it is apprehended that the proposition laid down by Blackstone, J., in the text, p. 215, is correct, viz. that wherever a trespass occasions consequential damage, the trespass itself may be waived, and case brought for the consequential damage. See *Wells v. Ody*, 5 Dowl. 95; *Raine v. Alderson*, 4 Bing. N. C. 702; [*Chamberlain v. Hazlewood*, 5 Mee. & W. 515.] See, however, the judgment of Parke, B., in *Wheaton v. Woodcock*, 7 Dowl. 857; 5 M. & W. 587, S. C. In Comyns's Digest, Action on the Case, (B. 6), the distinction is clearly stated as follows, viz. "So it (i. e. case) does not lie for a mere trespass, as for taking down the walls and pulling down the tiles from a house, *unless it be alleged that the timber was thereby rotted*, 1 Roll. 101."

Where the defendant elects to sue in case for an immediate but negligent act of violence, he must pay much attention to the wording of his declaration, and take care to introduce no expressions which import an exertion of wilful force. In *Day v. Edwards*, 5 T. R. 648, a declaration in case alleged that the defendant "so *furiously*, negligently, and improperly drove his cart and horse, that through the *furious*, negligent, and improper conduct of the defendant, the cart and horse were driven against the plaintiff's carriage." This was held bad on special demurrer; and is distinguished from *Williams v. Holland*, by Tindal, C. J., on the ground that the declaration imported wilful violence, 10 Bing. 116. There is sometimes a good deal of difficulty in determining whether a count be in case or trespass, see *Hensworth v. Fowkes*, 4 B. & Ad. 461. *Smith v. Goodwin*, *Ibid.* 413. *Holland v. Bird*, 10 Bing. 15. [*Hudson v. Nicholson*, 5 M. & W. 437; *Holford v. Bailey*, 8 Q. B. 1000.]

There are other instances in which

trespass and case lie concurrently. Where goods are tortiously taken out of the plaintiff's possession, *trover*, which is a form of action on the case, may be maintained *for the conversion*, which, and not the tortious *taking*, is then *the gist of the action*; and "if trover will lie which is only a subdivision of action on [*219] the *case, why should not *case* also in its more expanded form?" per Tindal, C. J., in *Holland v. Bird*, 10 Bing. 18. In that case the form of the count was, that the defendant having distrained the plaintiff's goods for rent, the plaintiff tendered the rent in arrear and the cost of the distress, which the defendant ought to have accepted and re-delivered plaintiff's goods, but wrongfully refused so to do: this was held the proper subject of an action on the case. See on the same point *Branscombe v. Bridges*, 1 B. & C. 145. *Smith v. Goodwin*, 4 B. & Ad. 413. [*West v. Nibbs*, 4 C. B. 172. And a wrongful seizure under a second distress was made the subject of an action on the case in *Lear v. Caldecott*, 4 Q. B. 123, *Dawson v. Cropp*, 1 C. B. 961.]

Another class of cases, and certainly rather an anomalous one, comprehends actions for criminal conversation and for seduction; for both which injuries trespass and case are held to lie concurrently. See 2 T. R. 167, 6 East, 388. In *Woodward v. Walton*, 2 New Rep. 476, the declaration contained two counts; the first stating that the defendant broke and entered the plaintiff's house, and there assaulted and debauched his daughter; the second omitted the breaking and entering the dwelling-house, but stated that the defendant assaulted and debauched his daughter, *per quod servitium amisit*. On a motion to arrest judgment the question was learnedly argued, and the previous authorities on both sides cited; and the court, after consideration, were of opinion that the action was rightly brought. "In actions like the present," said Sir J. Mansfield, C. J., delivering judgment, "as far as my recollection goes, the form of the declaration has always been in trespass, *vi et armis et contra pacem*. I cannot distinguish between this action and an action for criminal conversation. If that be the subject of trespass, this must be so too. In the action for criminal conversation [*219a] the violence is not the *ground of the action: both in that case and this, if the injury were committed

with violence, it would amount to a rape. I therefore do not see any good reason why either of them should be the subject of an action of trespass. In actions by a master for an assault on his servant, *per quod servitium amisit*, there is no trespass against the plaintiff; the sole foundation of the action is the loss of service. Yet this also has been considered as an action of trespass. All these cases are the same in principle, and fall within the same rule." His lordship then cited and commented upon several of the authorities, and concluded by stating himself perfectly satisfied that the injury complained of was the subject of an action of trespass, accord. *Ditcham v. Bond*, 2 M. & S. 436; *Where Woodward v. Walton* was recognised, and acted upon; [and on the same principle proceeded the case of a nun at Common Law, for whose abduction from her cloister an action of trespass lay by her prioress; for Lord Coke informs us, 2 Inst. 436, that where a monk was carried out of his cloister, the Register had provided a writ *de Apostata Capiendo*. "But (he continues) that writ doth not lie for a nun, and therefore the common law did give an action of trespass for taking her away," and he says that the stat. of West. 2, c. 34: "*Qui monialem a domo sua abducat licet monialis consentiat*, &c., was for further punishment only, 2 Inst. 436. It is clear, however, that for both criminal conversation and seduction case may be maintained as well as trespass, *Chamberlain v. Hazlewood*, 5 Mee. & W. 515, and the same in other cases where the injury is occasioned by an immediate act done to the servant; but where it is of such a character that the remedy of the servant would be by action on the case, so likewise is that of the master. *Martinez v. Gerber*, 3 M. & Gr. 88; 3 Sc. N. R. 386, S. C.]

One class of cases, illustrative of the distinction between *case* and *trespass*, consists of those in which the subject-matter of complaint is an *arrest*. If one man maliciously, and without probable cause, procure another to be arrested either by civil or criminal process, that is the subject-matter of an action on the case, for the tort consists not in any immediate violence to the plaintiff's person, but in communicating an improper direction to the process of the law, *Else v. Smith*, 1 D. & R. 97; [*Brown v. Chapman*, C. P., T. 1848; and it is held that trespass will not lie against a man who

merely states his case to a court of justice, in consequence of which it issues void process. *Carratt v. Morley*, 1 Q. B. 19; and this however urgent he may be, as though he say he will take the process at his peril or the like and even prepare it, provided he take no part in executing it, *Cooper v. Harding*, 7 Q. B. 99; [*219b] but if the defendant, [*219b] *without having recourse to legal process, make the arrest, or assist in making it, of his own authority, or direct a constable to make it, the remedy is *trespass*, for in that case he commits an unwarranted act of violence. *Stonehouse v. Elliott*, 6 T. R. 315; [*West v. Smallwood*, 3 M. & W. 418; *Green v. Elgie*, 5 Q. B. 99;] and so it is if he come armed without void process, for that is as none, [*Parsons v. Lloyd*, 3 Wils. 341; *Carratt v. Morley*, 1 Q. B. 19.] See *Bates v. Pilling*, 6 B. & C. 38; as, for instance, if it describe the defendant by a name by which he is not known, *Finch v. Cocken*, 5 Tyrwh. 775; 2 C. M. & R. 196, S. C.; [*Hoye v. Bush*, 2 Scott, N. R. 86;] though it is otherwise if the process be merely irregular, for then it stands good until set aside, *Riddell v. Pakeman*, 5 Tyrwh. 721. But when set aside it is as none; [see *Collins v. Beaumont*, 10 Ad. & E. 225;] and in *Codrington v. Lloyd*, 8 Ad. & E. 449, the fact that it had been set aside was replied: the attorney in such a case is liable as well as the plaintiff, *ibid.* [It is necessary, however, to show, in such a replication, that the writ was set aside for breach of faith or irregularity, because if it were set aside only for ground of error, no action would lie even against the party or his attorney; *Pren-tice v. Harrison*, 4 Q. B. 852; see as to the mode of pleading, *Rankin v. De Medina*, 1 C. B. 183; *Brown v. Jones*, 15 M. & W. 191. See, however, what was said by Lord Abinger, C. B., in *Small v. Attwood*, 3 You. & Col. 129. And process set aside for irregularity will still protect the officer; as will likewise process founded on a judgment which is void for want of jurisdiction of which he has no notice, *Andrews v. Marris*, 1 Q. B. 1. Yet, even the officer is not protected where he has notice of the defect of jurisdiction, *Watson v. Bodell*, 14 M. & W. 57.]

Upon a similar principle to that which governs the cases mentioned above, it is held that *trespass* will not lie for suing out execution and arresting thereon a

man discharged by an insolvent debtors' act, *Ewart v. Jones*, 14 M. & W. 774; *Yearsley v. Heane*, 14 M. & W. 322; and in such a case there is, it seems, no remedy, unless the arrest be made maliciously, and without reasonable or probable cause. The same law seems applicable to the arrest of a person who has some personal privilege; see *Mag-nay v. Burt*, 5 Q. B. 381; whilst, on the other hand, for the continuance of an imprisonment after it has ceased to be legal, *trespass* is the appropriate, when under the circumstances there is any, remedy, *ibid.*]

In *Briant v. Clutton*, 5 Dowl. 66, it was held that if defendant imprison plaintiff by the process of a superior court, and plaintiff bring *trespass*, he will make out a *prima facie* case by showing the imprisonment in consequence of *de- [*219c] fendant's act; and defendant, to discharge himself, must plead specially, *S. P. Sowell v. Champion*, 6 Ad. & E. 416, per curiam. [See *Randle v. Little*, 6 Q. B. 17; and where it was the *regular course of proceeding* of an inferior court, for the judge on a verdict being found to issue execution, the fact of a plaintiff bringing his plaint in that court and not countermanding the execution, was considered sufficient evidence of authority for executing it, to render him *prima facie* liable in *trespass* for a levy *regularly* made, so as to throw upon him the onus of justifying under the process of the court if he could. *Coomer v. Latham*, 16 M. & W. 713.] But the necessity of pleading specially only exists where the judgment has been legally proceeded on, so as to justify the act done by the officer; for where the attorney's defence is that he sued out a legal writ on a legal judgment, and that the sheriff of his own *wrong* executed it illegally, that is a defence under *not guilty*. *Sowell v. Champion*, *ubi supra*.

When a count in *trespass* is improperly substituted for one in *case*, or *vice versa*, or when *trespass* and *case* are misjoined, the mistake may be taken advantage of on general demurrer, motion in arrest of judgment, or writ of error. *Savignac v. Roome*, 6 T. R. 125; see *Cowp.* 407; 1 B. & P. 476; *Weeton v. Woodcock*, 7 Dowl. 853. [*Holford v. Bailey*, 8 Q. B. 1000 (now, September, 1848, in the Exchequer Chamber on a writ of error.) When, however, a count commences with the statement of a writ

in case, and contains a complaint which is the subject-matter of an action of trespass, it is good after verdict, and perhaps good unless specially demurred to; Hudson v. Nicholson, 5 M. & W. 437; see Brown v. Boorman, 11 Cl. & F. 1.]

THE actions of trespass *vi et armis*, and trespass *on the case*, are as well distinguished in principle, as any other two actions in the law.

Physical *force*, however slight, against the person or possession of another, is, in itself, and essentially, without regard to the motive, unlawful, and is the *gist* or *gravamen* of the action of trespass *vi et armis*. "The criterion or trespass, is, *force directly applied*:" C. J. TILGHMAN, in Smith and another v. Rutherford and another, 2 Sergeant & Rawle, 358.

Trespass *on the case*, is a general remedy, to recover compensation for damages which have resulted from the *fraudulent* conduct of another; and any conduct is in law deemed a *fraud*, and actionable within the scope of this remedy, which, though not unlawful in itself, yet by its natural and ordinary consequences, injures any right of the plaintiff, without fault in him, and is not done in the exercise or lawful pursuit of the defendant's rights; for the law always presumes that a man has intended that which is the natural or reasonable result of his conduct, and which might, and ought to, have been foreseen by him. Through all the phases this action assumes, its *gist* still is *fraud*: and though it lies to recover damage occasioned by a material or physical *tort*, yet the *force*, or *tortious act*, itself, is not the gist of the action, as it is in trespass *vi et armis*, but the negligence, carelessness, or other fraudulent conduct of the defendant, by which the *tort* was occasioned.

That *force* is the gist of trespass, and fraud upon the whole case between the parties at the time of suit brought, the gist of case, is shown by the pleadings: for, in the former action, under the general issue, the office of which in all actions, is to traverse that which is the gravamen or substantial matter in the declaration, only the *force*, and the defendant's *property* can be denied, but in the latter action under the same general issue, evidence of excuse, justification, or satisfaction may be given. Gilchrist v. Bale, 8 Watts, 335, 358.

There is, therefore, an essential and legal difference in the ground of the two actions: but the choice between them may often be determined by the nature and extent of the compensation sought. If the *act of force*, itself, be made the gist of the action, that is to say, if trespass be brought, of course, no more can be recovered than the equivalent of the injury which the act in itself, and at once, was; or, in other words, the damage involved in the act at the time of its taking place, though perhaps subsequently developed; ("immediate or obviously probable consequence;" Avery v. Ray et al., 1 Mass. 12.) Robinson v. Stokely, 3 Watts, 270; Spigelmoyer v. Walter, 3 Watts & Sergeant, 540; Sampson v. Coy, 15 Massachusetts, 493. See Laing v. Colder, 8 Barr, 479, 481; and Burdick v. Worrall, 4 Barbour's S. Ct. 597, 598. But if compensation is sought for some damage entirely collateral, the fraudulent conduct of the defendant on the whole case must be made the ground

of the action; that is, the action must be case. Thus, in the instance put by POWELL, J., in 11 Mod. 180, if there be false imprisonment, suit may be brought upon the forcible injury to the person, and that will be trespass, and damages will be recovered to the extent to which the rights of person have been damaged; but if the detention have caused a collateral loss, as by forfeiture of a recognizance to appear, there the fraudulent detention is the ground of the action, and it must be case. See the general principle discussed in *Cotteral v. Cummins* and another, 8 Sergeant & Rawle, 343.

Force, in reference to the action of trespass, it is very justly remarked in *Jordan v. Wyatt*, 4 Grattan, 151, 153, "is not merely actual force, but also force implied by law; and as the law always implies force where the injury is immediate to the person or property of another, it is obvious, that the substantial distinction is between direct and immediate injuries on the one hand, and those mediate or consequential on the other." And "the terms 'immediate' and 'consequential' should, as I conceive," said the judge in that case, "be understood, not in reference to the time which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act; but in reference to the progress and termination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act, at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or more exactly, a collateral consequence." It was accordingly held in *Jordan v. Wyatt*, that where the defendant innocently set fire to some brushwood on his own land for the purpose of clearing the soil, and the fire escaped from control, and consumed some wood of the plaintiff's, trespass was an appropriate remedy, concurrently with case.

If there be *force*, but not *negligence*, that is, if the force be wilful, trespass is the only remedy. If there be *force*, and also *negligence*, that is, if the forcible act proceed from negligence, the *force* may be made the gravamen of the action, and then it must be trespass; (*Guille v. Swan*, 19 Johnson, 381;) or the *negligence* may be made the gist, and then it must be case; (and this is the point decided in *Williams v. Holland*;) *Blin v. Campbell*, 14 Johnson, 432; *Percival v. Hickey*, 18 id. 257; *M'Allister v. Hammond*, 6 Cowen, 342; *Dalton v. Favour, jr.*, 3 New Hampshire, 465; *Saffin v. Wilcox*, 18 Vermont, 605; *Knott v. Digges*, 6 Harris & Johnson, 230; *Johnson v. Castleman and Ormsby*, 2 Dana's Kentucky, 377. Where, therefore, the injury is immediate, and is attributable to the defendant's negligence, trespass and case are used as concurrent remedies; *Jordan v. Wyatt*, 4 Grattan, 151, 158; *Schuer v. Veeder*, 7 Blackford, 342. But in some of the states, it has been decided, that under such circumstances, trespass is alone the proper action. *Taylor v. Rainbow*, 2 Henning & Munford, 423; *Gates and others v. Miles*, 3 Connecticut, 64; *Case and Davis v. Mark*, 2 Hammond's Ohio, 169; *Waldron v. Hopper*, Coxe, 339; *Barnes v. Hurd*, 11 Massachusetts, 57. See, also, *Vosburgh v. Moak* and others, 1 Cushing, 453, 456; *Waterman v. Hall et al.*, 17 Vermont, 128, 130. No doubt, in principle, these last decisions are right, for trespass is a writ at common law and of course, and case is extraordinary and judicial: but

the convenience of the latter for recovering all the special and remote damage recommends it to practice.

If a servant, without the authority or assent of his master, commit a tort, the servant's liability will be case or trespass, according to the circumstances; but the master's will always be case; unless the particular act which constitutes, or comprises, or by physical necessity leads to, the trespass, is ordered to be done by the principal; *Sharrod v. Railway Co.*, 4 Exchequer, 580; *Gordon v. Rolt*, id. 365; *Barnes v. Hurd*, 11 Massachusetts, 57; *Germantown R. R. Co. v. Wilt*, 4 Wharton, 143; *Duvan v. Melogue*, 7 Blackford, 144. The master is liable in case for only those wrongs of his servant, which result from incapacity and negligence in the course of his employment or duty, and not for his wilful trespasses; because only those injuries which are done in the course of the employment, and proceed from incompetency, which was a fault existing at the time of his appointment, and likely to produce damage, are fairly caused by the master's employing him; *Foster and another, executors, v. The Essex Bank*, 17 Massachusetts, 479: and for the distinction between negligent and wilful acts, compare *McCaw v. Kimbul*, 4 McCord, 220, with *Schmidt and Webb v. Blood and Green*, 9 Wendell, 268; and see *Hay v. The Cohoes Company*, 3 Barbour's S. Ct. 43, 46, and *Brasher v. Kennedy*, 10 B. Monroe, 28, 30. But if the master command or advise the trespass of the servant, or make himself in any way accessory, he becomes a principal trespasser; as in the case of a sheriff, who is liable as a principal, whenever the deputy acting under his authority is a trespasser. See *Dolph v. Ferris*, 7 Watts & Sergeant, 367.

Actions per quod servitium amisit, for seduction, abduction, or corporal injury, of a child, are all founded on the relation of master and servant, and not that of parent and child; but when the action is grounded by proof of some interest in the service of the child, the damages may be swelled by proof of incidental expenses, and injury to feeling, though these are not in themselves substantive causes of action.—The father of a child under twenty-one, may maintain the action though the child does not live with him, because he has a legal interest in the service of the child. *Martin v. Payne*, 9 Johnson, 387; *Hewitt v. Prime*, 21 Wendell, 79; *Bartley v. Richtmyer*, 2 Barbour's S. Ct. 183; *Boyd v. Byrd*, 8 Blackford, 113; *Hornketh v. Barr*, 8 Sergeant & Rawle, 36; *Helffenstein v. Thomas*, 5 Rawle, 209, 212; *Anderson v. Ryan*, 3 Gilman, 583; and a guardian has the same interest and the same right of action. *Fernsler v. Moyer*, 3 Watts & Sergeant, 416. In other cases, some evidence of a state of servitude existing or continuing must be given; but, in case of the father after the child is twenty-one; of the putative father; one in loco parentis; or the mother; slight acts of service, or probably merely living with the plaintiff, would be competent evidence of the relation: but in case of a mere stranger, probably full proof of a contract of service is necessary. *Niekleson v. Stryker*, 10 Johnson, 115; *Miller v. Thompson*, 1 Wendell, 447; *Ingersoll v. Jones*, 5 Barbour's S. Ct. 662; *Villepigue v. Shuler*, 3 Strobhart, 462; *South v. Denniston*, 2 Watts, 474; *Logan v. Murray*, 6 Sergeant & Rawle, 175; *Moritz v. Garuhart*, 7 Watts, 302; *Wilson v. Sproul*, 3 Penrose & Watts, 49; dicta in *Weckerly v. Lutheran Congregation*, 3 Rawle, 172, 176. See *Roberts v. Connelly*, 14 Alabama, 236. This action may be either

trespass; *Hoover v. Heim*, 7 Watts, 62, *Goddard v. Wagner*, 1 M'Cord, 100; or case; *Ream v. Rank*, 3 Sergeant & Rawle, 215; *Parker v. Elliott*, Gilmer, 33; *S. C. Munford*, 587; *Haney v. Townsend*, 1 M'Cord, 207; see the note p. 138 to *McClure's Executors v. Miller*, 4 Hawks, (N. Car.) 133. In *Ream v. Rank*, and *Wilt v. Vickers*, 8 Watts, 227, it is indicated that if the minor child be living in the father's house at the time, trespass is the more proper; but if out of it, case: and that trespass quare clausum fregit will lie in the former case, is held in *Clough v. Tenney*, 5 Greenleaf, 446; and in such action, it is said in *Schuylkill Nav. Co. v. Farr*, 4 Watts & Sergeant, 363, 377, that the plaintiff may give in evidence the debauching of his daughter, under alia enormia, but not loss of service or any other matter that would of itself bear an action, for such matter, must be stated specially. See *Moran v. Dawes*, 4 Cowen, 412, where the distinctions are considered; and case held to be always safe. It has also been held that for forcible abduction of a servant, trespass is more proper; for enticing a servant away, case alone. *Legaux v. Feesor*, 1 Yeates, 586; *Jones & Gully v. Tevis*, 4 Littell, 25.

For injury to a servant, the old forms are trespass, upon the principle, that the master has an interest in his servant, and possession of him, so that disabling the servant is a direct forcible injury to the master's interest and possession: and the per quod servitium was necessary to be added, not as the allegation of a collateral and special injury, but to show that such was the relation of the parties, and so great the injury, that the battery was a direct injury to the master's interest and possession: but in modern times the per quod has generally been considered as the allegation of a special and consequential damage; in which view case is more appropriate.

H. B. W.

[*220]

*COOPER v. CHITTY.

HIL. 27 GEO. II. K. B.

[REPORTED, 1 BURR. 20.]

The title of a bankrupt's assignees relates back to the Act of Bankruptcy; and the sheriff who has seized the goods of a bankrupt after the act of bankruptcy, but before commission, and sold them after the commission and assignment, is liable to the assignees in trover.

THIS cause was twice argued: it came first before the court on Monday, the 9th of June, 1755; and again upon Tuesday, the 16th instant. It was

an action of trover, brought by the assignees of William Johns, a bankrupt, against the sheriffs of London, who had taken and sold the goods of Johns, in execution under a *feri facias*, which had issued against Johns, at the suit of one William Godfrey.

On the trial a special case was settled :

Which case states, that Johns was regularly declared a bankrupt on the 8th of December, 1753. And as to the rest, the following times and facts were stated ; viz., that on the 5th of December, 1753, one Godfrey obtained judgment in the Common Pleas against the said Johns ; and on the same day (5th December, 1753) execution upon the said judgment was taken out against him by Godfrey, and the goods seized by the sheriffs, under it ; that Johns committed the act of bankruptcy on the 4th of December, 1753, and on the 8th of the same December, a commission of bankruptcy was taken out against him ; and, on the very same day, the commissioners of bankruptcy executed an assignment ; and afterwards, viz., on the 28th of December, a bill of sale of the goods was made by the sheriffs. The plaintiffs are the assignees under the commission : the defendants *are the [*221] sheriffs of London, who seized the goods under the execution.

The point was, whether the assignees under the commission of bankruptcy can maintain an action of trover against the sheriffs, who executed this process under a regular judgment and execution, for seizing the goods, under a *feri facias*, issued and executed after the act of bankruptcy was committed ; and selling them after the assignment was executed.

The counsel who argued for the plaintiffs made two questions, viz. :

1st. Whose property the goods were, when seized by the sheriffs, by virtue of this *feri facias* :

2ndly. Whose property they were, when sold by the sheriffs.

1st. Question. After the act of bankruptcy they ceased to be the property of the bankrupt himself, they said ; wheresoever else the property might be, between the act of bankruptcy and the assignment.

This relation to the act of bankruptcy is like that of administrations to the time of the death ; and they cited *Kiggil v. Player*, 1 Salk. 111, as S. P. with the present case, exactly.

The utmost that the bankrupt himself could be pretended to have was a special property, defeasible by the assignment. It is like the case of a distress for rent ; where the seisor may sell the distress, after five days ; but if the money be paid within the five days, he cannot sell : so that, in the interim, the right is defeasible.

Here, the plaintiffs have declared as assignees under the commission of bankruptcy : therefore, their interest vests as from the time of the act of bankruptcy.

If the bankrupt himself had delivered the goods to a stranger, it had been the same thing : the stranger would be answerable to the assignees.

Sheriffs execute process at their peril : they are answerable *civilter* for what they do upon it. 11 H. 4, 90, 14 H. 4, 25.

A man may, without his own fault, be possessed of a horse which has been stolen : but nevertheless he is answerable, *civilter*, to the true owner for it.

The sheriff had no authority to take any goods in execution but

[*222] *the goods of the defendant: if he does take any other goods, he is a trespasser.

In writs of execution, it is at their peril if they take another man's goods. In *Carthew, 381, Hallet v. Byrt*, it is so laid down by Chief Justice Holt, expressly.

Now these were goods of the assignees. And they may maintain an action, either against the plaintiff in the cause, or the sheriff, or the vendee of the goods: and the sheriff is the properest person against whom to bring the action.

The gist of an action of trover is the conversion: the finding is not the material part.

And they cited several nisi prius cases, of actions brought by assignees of bankrupts; viz.:

M. 11 G. 1, trover by *Vanderhagen et al.*, assignees of Daniel, a bankrupt v. *Rewise*, a serjeant-at-mace of the city of London; S. P. with the present. Lord Chief Justice held the action maintainable.

The S. P. was also before Chief Justice Lee, in a case of *Bloxholm*, assignee of *Mills*, a bankrupt v. *Oldham et al.*, at the sittings after Trinity, 1750, at Guildhall: in trover against a sheriff, and the former plaintiff, and the vendee (all of them together.) It was objected "that the sheriff ought to be acquitted:" but overruled; and verdict against all three.

The seizure there was before the commission, but after the act of bankruptcy.

The second question is, "Whose the goods were at the time of the sale." The writ only commands the sheriff "to sell the defendant's goods:" and if he sells the goods of another person it is a conversion.

It is beyond doubt that the assignment has relation to the act of bankruptcy: and the assignees stand in the bankrupt's place from that time. 1 Ventr. 193, *Monk v. Morris and Clayton*, proves this, and 2 Co. 25.

Here then the assignees had all the property that the bankrupt had, at the time of his act of bankruptcy. Consequently the absolute dominion was in them; and the sheriff could not, after such assignment, sell them as the defendant's. Indeed, sheriffs seldom do, in fact, sell the goods without indemnity. But the sheriff has here committed an error, in selling them at all: for they were not the defendant's. He might, it is true, have summoned a *jury to inquire "whose goods they were." But still, [*223] even their verdict cannot affect the right of the true owner of the goods.

The point about relation backwards does not at all effect the question as to the sale. For the assignment was prior to the sale, though not to the seizure.

And they affirmed that the sheriff not only might, but even ought, in this case, to have returned "*nulla bona*;" that would have been the proper and the true return. And if it had been disputed, he then might have brought the money into court. There is a case, of *Rex v. Brein*, bailiff, of the Savoy, 1 Keb. 901, where the goods were claimed under a bill of sale; the sheriff returned "*nulla bona*:" and the money was ordered to be brought into court by the sheriff; and the return to be made agreeable to the event of a trial of the validity of the pretended bill of sale, after such validity should be tried in an action.

In the present case, the defendants knew of the assignment before they sold the goods, whatever they might do when they seized them. And they could not possibly be obliged to sell them: it is contrary to an express act of parliament, which vests the property in the assignees. So that here the sheriff has sold the goods, not of the bankrupt, but of the assignees.

And supposing that the plaintiffs may bring an action against the plaintiff in the original action, or against the vendee of the goods; yet they seem, both of them, to have better excuses than the sheriff has; and are more innocent. Therefore, why should the assignees be turned round to them, when they can undoubtedly maintain either trespass or trover against the sheriffs, who have sold the goods, which is a conversion, and will support an action of trover. That the plaintiffs have this election, to bring either trespass or trover, appears from *Cro. Eliz.* 824, *Bishop v. Lady Montague*, and *Cro. Jac.* 50, *S. C.*

Therefore they concluded that the action was well brought.

The counsel who argued for the defendants, the sheriffs, agreed that the matter would turn upon the solution of the two questions made by the other side.

As to the first question, they said it would be very hard if this action should lie against the sheriffs, and they be put *to contravert the act of bankruptcy, which is a matter not at all within their knowledge. [*224]

They argued that the sheriffs shall not be considered as wrong-doers; and, to prove it, cited 1 *Lev.* 95, *Turner v. Felgate*; *Raym.* 73, *S. C.*, 2 *Siderf.* 126, *S. C.*, and 1 *Keble*, 822, *S. C.*; 1 *Lev.* 173, *Bailey v. Bunning*; 1 *Siderf.* 271, *S. C.*, and 2 *Keble*, 32, 33, *S. C.*

The only acts of the sheriffs that can be considered as a conversion are the acts of seizure and sale.

Now they were compellable by the writ of fieri facias to seize the goods and levy the debt.

For till the commission and assignment the property was in the bankrupt: and it did not appear that a commission ever would be taken out.

1 *Salk.* 108, *Cary v. Crisp*, is express in point, "that the property is in the bankrupt till assignment." It was there resolved that the property of the goods is not transferred out of the bankrupt till assignment. 2 *Str.* 981, *Brassy et al. v. Dawson et al.* accord.

1 *Lev.* 173, *Baily v. Bunning*. Judgment was for the officer; he being obliged to execute the writ, and could not know of the act of bankruptcy, or that any commission would ever be sued: and the sheriff was holden not to be liable, although he had notice of the assignment.

1 *Siderf.* 272, *S. C.* The taking was holden lawful.

Comberb. 123, *Lechmere v. Thorowgood*. The officer shall not be made a trespasser, by relation. 3 *Mod.* 236, *S. C.*, 1 *Shower*, 12, *S. C.*

The commission of bankruptcy makes no alteration till assignment: and after assignment there shall be a relation, so far as to avoid all mesne acts of the bankrupt, and even to overreach this judgment-creditor. Thus far they admitted.

But they insisted that the action ought not to have been brought against the sheriff.

The sheriff is to seize, sell, and return his writ. In proof of this they

cited 2 Ld. Raym. 1072, 1074. Clerk v. Withers, 1 Salk. 322, 323, S. C. (3d point), 6 Mod. 293, 299, S. C., 1 Siderf. 29. Harrison v. Bowden, Cro. Eliz. 235. Mountney v. Andrews, 1 Ro. Abr. Execution, 893. Letter B. pl. 2. Dyer, 98, b., and 99, a., s. 57, and the two cases there cited [*225] in the margin: and Cro. Eliz. 597. *Charter v. Peeter. From all which cases, it appears that the sheriff is not liable to be molested.

1 Salk. 321, Kingsdale v. Mann, proves that the seizure is the essential part of the execution: and an execution is an entire thing; and cannot be stopped, after it is once begun. 2 Show. 79, Cockram v. Welbye.

And after the sheriff had seized these goods, the original plaintiff (William Godfrey) could oblige the sheriff to return his writ; and yet upon the principles advanced, the sheriff must be put under the greatest hardships. And he had no method to make the assignees of the bankruptcy to give him any assistance towards proving the act of bankruptcy.

Indeed the execution is good, though the writ be never returned. 5 Rep. 90, a., Hoe's case (1st resolution).

The only return the sheriff could make, must be, "that he had levied the money" (which could only be by sale.) Therefore he was obliged to sell. Consequently the law will not make him a wrong-door by selling.

The following cases, they said, were in point for them, viz., 1 Lev. 173, Bailey v. Bunning; 2 Keble, 32, 33, S. C.; 1 Siderf. 271, S. C. 3 Lev. 191, Philips v. Thompson; 1 Show. 12, Lechmere et al. v. Thorowgood et al.; Comb. 123, S. C.; 3 Mod. 236, S. C. and Cole v. Davies et al., 1 Ld. Raym. 724, per Holt, in point, as against the sheriff most expressly.

And the present plaintiff may have an adequate and complete remedy against the plaintiff in the original action.—As to the cases cited, the gentlemen who have argued on the other side, put it upon the question, "who had the property of the goods?"

Now the property was in the bankrupt at the time of the execution; it was not in abeyance; as it is in the case of an administration. (Which is an answer to the case of Kiggil v. Player.)

The sheriff is not in the case of a stranger; for he was obliged to execute and return the writ.

Indeed the sheriff is to execute the writ at his peril: and Carthew, 381, is so; the reason is, because the sheriff may impanel a jury, to inquire "whose the goods are." But here there were no means for the sheriff to indemnify himself: the goods were undoubtedly then the goods of [*226] *William Johns, even though he had then committed an act of bankruptcy.

The assignees have not a right to recover the specific goods, but only damages.

Trespass will lie against the plaintiff in the original action, even before he receives the money: though trover indeed would not till after.

It is not certain that an action will lie against the vendee of the sheriff.

As to Vanderhagen's case, it is not sufficiently clear how it was, or why it was determined.

But as to the case of Bloxham v. Oldham, Mr. Henley did not insist on the objection. "that the action would not lie against the sheriff;" because it would not help his client; for in that case the sheriff and the plaintiff in the

original action were both of them defendants. And the case of 1 Leo. 173, was not indeed by Lord C. J. Lee, thought apposite to that case; but it was not over-ruled by him. And the goods were certainly the goods of the bankrupt till assignment.

†N. B. Mr. Hume, who was counsel for the defendant in that case of *Bloxham v. Oldham*, agreed, that the objection against the sheriff's being a defendant, was not insisted upon; because the plaintiff in the original action (who was also a co-defendant with the sheriff there) had indemnified the sheriff: so that it was really a point quite immaterial to the plaintiff (who was at all events liable to the action.)

They added, that this was a point of great consequence to all sheriffs and officers: on the other hand, creditors cannot be injured, though sheriffs should be excusable, and the original plaintiff only should be liable to the action.

As to what has been said of security taken by the sheriff—the court can take no notice of a sheriff's taking security; nor can they suppose him consulant of a private unknown act of bankruptcy: and it would be very hard if an innocent officer should be hurt by retrospection and relation.

They agreed that this execution may be avoided as against the original plaintiff: 2 *Strange*, 981, *Brassy et al. v. Dawson et al.*, is a proof that it may. But they denied *it, as to rendering the officer liable to an action; for he is excusable, as appears from the cases before cited. [*227]

As to the second question.—The foundation of this action of trover, is property in the plaintiff at the time of the seizure, and a tortious and illegal act of conversion; for without both these circumstances, this action will not lie.

Now the property is in the bankrupt till assignment: and the subsequent sale cannot make the sheriff a wrong-doer by a fictitious relation. *Raym.* 161, *Bilton v. Johnson et al.* “The relation of a teste shall not justify a tort.”

It is said that “this relation is given by act of parliament.” But there are no words in the act of parliament that can make the sheriff a wrong-doer.

If the seizure was lawful, the sale was so too. 2 *Ld. Raym.* 1074, 1076, *Clerk v. Withers*. *Cro. Jac.* 515, *Sly v. Finch*. *Cro. Eliz.* 440, *Boucher v. Wiseman*, March 13, *Parkinson v. Colliford et al.*, executors of a sheriff; *Cro. Car.* 539. *S. C.* 1 *Jones*, 430, *S. C.* *Hob.* 206, *Speake v. Richards*. *Cro. Eliz.* 231, *Mountenay v. Andrews*. The law considers the whole execution as one entire act: the intermediate days are only allowed for the sake of the sheriff. Consequently he may execute the whole at once: he may seize and sell directly. The execution is an entire thing and cannot be stopped, *Cro. Eliz.* 597, *Charter v. Peeter*; 6 *Mod.* 293, *Clerk v. Withers*. Therefore the officer shall be protected.

Suppose an action should be brought against the sheriff for the money. He might avail himself perhaps by special pleading, provided he was able to make out the facts he should specially plead: but how could he be able to prove the act of bankruptcy, trading, or assignment? to all which he is an entire stranger. Therefore it would be hard to suffer such an action to be maintained against him. But all these matters are in the privity of the original plaintiff; against whom, therefore, the action ought to be brought.

It is said, “the sheriff acts at his peril.”

But it is admitted that the method of impannelling a jury would be no protection to him.

The counsel for the plaintiffs replied, that it is stated "that the assignment by the commissioners of bankruptcy was previous to the bill of sale by the sheriffs."

[*228] The sheriff's being always a responsible person, and *therefore most likely to be made defendant, is the very reason why he ought to be liable to the party who has received the injury.

The finding, or even the taking possession of goods found, is no wrong: but it is the conversion that makes the person a tort-feasor.

They admitted that the sheriff is not answerable for the irregularity of a judgment (for he is bound to execute the command of the writ). But if he take the goods of another person, instead of the goods of the defendant, he is answerable for that.

It has been said, indeed, that "they were at that time the goods of the bankrupt himself."

But be the taking lawful, or not lawful, yet here is an actual conversion, an actual disposition of the goods; which makes him a trespasser ab initio.

It has likewise been said that "the court will protect the sheriff." But the relation goes back quite up to the act of bankruptcy.

They denied that the execution is so entire that the sheriff cannot stop in it, after seizure and before sale of the goods. Suppose the sheriff had confessedly seized another person's goods, should he be obliged to sell them? Dalton's Office of Sheriff says, "that the sheriff may impanel a jury; and after that shall not be answerable." Now here he might either have impanelled a jury, or have kept the money in his hands, or brought it into court, till the property of the goods had been determined.

They admitted the general principle of the cases cited on the head of executions; but denied the application of them to the present case. They also denied the principle, "that a sheriff shall never be a tort-feasor by relation;" for he shall in some cases be so, as where he takes the goods with a bad original intention.

As to *Baily v. Bunning*, they endeavoured to distinguish it. In order to which, they remarked that there is no finding of an actual conversion, or of what could be called so, by the court: it is only a demand and refusal; which is only evidence to a jury.† And the opinion of the court there went upon the taking, which they held to be legal; whereas here is an actual conversion stated. An action would lie, one would think, against the vendee of [*229] the sheriff *in point of reason, and the practice does strongly support it; for nine in ten of those actions are brought against the vendees of the sheriff.

In the case of *Bloxham v. Oldham*, there was a very material difference, "whether the sheriff should have a verdict for him, or a verdict against him:" for in the one case, he would receive costs; in the other, he must pay them.

The plaintiffs had no right to call upon the sheriffs, till the return of the writ: and they might then have returned "nulla bona." Therefore this is not such a hard case upon the sheriffs, as is suggested. And this is not the

† See notes to *Wilbraham v. Snow*, 2 Wms. Saund. 47 e.

only case where the sheriff is to act at his peril; for in taking of bail, &c., he must do so, as well as here.

If the sheriff had returned "*nulla bona*," the onus probandi would have lain upon the original plaintiff.

In the case of *Turner v. Felgate*, the sheriff was certainly excusable by virtue of his writ.

In the case of *Cole v. Davies et al.*, in 1 *Ld. Raym.* 724, the goods were sold before the commission and assignment. For the case is there put, of a commission and assignment, both of them subsequent to the sale of the goods. The words are, "If he seizes and sells, and then a commission is granted, and the goods assigned, the assignee may maintain trover against the vendee: but no action will lie against the sheriff, because he obeyed the writ."

But our reasoning in the present case is founded upon the sale's being an unlawful act.

In the case of *Brassey et al. v. Dawson et al.*, there was no assignment previous to the seizure.

They did not deny that the bankrupt had, in the present case, a sort of property, a defeasible property, in him at the time of taking the goods. But in the case of *Clerk v. Withers*, (reported in 6 *Mod.* 290, and in 1 *Salk.* 323, and in 2 *Ld. Raym.* 1072,) the defendant in the action had the whole indefeasible property in him; and the sheriff ought to have gone on: but that case is not applicable to the present case, where the property was only defeasible.

As to the cases cited from *Hob.* 206, and *March*, 13, they agreed to them.

The time allowed to the sheriff makes no difference, they said; because he has done wrong.

And however entire a thing an execution, in general, may be, yet here it was irregularly executed.

*The truth of the return of "*nulla bona*," in this case, depends [*230] upon the present question.

It is very frequent for sheriffs to be entangled in difficulties about their returns. Here, he might have taken a writ *de proprietate probandâ*.

Bailey v. Bunning turned upon the taking.

Techmere et al. v. Thorowgood only proves "that the goods were in *custodia legis*." And so they were: but to the purposes of the law; which, in the present case, is for the benefit of the creditors of the bankrupt.

CUR. ADV. VULT.

And now (Tuesday 23rd Nov. 1756) Lord *Mansfield* delivered the opinion of the court; and said they were all agreed, as well as his two brethren then present in court, as his brother *Wilmot*, (who was at present engaged in another place,) in their opinion.

There are few facts essential to this case; and it lies in a narrow compass.

He then stated the case, (which see p. 222, ante :) and was very particular in specifying the dates of the several transactions.

The general question is, "whether or no the action is maintainable by

the assignees, against the defendants, the sheriffs, who have taken and sold the goods."

It is an action of trover.

The bare defining the nature of this kind of action, and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently towards the solution, of the question in this particular case.

In form it is a fiction: in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods.

This action lies, and has been brought in many cases where, in truth, the defendant has got the possession lawfully.

Where the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten.†

[*231] Hence, if the defendant delivers the thing upon demand, *no damages can be recovered in this action, for having taken it.

This is an action of tort: and the whole tort consists in the wrongful conversion.

Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, property in the plaintiff; and 2dly, a wrongful conversion by the defendant.

As to the first, it is admitted in the present case that the property was in the plaintiffs, as on and from the 4th of December, (which was before the seizure,) by relation.

This relation the statutes concerning bankrupts introduced, to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes consider him as a criminal:) they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt, after the act of bankruptcy; and against all executions not served and executed before the act of bankruptcy.‡

Dispositions by process of law are put upon the same foot with dispositions by the party: to be valid, they must be completed before the act of bankruptcy.

Till the making of 19 Geo. 2, c. 32, if the bankrupt had bona fide bought goods, or negotiated a bill of exchange, and thereupon, or otherwise, in the course of trade paid money to a fair creditor, after he himself had committed a secret act of bankruptcy: such bona fide creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and bona fide made to the creditor, was avoided and defeated by the secret act of bankruptcy.§

This is remedied by that act, in case no notice was had by the creditor,

† See the note to *Scott v. Shepherd*, ante 218.

‡ But see now 6 G. 4, c. 16, sec. 81 and sec. 86; see also sec. 108, and st. 1 W. 4, c. 7, sec. 7; *Cumming v. Welsford*, 6 Bingh. 502; *Godson v. Sanctuary*, 4 B. & Ad. 255; *Crosfield v. Stanley*, 4 B. & Ad. 87, and the late act of 2 Vict. cap. 29.

§ See now 6 G. 4, c. 16, sec. 82; *Craven v. Edmondson*, 6 Bingh. 738; *Carter v. Breton*, 6 Bingh. 617; *Cannan v. Denew*, 10 Bingh. 292; *Hill v. Farrell*, 9 B. & C. 45, and St. 2 Vict. c. 29.

(prior to his receiving the debt,) "that his debtor was become a bankrupt, or was in insolvent circumstances."

Therefore, as to the first point, it is most clear, that the property was in the plaintiffs, as on and from the 4th of December, when the act of bankruptcy was committed.

2ndly. The only question then is, "Whether the defendants are guilty of a wrongful conversion?"

That the conversion itself was wrongful, is manifest.

The sheriffs had no authority to sell the goods of the *plaintiffs; but of William Johns only: they ought to have delivered these [*232] goods to the plaintiffs, the assignees. Upon the foundation of the legal right, the chancellor, even in a summary way, would have ordered them to be delivered to the assignees.

It is admitted, on the part of the defendants, that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey the plaintiff, would have no title to the money arising from such sale, but if he received it would be liable to an action to refund.

If the thing be clearly wrong, the only question that remains is, "whether the defendants are excusable, though the act of conversion be wrongful."

Though the statutes concerning bankrupts rescind all contracts and executions not completed before the act of bankruptcy, and vest the property of the bankrupt in the assignees, by relation, in order to an equal division of his estate among his creditors, yet they do not make men trespassers or criminal by relation, who have innocently received goods from him, or executed legal process, not knowing of an act of bankruptcy: that was not necessary, and would have been unjust.

The injury complained of by this action, for which damages are to be recovered, is not the seizure, but the wrongful conversion.

The assignment was made upon the 8th of December; the sale, not till the 28th of December; the return, not till the octave of St. Hilary, which is the 20th of January.

The sheriff acts at his peril; and is answerable for any mistake: infinite inconveniences would arise, if it were not so.

At the time of the sale and return, it was more notorious "that these goods belonged to the plaintiffs, than it could probably have been in the case of any third person; because commissions of bankruptcy, and the proceedings under them, are public in the neighbourhood, and indeed all over the kingdom.

This conversion is twenty days after the assignment.

The defendants have here made a direct false return: they have returned "that they took the defendant's goods, &c.," whereas they were, at the time of the return, notoriously *the goods of the assignees, when they were taken. They certainly might, and ought to have returned, [*233] "*nulla bona*;" which was the truth: for the goods taken were, beyond all manner of doubt, the goods of the assignees, at the time when the sheriffs took them; and the bankrupt could have no goods, after the 4th of December, when he had committed an act of bankruptcy. They would have been justified by the truth of the fact, if they had made this return: for the

bankrupt neither had nor could have any goods of his own, at that time. It is, arguing in a circle, to say, "that they could not return *nulla bona*, because they were obliged to sell; and they were obliged to sell, because they could not return *nulla bona*."

The seizure is, here, out of the case; for the point of this action turns upon the injurious conversion.

Therefore, we are all of opinion that the plaintiff is entitled to recover in this action.

But objections have been made, by the gentlemen who have argued this case on behalf of the defendants.

It has been said "that the execution is entire; for the debt is discharged by a seizure in *fi. fa.* That being entire, if once lawfully begun, it must be completed; for goods taken by a *fi. fa.* shall be sold by the representative of the sheriff."

"That they shall be sold, though the plaintiff dies; and the money arising from the sale shall not be recovered back by the defendant:" which is the case of *Clerk v. Withers*, 1 Salk. 323, 2 Lord Raym. 1072, S. C., and 6 Mod. 290, S. C.

"That a writ of error is no supersedeas."

"That the sale by the sheriff shall not be avoided against the vendee, by a subsequent writ of error and reversal;" which is the third point in *Matthew Manning's case*, in 8 Co. 92.

Answer. All this is true, and upon the plainest reason, as between the plaintiff and defendant, parties to the judgment, in consequence of which the execution issues; but no way applicable to the case of a third person.

None of these cases authorise the sheriff to sell the goods of a third person: and it is admitted that the vendee is not protected here; because, at the time of the sale, the sheriff had no authority to sell.

[*234] [He then went minutely through the cases; shewing the grounds upon which the determinations proceeded, as against the parties to the judgment, who are bound by it and every thing done in consequence of it.]

But the argument, from these principles to the present case, is this: "Here the taking was lawful; and, therefore, the sheriff was bound to complete the execution, by a sale." Answer. The premises are not true; and, if they were, the conclusion would not follow.

The taking was not lawful; because they were then the goods of a third person.

But if the taking were lawful, the sheriff ought not to go on to a sale, after a full discovery that the goods then belonged to a third person.

To prove the taking lawful, and that, therefore, the sheriffs shall not be liable to an action, were cited the cases of *Baily v. Bunning*, reported in 1 Leon. 173, 174; 1 Siderf. 272, and 2 Keble, 32, 33; *Lechmere v. Thorowgood*, in Comb. 123; 1 Shower, 12, and 3 Mod. 236; and *Cole v. Davies et al.*, 1 Lord Raym. 724.

The fallacy of the argument, from the authority of these cases, turns upon using the word "lawful," equivocally in two senses.

To support the act, it is not lawful; but, to excuse the mistake of the sheriff, through unavoidable ignorance, it is lawful. Or, in other words, the relation introduced by the statutes binds the property: but men, who

act innocently at the time, are not made criminals by relation; and, therefore, they are excusable from being punishable by action or indictment, as trespassers. What they did was innocent, and, in that sense, lawful: but, as a ground to support a wrongful conversion, by sale after a commission publicly taken out, and an actual assignment made, it was not lawful.

In the case of *Baily v. Bunning*, the goods were clearly bound by the teste. It is best reported in *Levinz*. The question referred by the special verdict was upon the taking, viz. "whether the party was guilty in the taking:" and the court excused the bailiff for his innocent executing his writ. The case of *Phillips v. Thompson*, in 3 *Levinz*, 192, expressly says "that this resolution in the case of **Baily v. Bunning*, was only in [*235] excuse of the bailiff for executing the writ."

Siderfin does not seem to know what the court was going upon: for the court tied it up to the taking; whereas he does not seem to distinguish between the trover and the trespass. Vide 1 *Siderf.* 272.

The case of *Lechmere v. Thorowgood* is best reported in 1 *Show.* 12. And this report, which is the only clear state of it in any of the reports, puts it singly upon the making the officers, who had good authority, and took the goods lawfully, trespassers by relation.

Comberbach, in giving the judgment of the court, which is the only sensible part of his whole report, (for it is plain to me, that he did not understand the former argument on the former day, which is the first part of his report of the case,) agrees with *Show*; and says that "the court were of opinion that a construction should not be made, to make the officer a trespasser by relation: for the taking was lawful at the time." But he must be mistaken in the first part of this report, for Lord Chief Justice Holt could never say, "that the property of the goods is vested by the delivery of the fieri facias; and the extent for the King afterwards comes too late." No inception of an execution can bar the crown:† this matter was lately very fully discussed in the Court of Exchequer in the case of the *King v. Cotton*.

As to the case of *Cole v. Davies et al.*, reported in 1 *Lord Raym.* 724, "that no action will lie against the sheriff, who, after the bankruptcy, seizes and sells the goods, under a fieri facias to him directed;" which is there said to be ruled by Lord Chief Justice Holt at nisi prius, in *Hil.* 10 *W.* 3. *These notes were taken in 10 W. 3, when Lord Raymond was young, as short hints for his own use: but they are too incorrect and inaccurate, to be relied on as authorities.* The note states four general resolutions upon evidence, in a trial at nisi prius; but does not state the case or question to which the resolutions were applied (though, by the particularity of the fourth resolution, I conjecture that to have been most immediately adapted to the case then in judgment.) The first resolution is an obiter reference to the determination in *Bailey v. Bunning*; and it might not be at all material to attend to the distinction between trover *and trespass. Besides, the case [*236] there put is of a sale by the sheriff, before the commission; and the conversion might be as excusable as the taking, because he obeyed the writ: whereas here, the goods were not sold till after both commission and assignment. It is a loose note of what was said obiter: it manifestly refers to

† *Giles v. Grover*, 9 *Bing.* 528.

the case of *Baily v. Bunning*; but is no authority applicable to the present case.

There are, in the course of trade, numberless acts of bankruptcy in fact committed, where no commission is ever taken out. Therefore, it would be very hard, to make the sheriff a trespasser for taking the goods of a person, who might privately and secretly have committed an act of bankruptcy, and, perhaps, many years before too, and on which no commission might ever afterwards issue, and which the sheriff could not possibly know. But none of these reasons hold, to justify the making a false return, and selling the goods after a commission and an assignment.

Arguments have been urged from inconvenience, if the sheriff should be made liable; because he is obliged to sell.

But the sheriff may take an indemnity from the plaintiff, in case there be a doubt concerning the property of the goods. Possibly, this court might interfere, if the sheriff was reasonably doubtful about the property: at least, they would have given him time to make his return. Or he might have put it on the parties concerned in interest, to litigate their right, by filing a bill in Chancery against them, to oblige them to interplead,† in order to ascertain to whom the property belonged. Or he might oblige the assignees to prove the act of bankruptcy, and the assignment.

And notwithstanding what has been urged as to the hardships that sheriffs will be under, there can hardly a case exist, where there will be any hardship upon the sheriff, where the taking and sale, or even the sale only, are subsequent to the assignment. But in the present case, the sheriffs knew of the bankruptcy, before they sold the goods.

There are much greater hardships upon other third persons concerned in pecuniary transactions with bankrupts: which hardships they are nevertheless left subject to; because it *was necessary that they should be [*237] so, in order to secure the end and intention of the acts relating to bankrupts; namely, the securing their effects for the equal satisfaction of their creditors.

The commission and assignment are both notorious transactions; so that a sheriff cannot well be hurt, by being left liable to this action: whereas there would be danger, if it were otherwise, of great collusion being practised by sheriffs, on these occasions; which might be encouraged by a contrary resolution. The seizure here is after the act of bankruptcy committed, and, therefore, after the property by relation is vested in the assignees: but that was innocent, and excusable; and the sheriff shall not be liable by relation, as a wrong-doer. The gist of this action is the wrongful conversion by the sale; and false return, long after the commission and assignment.

Therefore, *per Cur.* unanimously, the action is maintainable, in this case, against the defendants; and there must be judgment for the plaintiffs.

Judgment for the Plaintiffs.

† See now the Interpleader Act, 1 & 2 W. 4, c. 58, s. 6. *Isaac v. Spilsbury*, 2 Dowl. 211; *Ford v. Bayntoun*, 1 Dowl. 357; *Day v. Waldoek*, 1 Dowl. 523.

That the right of the assignees to the bankrupt's property dates *prima facie* from the act of bankruptcy, is so perfectly well known and elementary a position, that it would be a mere waste of time to enlarge upon it. In *Sims v. Simpson*, 1 Bing. N. C. 313, Tindal, C.

[*237a] J., *stated it to depend at present on 6 G. 4, cap. 16, sec. 12, which empowers the Lord Chancellor, on petition against any trader having committed an act of bankruptcy, to appoint commissioners, who are to take such order and direction with the body of the bankrupt, as also with all his lands, tenements, and hereditaments, which he shall have in his own right, *before he became bankrupt*, and with all his money, fees, offices, annuities, goods, chattels, wares, merchandize, and debts, wheresoever they may be found or known; and to make sale thereof in the manner thereafter mentioned. Upon this general enactment a number of exceptions have been engrafted, some arising out of the express words of the statute, others out of the reasonable and equitable construction thereof; (all of which are enumerated and discussed in the various treatises on bankruptcy;) and finally by the very sweeping enactment of 2 Vict. c. 29, which confirms all *contracts, dealings, and transactions* entered into, and all *executions and attachments* executed or levied, *bona fide*, before the date and issuing of the fiat, without notice of a prior act of bankruptcy.

[The statute 2 & 3 Vict. c. 29, after reciting the provisions of 6 Geo. 4, c. 16, and 2 & 3 Vict. c. 11, as to bona fide payments by and to, and conveyances by a bankrupt before a fiat, and that "it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any fiat against them," enacts, "that all contracts, dealings, and transactions by and with any bankrupt really and bona fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt bona fide executed or levied before the date and issuing of the fiat shall be deemed to be valid notwithstanding any prior act of bankruptcy by such bankrupt committed: provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such

execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing, or levying such execution or attachment, notice of any prior act of bankruptcy by him committed: provided also that nothing herein contained shall be deemed, or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference. A summary of the cases relating to its construction may be useful. It has been held to be retrospective in *Luckin v. Simpson*, 6 N. C. 353, 8 Scott, 676 S. C.; *Edwards v. Lawley*, 6 M. & W. 285; [*237b]

Nelstrop v. Scarisbrick, id. 684, except in cases where the assignees had been appointed, and an interest thus vested before its enactment, *Moore v. Phillips*, 7 M. & W. 356. It applies only to cases in which before it passed, a prior act of bankruptcy would have rendered the transaction invalid, and it simply does away with the effect of such *prior act* of bankruptcy if secret. It therefore does not render valid an act which *in itself* is an act of bankruptcy, such as an execution procured by the bankrupt; *Hall v. Wallace*, 7 M. & W. 353. Nor has it taken away the effect of a fiat issued before the sale, in cases where that would, previously to its passing, have defeated an execution: so that, upon executions other than those founded on warrants of attorney or cognovits given in actions not commenced adversely, the statute operates to render them valid, provided the *seizure* of the goods have taken place without notice of an act of bankruptcy and before the fiat, even though the *sale* do not take place until afterwards, (the words "executed and levied," signifying *seized* in execution,) *Cheston v. Gibbs*, 12 M. & W. 111; *Bird v. Bass*, 6 Man. & Gr. 143, 6 Scott, N. R. 928, S. C.; whilst, upon executions founded on warrants of attorney or cognovits given in actions not adverse, and therefore not within the protection of 1 W. 4, c. 7, s. 7, it operates conjointly with the 108th section of 6 Geo. 4, c. 16, with this effect, that, if the *seizure* of goods under such an execution is made *bona fide* without notice of an act of bankruptcy, and the *sale* is effected before the fiat, though after notice of the

act of bankruptcy, the execution stands good, *Whitmore v. Green*, 13 M. & W. 101. But if, in executions of the latter class, there be notice of the act of bankruptcy at the time of the seizure, or no sale before the fiat, the execution is avoided by the fiat; *Whitmore v. Robertson*, 8 M. & W. 469; *Rawdon v. Wentworth*, 10 M. & W. 36; *Skey v. Carter*, 11 M. & W. 571; *Lackington v. McLachlan*, 5 Scott, N. R. 874; *Cheston v. Gibbs*, 12 M. & W. 111; *Linnit v. Chaffers*, 4 Q. B. 762; and that so completely, that a subsequent execution which but for the bankruptcy would have been deferred to that founded on the warrant of attorney, takes its place, and has precedence of the fiat; *Goldschmidt v. Hamlet*, 6 M. & Gr. 187, 6 Scott, N. R. 962, 1 D. & L. 501, S. C.; *Graham v. Witherby*, and *Graham v. Lynes*, 7 Q. B. 491; an effect different, as it seems, from that produced by bankruptcy upon a conveyance valid as against an execution but void as against a fiat, *Oswald v. Thompson*, 2 Exch. 215, *Fawcett v. Fearn*, 6 Q. B. 20 (last point), and post, 237, c. d. e.

Where an execution appears to have been founded on a warrant of attorney [*237c] or cognovit, it seems that the onus of alleging and proving that the action was adverse, so as to bring the case within 1 W. 4, c. 7, s. 7, rests on the execution creditor. *Rawdon v. Wentworth*; *Linnit v. Chaffers*, *ubi supra*. In addition to the cases above cited, see as to the mode of pleading the statute in actions between assignees and execution creditors, *Turquand v. Hawtrey*, 9 M. & W. 727; *Unwin v. St. Quintin*, 11 M. & W. 277.

The words *bona fide* in the statute, so far as executions are concerned, mean "*really intended to be executed for a bona fide debt*," per Parke, B., *Edwards v. Cooper*, Kent Assizes, 26 July, 1847. They refer to the conduct of the execution creditor, not that of the bankrupt. *Belcher v. Magnay*, 12 M. & W. 102.

The "notice" in the case of an execution may effectually be given to the execution creditor, or to one of several, per Parke, B., *Edwards v. Cooper*, *ubi supra*, or to the attorney in the cause, *Rothwell v. Timbrell*, 1 Dowl. N. S. 778; but not to the attorney's clerk though at the office of the principal, at least not unless he have full discretion as to issuing or countermanding the execution, *Pike v. Stephens*, 12 Q. B. 466; nor to the sheriff or his officer, *Ramsey v. Eaton*,

10 M. & W. 22; (see *Lackington v. Elliott*, 7 M. & Gr. 539, 8 Scott, N. R. 275, S. C., where it was discussed whether notice to a bailiff who distrained was notice to the landlord). And in *Green v. Steere*, 1 Q. B. 710, it was laid down by the Court of Queen's Bench, (in apparent harmony with the language of the statute) that "the knowledge or ignorance of the person who actually, not constructively, deals with the bankrupt as to any prior act of bankruptcy is the natural question under stat. 2 & 3 Vict. c. 29." Yet the judgment of the same court in *Fawcett v. Fearn*, 6 Q. B. 20, may not be thought altogether to accord with that proposition. In *Fawcett v. Fearn* it appeared that Blackwell, a trader, had committed an act of bankruptcy by assigning his property to Fawcett, one of his creditors, and another person, as trustees for the benefit of creditors; goods included in the assignment were seized by the sheriff under *bona fide* executions, at suit of creditors who had no notice of any act of bankruptcy; Fawcett paid off the executions, and took an assignment from the sheriff of the goods seized; a fiat afterwards issued against Blackwell, and the assignees took possession of the goods; whereupon Fawcett, relying on his title as purchaser from the sheriff, sued the assignees in trover; but the court decided against him, stating in the course of the judgment, that, "though the execution creditors themselves, who knew nothing of the act of bankruptcy,*nor that the goods might by relation be [*237d] the property of other persons than the bankrupt, might be protected, the plaintiff, who became the assignee of the sheriff, with full knowledge of the bankruptcy, is not." So far as the decision of that case involves, if it at all involve, the general proposition,—that a purchaser from the sheriff at a sale operative at the time, under a *bona fide* execution at suit of a creditor who had no notice of any act of bankruptcy, may by reason of notice to himself, be in a worse position than the execution creditor, who has irrevocably received his money,—it is open to this observation, that the purchaser is neither "a person dealing with the bankrupt," nor "a person at whose suit or on whose account the execution issued," therefore not within the words of the statute 2 & 3 Vict. c. 29, s. 1. And, seeing that there was another reason (to be mentioned by and by), apart from the ope-

ration of the statute, upon which the decision in *Fawcett v. Fearne*, may be sustained, it is possible that a reconsideration of the subject may lead to a correction of some expressions used in delivering the judgment in that case, and a recurrence to the language of the statute, according to its juster exposition in *Green v. Steere*.

Suppose that the assignment to the trustees in *Fawcett v. Fearne* had been (for any reason of which *Fawcett* was not estopped from availing himself) void as against the execution, and so the sale under the execution had operated upon the goods, the question under discussion would have been raised. If a stranger to the deed had in that case purchased under the execution, he would have been, according to the judgment, undoubtedly entitled to the goods. Then is there anything in the statute to disqualify a man from becoming a purchaser under a valid execution, by reason of his knowing something, which, *if* the execution creditor had known it at the time of the seizure, would have rendered the execution invalid? If so, hardly any one could safely purchase at a sale after the fiat, though under a valid execution levied before the fiat. Next, take the simple case of a sale of goods under a valid execution, the creditor being ignorant of any act of bankruptcy, to a purchaser who has never had *any* dealing with the bankrupt, but who knows of an act of bankruptcy committed before the seizure: there is nothing *in the statute* to invalidate such purchaser's title, and following its express language, it may be concluded to be immaterial who has notice, if the person at whose suit or on whose account the execution issued, i. e. *the execution creditor*, (by himself or his agent) have not.

The true ground of the decision in *Fawcett v. Fearne* may have been, that the execution *did not* *operate at all [*237e] upon the goods; that the assignment to the trustees was valid as against the execution, though afterwards avoided by the fiat; that the goods therefore were not the goods of the execution debtor at the time of the sale; that consequently the sale did not *at the time it was made*, pass any property in the goods, or confer any new right upon *Fawcett*. *Quod meum est amplius meum esse non potest, et nemo dat quod non habet*. In this view of the case the sale was not a sale of goods which the

sheriff was authorised by the writ of *fieri facias* to seize, and the purchaser, whether with or without notice, had no title as against the assignees. Whether the effect of the sale in that case would have been different if made after the fiat, or whether the assignees could then have insisted that there was no seizure of *the execution debtor's* goods before fiat, it is unnecessary to discuss at length, but it may be suggested that probably the doctrine of relation would here operate only in favour of the assignees to defeat the assignment, and not to set up what had been wrongly done under the execution. The goods would in such a case be the goods of the trustees until the fiat; and upon the issuing of the fiat they would become by relation to the act of bankruptcy the goods of the assignees; and so the execution, never having been executed by seizure of *the goods of the execution debtor*, would probably be excluded altogether. The distinction between such a case and *Graham v. Witherby*, *ubi supra*, is obvious, because a conveyance valid as against the execution, though void as against the subsequent fiat, yet changes the property in the goods for the time, whereas an execution by *fieri facias* does not change the property until sale.

As to *what* notice is sufficient, it has been decided that a general notice that J. S. has committed "an act of bankruptcy," *Udall v. Walton*, 14 M. & W. 254, or a notice that he has done anything which amounts to an act of bankruptcy, as that he has made a conveyance of all his property for the benefit of his creditors, *Lackington v. Elliott*, 8 Scott, N. R. 275; or that he has *filed* (though not gazetted) a declaration of insolvency pursuant to 5 & 6 Vict. c. 122, s. 22, *Follett v. Hoppe*, 5 C. B. 226, *Green v. Laurie*, 1 Exch. 335, is sufficient. But notice of an *intention* to commit, *Exp. Halifax* 3 M. D. & D. 544, or of a step having been taken towards committing an act of bankruptcy; as that J. S. has *signed* a declaration of insolvency, *Conway v. Nall*, 1 C. B. 643; or that a docket has been struck, *Hocking v. Acraman*, 12 M. & W. 170, is not sufficient. Notice in the statute means actual knowledge, and not merely the means of knowledge, such as being in possession of an unread letter, containing *notice, *Bird v. Bass*, 6 M. & [*237f] Gr. 143, 6 Scott, N. R. 928, S. C.

As this note is, for the most part, confined to executions, let it suffice here for further exposition of the statute to refer, as to its effect upon a lien, to *Bowman v. Malcolm*, 11 M. & W. 833, per Parke, B.; upon a distress, to *Lackington v. Elliott*, 8 Scott, N. R. 275; upon payment by the bankrupt, to *Turquand v. Vanderplank*, 10 M. & W. 180, per Alderson, B.; *Green v. Bradfield*, 1 Car. & K. 449; upon payment by an agent for the bankrupt, to *Kynaston v. Crouch*, 14 M. & W. 266; upon mutual credit, to *Bittleston v. Timmins*, 1 C. B. 389, per Cresswell, J.; upon reputed ownership, to *Fawcett v. Fearn*, 6 Q. B. 20, (first point,) which shews that the assignees are still only entitled, in any event, to such goods as were in the reputed ownership of the bankrupt with the consent of the true owner at the time of the act of bankruptcy; and *Pariente v. Pennell*, 2 Mo. & Rob. 517, *In re Styant*, 2 M. D. & D. 219, recently (E. 1845) approved of by the Court of Exchequer in a case not yet reported, from which it appears that if the consent of the true owner be bona fide retracted before fiat without notice of the act of bankruptcy, the inchoate right of the assignees is defeated.]

This enactment [2 & 3 Vict. c. 29,] which has taken place since the 1st Edition of this work was published, has rendered the subject of [the remaining portion] of this note of much less importance than it formerly was. Still it is proper to bear in mind the state of things before the act, both in order to understand rightly the effect of its provisions, and to apply the law in those cases to which the statute is applicable.

Cooper v. Chitty became celebrated on account of the frequent discussions which occurred upon the question, whether the liability of the sheriff in such cases was not to be confined to acts done by him with notice of the bankruptcy, for it had been decided that trespass would not lie against him for taking the bankrupt's goods in execution, after an act of bankruptcy, but without notice thereof, and selling them after commission and notice, *Smith v. Milles*, 1 T. R. 475; *Letchmere v. Thoroughgood*, 1 Show. 12; and one of the reasons given in those cases, viz., that officers and ministers of justice were not to be made trespassers by relation, was said to apply to actions of trover brought against them, as well as actions of trespass,

though certainly the judgment in *Smith v. Milles* will, to any person who *will look narrowly at it, appear [238] to be unfavourable to such an extension of the principle therein established; for the court there appear to have thought that the exemption from actions of trespass was not confined to sheriffs and ministers of justice only, but was common to them with the king's other subjects. "There is no instance," says *Ashurst, J.*, delivering judgment, "that I know of, where a man, who has a new right given him, which, for reasons of policy, is so far made to relate back as to avoid all mesne encumbrances, shall be taken to have such a possession as to entitle him to bring trespass for an act done before such right was given to him." So that the court appears to have conceived the distinction to be rather between the action of trespass and that of trover, than between ministers of justice and private persons. Indeed, the judgment proceeds: "But at all events the rule will hold with respect to officers and ministers of justice;" and upon this some stress was laid in *Balme v. Hutton*, as also on a dictum of *Buller, J.*, in *Vernon v. Hankey*, 2 T. R. 122, expressed however in very general words. At last, in *Potter v. Starkie*, 4 M. & S. 260, it was decided that the sheriff would be liable in trover, though he seized, sold, and paid over the money before any commission issued, and before any notice; and the court said this necessarily followed from *Cooper v. Chitty*, for it was an unlawful interference with another's goods. In *Wyatt v. Blades*, 3 Camp. 396, *Lord Ellenborough* held the sheriff, who had seized and removed the goods, after an act of bankruptcy, liable, though, on receiving notice from the assignees not to sell, he forebore to do so. It was remarked on these two cases, in *Balme v. Hutton*, that the question, whether an officer of justice be entitled to any peculiar exemption, seems hardly, if at all, to have been raised in them. The law now appears to have been considered settled, for in *Lazarus v. Waithman*, 5 B. M. 313, *Potter v. Starkie* was recognised; in that case the seizure and sale were both subsequent to the act of bankruptcy and prior to the commission: it is, however, remarked in *Balme v. Hutton*, that the report of *Lazarus v. Waithman* is silent on the points, whether the sheriff had notice of the act of bankruptcy, and whether he was indem-

nified (for it is proper to observe, that, throughout the whole controversy, it has been admitted, and indeed was expressly held in *Balme v. Hutton*, that if the sheriff be indemnified, he stands on the same ground as the execution creditor who indemnified him; and, in that case, is unquestionably liable.) It was further remarked on *Lazarus v. Waithman*, that none of the cases prior to *Cooper v. Chitty* were noticed in it, and that the distinction in favour of the sheriff was not pointed out. In *Price v. Holyar*, 4 Bing. 597, the seizure and sale both took place before notice to the sheriff of any act of bankruptcy; this case was followed and recognised by *Carlisle v. Garland*, 7 Bing. 298, and *Dillon v. Langley*, 2 B. & Adol. 131; and the point was considered settled against the sheriff, until, in *Michaelmas Term*, 1831, the famous case of *Balme v. Hutton*, 2 Tyrwh. 17; 2 C. & J. 20, occurred in the Court of Exchequer. That was an action of trover for machinery, brought by the assignees of Bankart and Benson, against Mr. Hutton, the sheriff of Yorkshire, Jewison, the chief, and Ingham, the deputy, bailiff, of the Honor of Pontefract, and the Messrs. Wood, creditors of Bankart and Benson, and to whom they had given a warrant of attorney, which was duly filed, and judgment signed thereon upon the 14th November, 1825, on the 31st of December, in which year Bankart and Benson committed an act of bankruptcy. On the 25th of January, 1826, Ingham, as Jewison's deputy, seized the property in question, by virtue of a warrant directed to Ingham and Jewison, founded on a *fi. fa.* which had issued upon the last-mentioned judgment, and was directed to the sheriff, Mr. Hutton. On the same day, the property was sold by Ingham to a clerk of Messrs. Wood, who executed a bond of indemnity to Ingham. On the 21st of February, a commission issued against Bankart and Benson, under which the plaintiffs became assignees. Neither Mr. Hutton, Jewison, nor Ingham had any notice of the bankruptcy, before the return of the *fi. fa.*

At the trial a general verdict was found *for Mr. Hutton, and against [*239] Messrs. Wood, and a special verdict, containing the above facts, as to the liability of Jewison and Ingham.

The case was ably argued before the Court of Exchequer, and the court, after

consideration, delivered one of the most elaborate judgments on record.

They held, 1st, that Ingham having been indemnified by Messrs. Wood, stood on the same footing with them, and was clearly liable.

2nd. That the liability of Jewison was not altered by his having taken the usual indemnity from his bailiff Ingham against all Ingham's acts as deputy.

3rd. They proceeded to consider the main question, viz., whether Jewison was liable for having seized and sold after the bankruptcy, but without notice thereof. In order to determine this, they proceeded to a minute examination of *Cooper v. Chitty*, and the authorities previous and subsequent to it, and arrived at the conclusion, that the defendant Jewison was exempted from liability by his official character, upon the ground that *Bailey v. Bunning*, 1 Lev. 173; *Letchmere v. Thoroughgood*, 3 Mod. 236, 1 Shower, 12, Comb. 123, and *Cole v. Davies*, L. Raym. 724, had established a distinction between the case of the sheriff and that of an execution creditor; that this distinction was supported, not impugned by *Cooper v. Chitty*; that it was mentioned with approbation in several cases, which will be found cited and commented upon in the judgment; and that it was entirely overlooked in *Potter v. Starkie*, and the subsequent cases which have been above enumerated. Judgment therefore was given for Jewison, and against Ingham.

This judgment was carried by writ of error to the Exchequer Chamber, see report, 9 Bing. 471; where it was reversed by Tindal, C. J., Park, Littledale, Bosanquet, Taunton, and Patteson, JJ., contrary to the opinion of Gaselee, J. Lord Tenterden, who had died pending the argument, was stated by Tindal, C. J., to have been of opinion with the majority. In the mean while, a writ of error had been brought on the judgment of the Court of Common Pleas, in *Carlisle v. Garland*; the judgment of the Court of Error is reported in 3 Tyrwh. 705; 10 Bing. 452; it was subsequent to that in *Balme v. Hutton*, and the judges were equally divided upon the main point, that, viz., discussed in *Balme v. Hutton*; Littledale, Parke, and Taunton, JJ., and Gurney, B., being of opinion that the judgment of the court below ought to be affirmed; and Denman, C. J. Bayley, Vaughan, and Bolland, Barons, being of opinion that it ought to

be reversed except as to 5*l.*, to which all the judges agreed that the plaintiffs were entitled, there being no doubt that there had been a conversion of their goods to that amount. A writ of error upon this judgment was afterwards brought in the House of Lords, where judgment was given in accordance with the decision of the Exchequer Chamber in *Balme v. Hutton*; *Garland v. Carlile*, 3 *Mee. & W.* 152, *S. C.*, 4 *Bing. N. C.* 7.

In *Groves v. Cowham*, 10 *Bing. 5*, a point was determined on the construction of the insolvent act, similar to that decided on the construction of the bankrupt act, in *Cooper v. Chitty*. On the 10th of June, judgment was signed on his *cognovit* against one Bowler, who, on the 19th of the same month, petitioned the Insolvent Debtors' Court for his discharge; upon the 20th, the sheriff seized his goods under a *fi. fa.*, issued on the above judgment; on the 23rd, Bowler assigned all his effects to the provisional assignee, notice whereof was forthwith communicated to the sheriff, who was requested not to sell, which he however did, and paid over the proceeds. The court held that he was liable in trover, in consequence of the thirty-fourth section of 7 *G. 4*, c. 57; which enacts, that, "in all cases where any prisoner, who shall petition the court for relief under that act, shall have executed any warrant of attorney, &c., to confess judgment, or shall have given any *cognovit actionem*, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself, or herself, of any execution issued, or to be issued, upon such warrant of attorney, or *cognovit actionem*, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof: but that any person or persons, to whom any sum or sums shall be due in respect of any such warrant of attorney or *cognovit actionem*, shall and [*240] *may be a creditor, or creditors for the same under that act." The court held that the words marked in italics effected a statutory supersedeas of the execution; that the case was, therefore, governed by *Cooper v. Chitty*, and that trover was maintainable against the sheriff. [So trover may be maintained against the sheriff for the sale of goods under an execution avoided by 6 *Geo. 4*,

c. 16, s. 108; *Cheston v. Gibbs*, 12 *M. & W.* 111, per *cur.* *Graham v. Witherby*, 7 *Q. B.* 491. But trover cannot be maintained against the sheriff for a conversion of the goods of the assignees, when the act relied upon as a conversion has taken place before the act of bankruptcy; thus in *Brookes v. Mitchell*, 6 *N. C.* 349, 8 *Scott*, 739, *S. C.*, where the goods had been seized before the act of bankruptcy, under a warrant of attorney void by 3 *Geo. 4*, c. 39, it was held that the assignees could not maintain trover, see *Everett v. Wells*, 2 *Scott*, *N. R.* 525, 2 *M. & Gr.* 209, *S. C.*; so where the sheriff had sold goods before the act of bankruptcy, it was held that the assignees could not, by a subsequent demand, render him liable in trover, *Edwards v. Hooper*, 11 *M. & W.* 363.]

The assignees, however, in cases of this description, are not bound to sue the sheriff in trover; they may waive the tort, and bring money had and received for the proceeds of the goods, *Kitchen v. Campbell*, 3 *Wils.* 304; *Young v. Marshall*, 8 *Bing.* 43; *Clarke v. Gilbert*, 2 *Bing. N. C.* 343.

The danger of the sheriff's position is now, however, greatly lessened; for by *St. 1 & 2 W. 4*, c. 58, commonly called the Interpleader Act, on any claim being made by assignees of bankrupts or others, to any goods or chattels taken, or intended to be taken, in execution, or to the proceeds and value thereof, the sheriff or officer may apply to the court from which the process issued, which may thereupon exercise for his protection and for the adjustment of such claims, the powers and authorities thereinbefore contained in that statute, and the costs of all such proceedings shall be in the discretion of the court. The powers and authorities alluded to are given by the previous sections of the act, and enable the court to call the parties before them by rule, to hear and adjudicate upon their claims, and, if necessary, to order them to try an action, or one or more feigned issues, for the determination thereof. But, in *order that the sheriff may avail himself of this act, he must be [*24Ca perfectly without interest; *Dudden v. Long*, 1 *Bing. N. C.* 300; *Ostler v. Bower*, 4 *Dowl.* 259; nor must he colude with either party; *Braine v. Hunt*, 4 *Tyrrw.* 244; *Cook v. Allen*, 3 *Tyrrw.* 586: and the court will not receive his application merely *quia timet*, a claim

must actually have been made upon him, *Bentley v. Hook*, 4 Tyrw. 230; *Isaac v. Spilsbury*, 10 Bing. 3. [He must also apply within a reasonable time, *Mutton v. Young*, 4 C. B. 371.] The powers

given by this act for the relief of sheriffs may now be exercised by a judge sitting at chambers. Stat. 1 & 2 Vict. c. 45, s. 2.

NOTHING can be better established in English or American law than the general doctrine, that a sheriff in executing a writ proceeds at his peril, and that if he exceed the authority there given, although acting with the fullest good faith, he will be answerable, even where the circumstances have been such, that the utmost exercise of prudence or care on his part, could not have enabled him to guard against mistake. There does not, however, appear to have arisen, during the brief continuance of the different bankrupt laws, which have been in force in the United States, any case in which it has been determined, whether the sheriff can be made so far a tortfeasor by relation, as to become liable to the assignees in trover or trespass, for seizing goods which in consequence of proceedings in bankruptcy, have proved not to be the property of parties, to whom, independently of the decree, they would have belonged. The cases of *Acker v. Campbell*, 23 Wendell, 372, and *Ash v. Putnam*, 1 Hill, 302, would appear to make the nearest approach to the practical enforcement of this doctrine, to be found in the American decisions. In those cases the sheriff was held to be liable, either in replevin or trespass, to the owner of goods, for seizing them as the property of the defendant in the execution, by whom they had been purchased, under circumstances of fraudulent misrepresentation. As a sale vitiated by fraud, whether on the part of the buyer or seller, would seem to be merely voidable, and not void ab initio, *Hazard v. Irwin*, 102, *Rowley v. Bigelow*, 12 Pick. 307, it appears, that in these cases the vendor was allowed, by disaffirming the contract and demanding back the goods, to impose upon a sheriff a liability for an act as tortious, which would otherwise have been valid, as against all the world.

In the recent case of *Tharpe v. Stallwood*, 5 M. & G. 760, it was declared that the cases of *Garland v. Carlisle*, and *Balme v. Hutton*, supra, 497, had definitely settled the law, that the assignees cannot treat the sheriff as a trespasser by relation, for taking the goods of the bankrupt before the fiat, although, under such circumstances, they may render him liable, in an action of trover. But it was held that the principle of those decisions only applies where the act complained of is rightful at the time, and becomes wrongful afterwards, as in the case of a seizure of goods by authority of law, of which the title is in the defendant in the execution, at the time when they are taken, although subsequently vested by relation in other parties. It was, therefore, determined that an administrator may maintain trespass for the asportation by the defendant, of the goods of the intestate, after his death and before administration granted, for there the act is wrongful from the beginning, and the relation extends only to vesting the right of action in the plaintiff. In this respect, the case before the court was said

to be analogous to the well established doctrine of the common law, that a disseissee who reverts his estate by re-entry, may maintain trespass for all injuries committed while he has been out of possession.

H.

[*241]

*ROBINSON v. RALEY.

EASTER—30 GEO. 2, B. R.

[REPORTED 1 BURR. 316.]

Several matters may be put in issue by a single traverse, provided they constitute but one defence.

The traverse of a material allegation is properly concluded to the country.

The defendant will not be allowed to withdraw his demurrer to the replication and amend, after the court have given judgment against him on the demurrer, and after other issues have been tried, and contingent damages assessed on them.†

THIS was an action of trespass. The declaration contained a great number of counts; among the rest, one in trespass for breaking and entering the defendant's close; and depasturing it with, &c.; and for breaking and entering his free-warren; a 2nd count, to the like effect; (but in different years;) so a 3rd, 4th, 5th, and 6th; and six more for breaking and entering another close called Sand's Piece; a 13th for taking and carrying away the plaintiff's trees; and a 14th for taking and carrying away his goods and chattels.

The defendant had leave to plead several pleas; and accordingly he pleaded: 1st. The general issue, to the whole. 2nd plea, (by leave, *ut supra*,) That as to the close called the rabbit-walks, "that it is one rood of land, parcel of a common-field; and that Mr. Finch, in right of his prebendal estate, and all, &c., have right of common, &c., in certain fields, called Middle Fields, whereof the rabbit-walks are parcel;" which right he derives to himself; and so justifies under it. The like plea to the other five [*242] next counts. He pleads, as to the six counts relating to Sands's Piece, the general issue. To the 13th count, he pleads tenancy of another close, under the plaintiff; and justifies under a license, and avers that it was used for gates, &c. Another plea was a right of common, &c. &c.

The plaintiff, in his replication to the 2nd plea to the 1st count, traverses the right of common; and in his replication to the like pleas, as to the other five counts, traverses the rabbit-walks being parcel of the Middle Fields. In the replication to the last-mentioned plea, he traverses the right of common. All these issues were found for the defendant. To the plea to the

† Under 3 & 4 W. 4, c. 42, sec. 23, an amendment at the trial may be made after demurrer. *Beckwith v. Harrison*, 5 M. & W. 427.

5th count, the replication traverses, "that the cattle were the defendant's own cattle; and that they were *levant et couchant* upon the premises, and commonable cattle." To this there is a special demurrer for cause, (*viz.*, "that the replication is multifarious, and that several matters, specifying them, are put in issue; whereas only one single matter ought to be so:") and joinder in demurrer. To the plea to the 13th count, the replication traverses the license; (after protesting "that the tree was not used for gates, &c., as is alleged by the defendant's plea.") And to this replication also, the defendant demurs specially, and shows for cause, "that it concludes to the country, whereas it ought to conclude with an averment."

Serjeant *Poole*, for the defendant, complained of the hardship the plaintiff put upon the defendant in the 5th count, by enforcing the defendant to prove the cattle to be his own cattle, and commonable cattle, and *levant and couchant* upon the land; which hardship had obliged him to demur.

He argued, that some one *fact* only ought to be put in issue; not several.

He cited Co. Lit. 126, a. It must be one single certain material *point*. And so also 8 Rep. 67, b. Crogate's case, the last resolution, lays down the rule accordingly, "that an issue ought to be full and single."

Now here are three distinct facts put in issue, by this replication; any one of which was sufficient.

For if the cattle were not his own, or were not *levant and couchant*, they were not commonable cattle. The plaintiff might as well have put twenty facts in issue.

This therefore is, at least, a fault in form: and we have demurred especially, and shewn this for cause; "that the *replication is multifarious and that several matters are put in issue (specifying them) [*243] whereas only one single matter ought to be so."

As to the license: The replication, protesting that the tree was not used for gates, &c., traverses the license. To this replication, we have demurred, out of necessity: for though we really have a license, yet the person who gave it to us (the plaintiff's steward) has denied it; and, we apprehend, would do so again, on oath. Therefore, we have demurred specially, and shewn for cause "That the replication concludes to the country, whereas it ought to conclude with an averment."

Now, they have traversed the license specially, and to have concluded with an averment. Crogate's case, 3rd resolution, fo. 67, a. b., shows that his license ought to have been specially traversed, and concluded with an averment. And Rast. 660, b. bis, 661, 630, 651, and 1 Brown, 353, and Thompson's Entr. 365, and many other precedents are so.

Indeed, where the whole of the plea is traversed, the conclusion may be to the country. But this is not a traverse of the whole. So that this is a departure, by Mr. Robinson, from the common form of pleading.

Mr. *Yates* contra, for the plaintiff.

One part of the duplicity, *viz.*, the cattle not being commonable, is not pointed out by the special demurrer.

However, this traverse is not double: though I agree that it numerically contains several matters; all which together make up the defendant's plea, and make one entire defence. And it is within the reason of Crogate's case, 8 Co. 67.

Whereas duplicity is, where distinct matters, not being part of one entire

defence, are put in issue. For there are cases where several matters may be put in one traverse: as, for instance, a custom consisting of several parts.

Now, all these parts here traversed make one entire defence. For the cattle must be commonable, *levant* and *couchant*, and his own: or else it is no sufficient defence. To prove which he cited 1 Ro. Abr. 398, Letter G. pl. 2, 3, Letters H. and I throughout; 1 Saund. 227, the case of Stennell v. Hogg; and 2 Show. 328, the case of Manneton v. Trevilian, in point.

[*244] *As to the license, the cause of demurrer shown is "that he ought to have maintained his declaration; and that he ought to have concluded with a traverse and averment."

But precedents are both ways. 2 Brown's Entr. 283, concludes as the present does. And whoever has seen the whole of this record will not think that either of the parties has concluded too hastily. He cited the case of Clark v. Glass, Tr. 28, 29 G. 2, B. R., to prove that where the whole contents of the plea are denied, the conclusion must be to the country: but where only a particular fact is denied, the conclusion must be with an averment. He also cited 2 Lutw. 1399, 1401, the case of Hustler v. Raines.

Serjeant Poole, in reply.

1st. As to the two matters making but one entire defence:—yet being variety of facts, they ought not both to be put in issue. Crogate's case, 8 Co. 67.

And the common method is, to traverse, "that the said cattle were *levant* and *couchant*."

As to the case of Manneton v. Trevilian, I agree that the cattle ought to be *levant* and *couchant*. My demurrer here is in point of form; and is special.

2dly. I do not know but the party may go to issue in some cases; but I say this is not the common form.

The case of Hustler v. Raines, 2 Lutw. 1399, 1401, proves nothing against me.

Lord Mansfield held both these demurrers to be frivolous.

The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic; and so appear, when well understood and explained: though, by being misunderstood and misapplied, they are often made use of as instruments of chicane.

As to the present case. It is true, you must take issue upon a single point: but it is not necessary that this single point should consist only of a single fact. Here, the point is, the cattle being entitled to common: this is the single point of the defence. But, in fact, they must be both his own cattle, and also *levant* and *couchant*; which are two different essential circumstances of their being entitled to common; and both of them absolutely requisite.

So, as to the license. The license is the point in question. And this point in question, "whether the license was given, *or not," is put in [*245] issue: the whole turns upon this particular proposition. Indeed, it may be a different case, where the whole of the plea is not denied; but only some parts of it. But that is not this case.

Mr. Yates has made right and reasonable and intelligible distinctions: and he has cited an express authority.

Mr. Justice *Denison* concurred.

1st. As to Crogate's case. The replication "*de injuriâ suâ propriâ absq; tali causa*," will do, in all cases where matter of title, and other things of that kind, are not included in the "*absq; tali causa*:" and if you admit them, you may then plead "*De injuriâ suâ propriâ absque residuo causæ*;" traversing that residue. But the rule in Crogate's case does not affect this case. For here the question is one single proposition, viz., the measure of the common: and the measure of the common is the levancy and couchancy jointly with the property.

Skinner, 137, is a more sensible report of the case of *Molliton v. Trevilian*, than 2 Show. 328. And there, the levancy and couchancy, together with the property, were esteemed to be the measure of the common: and not the levancy and couchancy only.

So that nothing more is here traversed than the measure of the common. The case is in point.

Besides, I think it is within Crogate's case.

As to the license. It is right, and avoids the prolixity of pleading. The old way, indeed, was otherwise: but it is altered of late.

And he cited a case (of an alternate way of traversing a corrupt agreement), which was in M. 5 G. 1, B. R., *Fen v. Alston*, where it was holden, "that the plaintiff has a liberty either to reply that the bond was given upon another account," and to traverse the corrupt agreement with an *absque hoc*; or to deny the corrupt agreement directly, and conclude to the country. And the case of *Baynham v. Mathews*, 2 Strange, 71, goes upon the very same foundation; and mentions the same alternative.

Mr. Justice *Foster*.—I am of the same opinion.

Mr. Norton, who was also of counsel for the defendant, desired the court not to give judgment yet; but to give them an opportunity to move for leave to withdraw their demurrers and amend: which the court agreed to. And in a few days afterwards, Mr. Norton moved for leave to withdraw the *two demurrers, and plead to issue; (upon payment of costs;) and a rule was there upon granted to show cause. [*246]

And now Mr. *Yates* showed cause, for the plaintiff, against the defendant's being at liberty to withdraw the two demurrers, and plead to issue. And he cited 6 Mod. 102, the case of *Cross v. Bilson*; 6 Mod. 1, the case of *Stable v. Haydon*; 1 Lord Raym. 668, the case *Fox v. Wilbraham*; and 2 Strange, 1002, the *Bank of England v. Morrice*.

Serjeant *Poole* and Mr. *Norton* contra, for the defendant.

The merits have not been tried upon these demurrers. We move this at common law; not under any statute; and the court are not bound down by any certain rules. And they cited 2 Saund. 402; *Rex v. Ellames*, 2 Strange, 976, *Duchess of Marlborough v. Widmore*, Hil. 4 G. 2, B. R., the case of *Cope v. Marshall*, Tr. 28 G. 2, B. R.; vide ante, 259, S. C.

The case of *Giddins v. Giddins*, Tr. 29, 30 Geo. 2, B. R., was even after the court had given their opinion.

And here is a declaration of twenty counts, manifestly intended to catch the defendant, and to save costs.

If our motion is granted, the contingent damages assessed will be out of the case, and will be as none at all.

Lord *Mansfield*.—It is admitted to have been done, after a demurrer and argument: but this is after a trial; and without any favourable circumstances.

Now, as no case of such an amendment after a trial is cited, I take it for granted that none exists.

These are frivolous demurrers: and the only view of this motion is to get rid of the costs. But the plaintiff would have had his costs, if the defendant had done right at first, and joined issue upon these facts, if they had been found against him.

So that here is neither precedent nor reason for allowing this motion.

Mr. Justice *Denison* concurred.

Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend: as in the case of *Giddins v. Giddins*. But this is an attempt to amend an issue at law, after a verdict has been found on the issues upon facts, and contingent damages found upon the demurrers; of which there never was an instance. And we do not know where it would end; nor do I well know how the cause could be again carried down to trial.

[*247] *If this had at first gone down to issue, and had been found against the defendant, it would have carried costs.

The court cannot help seeing that this is upon record: here are verdicts and contingent damages found. Therefore, we cannot help this: I wish we could; because the merits seem to be with the defendant.

The cases of amendment cited are where the whole is supposed to be in paper; or else the court could not have done it. We have no authority to do this, after it is plainly upon record.

Mr. Justice *Foster* concurred.

Per cur' unanimously judgment for the plaintiff upon the demurrer.

THE decision of the court upon the former of the two points involved in this demurrer was approved of in *O'Brien v. Saxon*, 2 B. & C. 908. The declaration there was for maliciously, and without reasonable or probable cause suing out a commission of bankruptcy against the plaintiff. *Plea*, that the plaintiff, before the suing out of the commission, being a trader, and indebted to the defendant in 100*l.*, became bankrupt, whereupon the defendant sued out the [*247*a*] *commission. *Replication, De injuriâ*. The defendant demurred, and assigned for cause that the plaintiff had attempted to put in issue three distinct things, viz., the trading, the petitioning creditor's debt, and the bankruptcy. But the court held it good, for "the three facts connected together constitute but one entire proposition, and, therefore, the replication is good."

[So, in *Eden v. Turtle*, 10 M. & W. 635, where the acceptor of a bill pleaded, that the drawer who had indorsed it over held it for a special purpose and for the sole use and benefit of the defendant, a replication denying that the drawer held it for a special purpose and for the sole use and benefit of the defendant, was held to be good.] So it was held in *Webb v. Weatherby*, 1 Bing. N. C. 502, that payment in satisfaction and acceptance in satisfaction may both be put in issue by the same replication. [And where the plea alleged a payment by an agent, a replication that the defendant did not by his agent in that behalf pay was held good. *Bennison v. Thelwell*, 7 M. & W. 512; *Bell v. Tuckett*, 3 M. & Gr. 784, 4 Scott, N. R. 402, S. C.; *Pigeon v. Osborne*, 12 A. & E. 715. So, in *Washbourn v. Burrows*, 1 Exch. 107, was a replication

putting in issue the various steps through which the plaintiff had obtained satisfaction by sale and application of the proceeds of a mortgage security.] But though several facts may often be traversed cumulatively, where they constitute together one ground of action or defence, yet care must be taken to traverse them not copulatively, but in the disjunctive, whenever proof of all of them is not absolutely incumbent on the opposite party, *Goram v. Sweeting*, 2 Wms. Saund. 207; *Moore v. Boulcott*, 1 Bing. N. C. 323; *Stubbs v. Lainson*, 5 Dowl. 162; [unless the pleading traversed be distributive, see *Wood v. Peyton*, 13 M. & W. 30.] And the rule that several facts constituting one single point may be traversed cumulatively, must be taken with considerable qualification; for every plea or replication, which is not bad for duplicity, consists [as Mr. J. Patteson remarks in *Selby v. Bardons*, 3 B. & Ad. 9] of a single point, yet there are cases where a traverse of several matters constituting one plea or one replication has been disallowed. See *Faulkner v. Chevell*, 5 Nev. & M., 5 A. & E. 213; *White v. Reeves*, 2 Moore, 23; [*De Wolff v. Bevan*, 13 M. & W. 160, where the doctrine laid down in the principal case was discussed, and explained, and it is said that the replication in the old form ought not to traverse both; *Bonzi v. Stewart*, 8 Scott, N. R. 525;] and *Smith v. Dixon*, 7 A. & E. 21. Indeed the cases regarding duplicity seem to rest at present on no well-settled principle. See Lord Tenterden's [*247b] observations in *Selby v. Bardons*, 3 B. & Ad. 1. In *Hulme v. Mugglestone*, Mich. T. 1837, reported 3 Mee. & W. 30, 6 Dowl. 112, the question what constitutes duplicity was brought before the court by demurrer to a replication traversing both sides of a plea of mutual credits. The declaration was by assignees of a bankrupt for money had and received to their use; the defendant pleaded among other things as to 19*l.* 19*s.* parcel, &c., that the bankrupt was before bankruptcy indebted to the defendant in 20*l.* for goods sold, and that before bankruptcy he lent the defendant a cheque for 97*l.* 10*s.* on the Chesterfield bank, which cheque the defendant procured to be cashed after the bankruptcy, and the amount of which was the same money for which the plaintiffs had declared; and as to 19*l.* 19*s.* thereof

defendant claimed to set off under St. 6, G. 4, c. 16, s. 50. *Replication* that the bankrupt was not indebted to the defendant nor did the bankrupt give credit to the defendant in manner and form, &c., the court after argument advised the plaintiff to amend, which he accordingly did on payment of costs. See further, *Smith v. Dixon*, 6 Dowl. 47; [*Butcher v. Stewart*, 9 M. & W. 405;] and *Stevens v. Underwood*, 4 Bing. N. C. 655. The power of putting the whole of a defence in issue must of course be taken subject to the qualifications established by *Crogate's case*, which see with the notes ante, p. 53. [And negative pregnancy must be avoided, *Jones v. Jones*, 16 M. & W. 710.] Where a traverse is bad for duplicity, it appears [from some authorities] to make no difference though one part of it may be immaterial. *Stevens v. Underwood*, 4 Bing. N. C. 655; *Regil v. Green*, 1 Mee. & Welsb. 328. [This view is sustained by decisions, that it is objectionable, as tending to embarrass the trial, to traverse so as to put in issue to be tried an immaterial fact, either by involving in the traverse some matter not alleged expressly or impliedly by the opposite party, as in *Bishton v. Evans*, 2 Cr. M. & R. 20, where the plaintiff alleged for breach of the condition of a bond non-payment of 6000*l.*, and the defendant pleaded payment of 6000*l.* and interest; (but see the dicta in *De Bernardy v. Spalding*, 4 Q. B. 823, where *Bishton v. Evans* was not cited;) or by traversing an averment immaterial to the case, either separately or together with material averments, as in *Bushell v. Lechmore*, 1 Lord Raym. 369; *Hall v. Tapper*, 3 B. & Ad. 655; *Regil v. Green*, *ubi supra*; *Radford v. Smith*, 3 M. & W. 254; *Thurman v. Wild*, 11 Ad. & El. 453; *Turnley v. McGregor*, 6 Scott, N. R. 906. Indeed, to do so in a traverse seems quite as objectionable as to plead affirmatively two distinct matters as defences, though only one of them be in law a defence, *a course open to the objection of duplicity, [*247c] because it embarrasses the plaintiff in his replication, *Wright v. Watts*, 3 Q. B. 89. Nor does the decision of the Court of Exchequer Chamber in the case of *Palmer v. Goden*, 8 M. & W. 890, (if its effect be confined to the point actually decided), conflict substantially with the former authorities. That was an action of covenant for rent of turnpike tolls, to

which there was a plea, that the plaintiffs entered upon part of the tolls and ejected expelled put out and removed the defendant from the possession thereof, &c. *Replication* that the plaintiffs did not enter into or upon the said part or portion of the said demised tolls, or eject expel put out or remove the defendant from the possession thereof *modo et forma*, to which there was a special demurrer on the ground that the allegation of entry was immaterial, and ought not to have been traversed, on which ground the Court of Exchequer gave judgment for the defendant. The Court of Exchequer Chamber, however, reversed that judgment on the ground, it would seem, that an entry upon tolls was impossible, and the averment and traverse of it insensible, so that, in fact, *no separate issue* was raised upon it, or that, if it had any meaning, it must be taken as part of the defendant's own description of the eviction relied upon, which the plaintiffs had a right to follow in their traverse. See *De Bernardy v. Spalding*, 4 Q. B. 823, 2 Wms. Saund. 207, b. (m).]

As to the second cause of demurrer, it is now settled that, wherever a subsequent pleading traverses a material part of the former one in such a manner that the adversary, if he were obliged to answer it at length, could do nothing but repeat the allegation traversed, there a conclusion to the country is proper, and that whether the traverse be or not preface by an inducement. Reg. Gen. Pl. Hil. 1834, Pl. 13. See 1 Wms. Saund. 103 a, note 3.

With respect to the refusal of the application to amend, the courts always refuse permission to do so under such circumstances as those in the principal case, [*Baden v. Flight*, 4 N. C. 35; *Pearson v. Rogers*, 9 A. & E. 310; *Crucknell v. Truman*, 9 M. & W. 684, 2 Dowl. N. S. 276, S. C.; *Jones v. Jones*, 16 M. & W. 699, per curiam]; and even in cases where the objection is not so strong, leave to amend is by no means granted as a matter of course. See *Kinder v. Paris*, 2 H. Bl. 561; *Rex v. Holland*, 4 T. R. 459; *Evans v. Stevens*, *Ibid.* 223; *Wood v. Grimwood*, 10 B. & C. 689; *Saxby v. Kircus*, Say, 117; *Noble v. King*, 1 H. Bl. 37; *Jordan v. Twells*, *Hardw.* 171. Indeed the court is very reluctant to amend after its opinion has been delivered upon argument; for, if it were to become usual so to do, great encouragement would be

afforded to frivolous and experimental demurrers, since parties would take the chance of succeeding upon argument of any legal objections which might occur, knowing that, in case of failure, they would be allowed to amend, and go to trial on the facts. See Say, R., 116—17, and *Bramah v. Roberts*, 1 Bing. N. C. 433, where Tindal, C. J., in refusing such an application, said, "The law of Westminster *[*Hall, I believe, [*248]] ever since it stood in the place, in which it now stands, has been that, if a party thinks proper to rest his defence on his case upon a point of law, raised on the record, he must either stand or fall upon the point so raised. I do not mean to say that a case may not arise, where a point being so taken, a party may, even after judgment, apply to the court to amend; but, according to the advice of Lord Coke, *Butler and Baker's case*, 3 Rep. 25, you ought never to rely on a point of law when the facts are in your favour. Although there are excepted cases, which will always be attended to, I should expect after an argument has been heard, and judgment given for the plaintiff, at least a distinct affidavit of merits from those who make the application."

But after *demurrer* and *joinder* and before argument, leave to amend is now a matter of course; for, indeed the reason that the statute of Elizabeth required objections of form to be shewn specially for cause of demurrer, was to give the parties an opportunity of amending them. See *Hatton v. Walker*, 2 Str. 816; and amendments are sometimes allowed even *after* argument. See *Ayres v. Wilson*, 1 Dougl. 385; *Waters v. Ogden*, 2 Id. 452; *Alder v. Chip*, 2 Burr. 756; *Cholmley v. Paxton*, 3 Bing. 1. And so long ago as *Michaelmas 2 Anne*, the rule which has ever since prevailed was laid down in the following terms, viz.: "Since pleading in paper is now introduced instead of the old way of pleading, *ore tenus*, at the bar, it is but reasonable after a plea to issue or demurrer joined, that upon payment of costs the parties should be at liberty to amend their plea or to waive their plea or demurrer, while all the proceedings are on paper." Anon. 2 Salk. 520. For in ancient times the counsel, as is well known, used to deliver the declaration, plea, &c., *ore tenus*, at the bar, up to demurrer, or issue in fact, and, in case of any mistake, used to

correct themselves and amend it. Now therefore that paper pleadings are substituted for these oral ones, the same species of amendments are permitted, not in consequence of any statute, but merely in continuance of the old common law practice.

But when the proceedings have been entered upon record, the common law power of amendment ceases; for the judges at common law were prohibited from allowing alterations to be made in any record, Britton, proem, 2, 3; and indeed several of them were, during the reign of Edward the First, severely punished for so doing, among whom the Lord Chief Justice Ingham, or Hengham, was fined, according to some, 7000, to others, 800, marks; claus. 6 Edw. I. m. 6. Dugd. Chron. Ser. 26. Year Book, M. 2 Ric. 3, 10; 4 Inst. 255; 1 H. P. C. 646; which sum, as we are told by Justice Southcote, 3 Inst. 72, 4 Inst. 255; was expended in building a clock-house at Westminster, with a clock to be heard in the Hall—a circumstance which, as is observed by Mr. J. Coleridge, in his admirable edition of the Commentaries, explains a dictum of Lord Holt. Anon. 6 Mod. 130; where his lordship, refusing to amend a record, said, “He considered there wanted a clock-house over against the Hall-gate.”

Several statutes, however, were soon passed, authorising amendments in the record itself. And others called statutes of Jeofails, curing mistakes of form without any actual alteration. See a good account of these acts, B. N. P. 321, a.; and see Siboni v. Kirkman, 3 Mee. & Welsb. 46, where the omission of a similiter was amended even after Writ of Error.

In construing the statutes of *amendment*, there was one general rule, viz., that, in order to amend under them, there must be something to amend by. Thus the writ or bill was amendable by the *præcipe*; the pleadings by the draft under counsel's hand; the Nisi Prius roll by the plea roll; the verdict, if general, by the memory or notes of the judge, or notes of the associate or clerk of assize, if special, by the notes of counsel or by affidavit; the writ of execution by the judgment, or by the award of it upon the roll, or by former process. See Tidd's Prac. 9 Ed. p. 712; B. N. P. 321, a, et seq.; [R. v. Virrier, 12 A. & E. 317; Thorpe v. Hooke, 1 Dowl. 501; Arnell v. Weatherby, 5 Tyrwh. 485;

Bicknell v. Weatherall, 1 Q. B. 914, by notes of under sheriff; Wallis v. Goddard, 2 M. & Gr. 912. It has been held that the issue may, even after verdict, be amended by the writ, in order to cure a variance between it and the writ of trial, Watts v. Ball, 1 M. & Gr. 208. In Cheese v. Seales, 10 Meeson & Welsby, 490, where the distringas commanded the sheriff to have the bodies of the jurors in vacation instead of term, and was tested on the day on which it should have been returned, the court amended it by the award of the jurata. A writ of summons was amended by the *præcipe*, in Kirk v. Dolby, 6 Mee. & W. 636. In Williams v. Williams, 10 M. & W. 477, the entry of writs on the roll, to save the Statutes of Limitations, and the writs themselves, were amended after demurrer and argument. And a similar amendment was allowed in Culverwell v. Nugee, 15 M. & W. 559, see *infra*. An amendment, where there is something to amend by, may be made in a criminal as in a civil case, R. v. Virrier, 12 A. & E. 217.] However, several cases occur in the books in which records have been amended, although it would appear that there was nothing to amend by; for instance, Halhead v. Abrahams, 3 Taunt. 81; where in an action on a bond, the plaintiff* was non-suited for a variance between the [*249] bond and the statement of it in the declaration; and the court set aside the nonsuit, and amended the declaration. See Skutt v. Woodford, 1 H. Bl. 238; and Tidd's Prac. 697-8, 708-9. [In Brown v. Fullerton, 13 Meeson & Welsby, 556; 2 Dowl. & L. 251, S. C., a plaintiff was added, and in Christie v. Bell, 16 M. & W. 669, the character in which parties sued and were sued was added to the writ of summons though there was nothing to amend by, all to save the Statute of Limitations. In Campbell v. Smart, 5 C. B. 196, however, the court refused for that purpose to alter the date of the writ contrary to the truth. And in Goodchild v. Leadham, 1 Exch. 706, leave to add a defendant was refused. See the note to Rice v. Shute, post, 292]. And the late case of Siboni v. Kirkman, 3 Mee. & Welsb. 46, seems to prove that where the error is an evident misprision of the clerk in omitting a *well known and established form of words*, it is not necessary to produce any thing to amend by in order

to induce the court to supply the deficiency. The subject is not now, however, of so much practical importance as formerly; for by Reg. G. Hil. 1834, pl. 15, it is directed that "the entry of proceedings on the record for trial, or on the judgment roll, according to the nature of the case, shall be taken to be, and shall be, in fact, the first entry of the proceedings in the cause, or of any part thereof upon record." So that now the proceedings remain in paper until the making up of the judgment roll, in all cases, except those in which there is a trial; and, with respect to the *Nisi Prius* record, it appears clear that, as the paper pleadings and issue are now

substituted for the plea and issue rolls, it may be amended by the former, as it once might have been by the latter; besides which, very extensive powers of amending it at the trial are given by statutes 1 G. 4, c. 55; 9 G. 4, c. 15; and 3 & 4 W. 4, c. 42; the provisions of which will be found in the notes to *Bristow v. Wright*, post.

The common law rule, that a record was not amendable, must be taken to mean that it was not amendable after the term. See *R. v. Carlile*, 2 B. & Adol. 971; for during the term the record is said to be *in fieri*; and it is in the breast of the court to mould it as the justice of the case requires.

No question has been more frequently determined in courts of justice in this country, than that duplicity will vitiate a plea on the one hand, and on the other, that the averment of several facts, going to make up one point will not render a plea double. *Stevenson v. White*, 3 Har. & M'Henry, 455; *Dates v. Blake*, 6 Mass. 336. Thus, when the plaintiff declared on a covenant by the defendant, to make a deed of conveyance, when thereto requested, and alleged a request and refusal, a plea traversing both request and refusal, was held bad for duplicity, as containing two distinct points, either of which by itself, would have constituted a sufficient defence. *Connelly v. Peirce*, 7 Wend. 130.

In like manner, a replication, in confession and avoidance, which, as containing no traverse, and merely setting forth new matter, comes under the same law as an affirmative plea, was, in *Cooper v. Heermance*, 3 Johns. 315, held bad, where it contained, as an answer to a plea of discharge under an insolvent act, averments of three several acts of fraud, committed in obtaining such discharge: and in *Craig v. Brown*, 1 Peters, C. C. R. 443, a replication to plea of the statute of limitations, that the plaintiff was beyond sea, and that the account was between merchant and merchant, was also determined to be double. The same general principle was also applied under various circumstances, in the cases of the *U. S. v. Gurney*, 1 W. C. C. R. 446; *Kennedy v. Strong*, 10 Johnson, 289; *Nichols v. Arnold*, 8 Pick. 172; *Burrass v. Hewit*, 3 Scammon, 224; *Benson v. Elliott*, 5 Blackford, 451; *McConnell v. Stettincies*, 2 Gilman, 707; *The Hampshire Bank v. Billings*, 17 Pick. 87.

It is obvious that the introduction into a plea of matter merely of inducement or surplusage, cannot render it double; *Lord v. Tyler*, 14 Pick. 156; *Porter v. Brackenridge*, 2 Blackford, 335; *Stewardson v. White*, 3 Har. & M'Henry, 455; and in these cases the court appear to have entertained the opinion that duplicity could not exist, unless the matters contained in the pleading were not only set forth as several and distinct defences, but were actually valid as such, so that either would be a complete bar to the action. Such also appears to have been the view taken by WILDE, J., in the case of *Dunning v. Owen*, 14 Mass. 157. If such be the rule of law, it must

expose the plaintiff to the hardship of determining as to the validity of two distinct points, which may be so pleaded that if issue be joined on one, and found in his favour, it will be contended that the other is material; while on a demurrer, an opposite language may be held, and the defendant may argue, that he has in reality set forth but one valid defence. On this ground it was held by Lord DENMAN, in *Wright v. Watts*, 3 Q. B. 89, that it is not essential that the matter in a plea should form a good defence, in order to render the plea double, as containing another defence, but that it is enough if the defendant appear to treat such matter as affording a defence. It is, at all events, settled, that matter ill pleaded, if not matter immaterial, may render a plea bad for duplicity; and that this result will be produced, if both defences would separately be good after verdict, even if incapable of being sustained on demurrer. *Purssord v. Peck*, 9 M. & W. 176.

On the other hand, in *Tucker v. Ladd*, 7 Cowen, 450, the court recognised the principle, that several facts going to make up one point, may be pleaded, without vitiating the plea, and the same doctrine may be found in the cases of *Patcher v. Sprague*, 2 Johns. 462, and *Strong v. Smith*, 3 Caines, 160. These cases have been generally followed in New York, as well as by the other courts of this country; *Russell v. Rogers*, 15 Wend. 351; *Bickley v. Moore*, 1 M'Cord, 464; *Potter v. Titecomb*, 10 Maine, 53; *Commonwealth v. Curtis*, 11 Pick. 134; *Waddams v. Burnham*, 1 Tyler, 233; *Torrey v. Field*, 10 Vermont, 353; *The State Bank v. Hinton*, 1 Devereux, 397; *Jackson v. Rundlet*, 1 W. & M. 381.

Where the defendant has recourse to a plea, bad for duplicity, as containing several points, any one of which would have been a sufficient defence, and the plaintiff does not choose to demur, he must, at the risk of a demurrer from the other side, traverse all the material points averred, for even on protestation as to the rest, and issue found in his favour as to one, the court must take those not traversed as true, and give judgment thereon for the defendant. The protestation, of course, avails nothing in the action in which it is employed, and merely serves, where the issue is found for the party protesting, to prevent an estoppel in a future controversy, between the same parties. *Richards v. Allen*, 1 Bibb, Ken. R. 189. *Gould v. Ray*, 13 Wend. 639. Nor is any danger to be apprehended from a traverse of both the defences set forth in a plea bad for duplicity. Although this defect cannot be taken advantage of on a demurrer by the opposite party, unless special; *Currie v. Henry*, 2 Johnson, 433; *Otis v. Blake*, 6 Mass. 336; *Decroix v. Clark*, 18 Id. 363; *Lomax v. Bailey*, 7 Blackford, 599; except in the case of a plea in abatement, to which the statutes requiring the causes of demurrer on points not of substance, to be set forth, do not apply; *Walker v. Sargeant*, 14 Vermont, 247; *Esdaile v. Lund*, 12 M. & W. 606; yet it has been determined, that where the duplicity of the replication consists merely in putting in issue two distinct defences raised by the plea, if the defendant demur, judgment will be rendered for the plaintiff. *Reynolds v. Blackburn*, 7 A. & E. 161; *Lane v. Ridley*, 10 Q. B. 479.

The point decided in *Robinson v. Raley*, that the whole of the facts going to make up a single point in the plea, may be severally traversed by the replication, will be found supported in New York, by a series of cases, extending as far back as *Strong v. Smith*, 3 Caines, 160. In that case it was determined, that where the defendant had pleaded to trespass quare clau-

sum fregit, seisin in fee in A., and a demise from him, the replication might traverse both the seisin and demise. Subsequently, it was held in *Patcher v. Sprague*, that the plaintiff could not sustain a demurrer to a replication traversing the two distinct allegations in a plea, that certain horses, seized in an attachment, were the property of the party sued in the attachment, and that the defendant had taken them by the command of the sheriff. The same doctrine has since been maintained, in the cases of *McClure v. Erwin*, 3 Cowen, 213, and *Tucker v. Ladd*, 7 Cowen, 450. In the latter case, the plea averred, in bar of the plaintiff's action for money had and received, that the money therein claimed, equitably belonged to a third person, against whom the defendants, conjointly with one B., had obtained judgment in another suit, and that they had since become sole owners of the judgment. The replication traversed all the facts thus set forth; and on demurrer by the defendant, the court held, that the plea being single, as containing nothing more than was necessary to make up a single point in defence, the replication could not be considered double, in traversing all the facts essential to that point. *McClure v. Erwin*, is to the same effect, and the defendants were there permitted, in their rejoinder, to traverse an averment in the replication, that they had notice of a suit, and at the same time to allege, in avoidance, that the plaintiff had not availed himself of a good defence in bar of the judgment for which he now sought to render the defendants responsible. This rejoinder was held good, because to make its affirmative matter, that there was a good defence to the former suit, a bar to the present action, it was necessary to traverse the averment in the replication that the defendants had received notice to appear, and take defence themselves. To illustrate the principle here recognised, it may be observed, that to a declaration on a covenant of warranty, averring eviction under a judgment in a suit brought on title paramount, and notice given at the time to the present defendant, to come in and take defence, the latter may plead traversing the notice, and setting forth a good defence to the suit, wherein the plaintiff on the warranty was evicted, without incurring the fault of duplicity.

In the case of *Strong v. Smith*, already cited from Caines, as the first of the series of authorities in New York, for the principle, that several facts may be put in issue by one traverse, *LIVINGSTON, J.*, placed the foundation of the rule on the ground assumed by *TINDAL, C. J.*, in defending the replication in *Bardons v. Selby*, supra, 178, that if the plea were single, a replication, although traversing the whole, could not be double. It must, however, be observed, that in *Robinson v. Raley*, although there were two points in the plea, each necessary to make a good defence, the replication did not attempt to traverse both, but merely the facts going to make up one, that the defendant had not exceeded his commonable right; the other point, that such commonable right existed, being left untouched. *De Wolf v. Bevan*, 13 M. & W. 169. On this distinction, between a traverse of several facts, necessary to make up one point, and a traverse of several points, though necessary to make a good plea, the Supreme Court of New York, by a judgment subsequently affirmed in error, decided, that where the defendants pleaded, that the promissory note on which suit was brought, was made by them jointly with B., and that the plaintiffs had subsequently released B.; a replication traversing both the joint making and the release, was bad for duplicity. *Tubbs v. Caswell*, 8 Wend. 129. The Chancellor, in delivering

his opinion in the court of errors, argued that the two averments in the plea, though both essential to a valid defence, and constituting together but a single plea, were yet two distinct points; and as such, not within the decision in *Robinson v. Raley*. This doctrine is undoubtedly law, and is supported at once by authority, and by the whole reason of the system of pleading at common law, which constantly tended to narrow the issue to a single point. *De Wolf v. Bevan*, 13 M. & W. 160. There is, however, some difficulty in applying it in practice, from the want of any certain test, whereby to discriminate between those cases, in which several averments go to make up a single point, and may, therefore, be traversed together, and those in which they each constitute a distinct point, though all essential to the validity of the plea. Thus each of the several facts which were jointly denied in *Tucker v. Ladd*, and *Strong v. Smith*, by one traverse, might have been contended to be as much distinct points, as those which were held to have that character, in the case of *Tabbs v. Caswell*.

The case of *Patcher v. Sprague*, is nearly the exact counterpart of *Robinson v. Raley*. As in the English case, the replication traversed several distinct facts in the plea, without putting the whole in issue, and the court, while determining that it was not bad for duplicity, also held, that in concluding to the country, and not with a verification, it was right in principle, and supported by authority. The rule was said to be, that when a traverse is so direct, and of such a character, that it cannot be answered by the opposite party, by matter in confession and avoidance, without a departure from the plea, the replication should conclude to the country; since the defendant can lose nothing by being compelled to add the similiter, and join issue instead of rejoining. The doctrine that a traverse of part of the plea, should conclude with a verification, seems a relic of the formal traverse, with an *absque hoc*, which is now seldom used. In the case of *Snyder v. Croy*, 2 Johnson, 428, it was determined, that even under these circumstances, if the whole matter of the plea be put in issue by the traverse, a conclusion to the country will still be good.

H.

[*250]

*MILLER v. RACE.

HIL. 31.—GEO. 2.

[REPORTED 1 BURR. 452.]

Property in a bank-note passes like that in cash, by delivery; and a party taking it bona fide and for value, is entitled to retain it as against a former owner from whom it has been stolen.

It was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord Mansfield, at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty, at Chipping Norton in Oxfordshire; that on the same night the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title than what arises from the possession. It appeared that Mr. Finney, having notice of this robbery on the 13th of December, applied to the Bank of England "to stop the payment of this [*251] note;" *which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the bank."

Some little time after this the plaintiff applied to the bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the bank: but the defendant refused either to pay the note, or to re-deliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21*l.* 10*s.* damages; subject, nevertheless, to the opinion of this court upon this question—"Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?"

Mr. *Williams* was beginning on behalf of the plaintiff;—

But Lord *Mansfield* said, "That as the objection came from the side of

the defendant, it was rather more proper for the defendant's counsel to state and urge their objection."

Sir *Richard Lloyd* for the defendant.

The present action is brought, not for the money due upon the note; but for the note itself, the paper, the evidence of the debt. So that the right to the money is not the present question: the note is only an evidence of the money's being due to him as bearer.

The note must either come to the plaintiff by assignment, or must be considered as if the bank gave a fresh, separate, and distinct note to each bearer. Now the plaintiff can have no right by the assignment of a robber. And the bank cannot be considered as giving a new note to each bearer: though each bearer may be considered as having obtained from the bank a new promise.

I do not say whether the bank can or cannot stop payment: that is another question. But the note is only an instrument of recovery.

Now this note, or these goods (as I may call it), was the property of Mr. Finney, who paid in the money: he is the real owner. It is like a medal which might entitle a man to payment of money, or to any other advantage. And it is by Mr. Finney's authority and request that Mr. Race detained it.

It may be objected, "that this note is to be considered *as cash [*252] in the usual course of trade." But still the course of trade is not at all affected by the present question, about the right to the note. A different species of action must be brought for the note from what must be brought against the bank for the money. And this man has elected to bring trover for the note itself, as owner of the note; and not to bring his action against the bank, for the money. In which action of trover property cannot be proved in the plaintiff, for a special proprietor can have no right against the true owner.

The cases that may affect the present are 1 Salk. 126, M.; 10 W. 3.; Anonymous, coram Holt, Chief Justice, at Nisi Prius at Guildhall. There Lord Chief Justice Holt held, "That the right owner of a bank-bill, who lost it, might have trover against a stranger who found it: but not against the person to whom the finder transferred it for a valuable consideration, by reason of the course of trade, which creates a property in the assignee or bearer." 1 Lord Raymond, 738, S. C., in which case the note was paid away in the course of trade: but this remains in the man's hands, and is not come into the course of trade. H. 12 W. 3, B. R.; 1 Salk. 283, 284, Ford v. Hopkins, per Holt, Chief Justice at Nisi Prius at Guildhall. "If bank-notes, exchequer-notes, or million-lottery tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action, into whatsoever hands they are come. Money or cash is not to be distinguished: but these notes or bills are distinguishable, and cannot be reckoned as cash; and they have distinct marks and numbers on them." Therefore the true owner may seize these notes wherever he finds them, if not passed away in the course of trade.

1 Strange 505. H. 8 G, 1. In Middlesex, coram Pratt, Chief Justice, Armory v. Delamirie—A chimney-sweeper's boy found a jewel. It was ruled, "that the finder has such a property as will enable him to keep it against all but the rightful owner; and, consequently, may maintain trover."

This note is just like any other piece of property, until passed away in
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the course of trade. And here the defendant acted as agent to the true owner.

Mr. *Williams* contra, for the plaintiff.

[*253] *The holder of this bank-note, upon a valuable consideration, has a right to it, even against the true owner.

1st. The circulation of these notes vests a property in the holder, who comes to the possession of it upon a valuable consideration.

2ndly. This is of vast consequence to trade and commerce; and they would be greatly incommoded if it were otherwise.

3rdly. This falls within the reason of a sale in market-overt; and ought to be determined upon the same principle.

First—He put several cases where the usage, course, and convenience of trade, made the law, and sometimes even against an act of parliament, 3 Keb. 444, *Stanley v. Ayles*, per Hale, Chief Justice, at Guildhall. 2 Strange, 1000, *Lumley v. Palmer*: where a parole acceptance of a bill of exchange was holden sufficient against the acceptor, 1 Salk. 23.

Secondly.—This paper credit has been always, and with great reason, favoured and encouraged, 2 Strange, 946, *Jenys v. Fawler et al.*

The usage of these notes is, “that they pass by delivery only; and are considered as current cash; and the possession always carries with it the property.” 1 Salk. 126, pl. 5, is in point.

A particular mischief is rather to be permitted than a general inconvenience incurred. And Mr. Finney, who was robbed of this note, was guilty of some laches in not preventing it.

Upon Sir Richard Lloyd's argument, a holder of a note might suffer the loss of it for want of title against a true owner; even if there was a chasm in the transfers of it through one only out of five hundred hands.

Thirdly—This is to be considered upon the same foot as a sale in market-overt.

2 Inst. 713. “A sale in market-overt binds those that had a right.”

But it is objected by Sir Richard, “that there is a substantial difference between a right to the note, and a right to the money.” But I say the right to the money will attract to it a right to the paper. Our right is not by assignment, but by law, by the usage and custom of trade. *I [*254] do not contend that the robber, or even the finder of a note, has a right to the note; but, after circulation, the holder upon a valuable consideration has a right.

We have a property in this note: and have recovered the value against the withholder of it. It is not material what action we could have brought against the bank.

Then he answered Sir Richard Lloyd's cases; and agreed, that the true owner might pursue his property, where it came into the hands of another, without a valuable consideration, or not in the course of trade: which is all that Lord Chief Justice Holt said in 1 Salk. 284.

As to 1 Strange, 505, he agreed that the finder has the property against all but the rightful owner: not against him.

Sir Richard Lloyd in reply:—

I agree that the holder of the note has a special property; but it does not follow that he can maintain trover for it against the true owner.

This is not only without, but against the consent of the owner.

Supposing this note to be a sort of mercantile cash; yet it has an earmark, by which it may be distinguished; therefore trover will lie for it. And so is the case of *Ford v. Hopkins*.

And you may recover a thing stolen from a merchant, as well as a thing stolen from another man. And this note is a mere piece of paper: it may be as well stopped as any other sort of mercantile cash (as, for instance, a policy which has been stolen.) And this has not been passed away in trade: but remains in the hands of the true owner. And therefore it does not signify in what manner they are passed away, when they are passed away; for this was not passed away. Here, the true owner, or his servant (which is the same thing,) detains it. And surely robbery does not divest the property.

This is not like goods sold in market-overt: nor does it pass in the way of a market-overt; nor is it within the reason of a market-overt. Suppose it was a watch stolen: the owner may seize it, though he finds it in a market-overt, before it is sold there. But there is no market-overt for bank-notes.

*I deny the holder's (merely as holder) having a right to the note, against the true owner; and I deny that the possession gives [*255] a right to the note.

Upon this argument on Friday last, Lord Mansfield then said, that Sir Richard Lloyd had argued it so ingeniously, that (though he had no doubt about the matter) it might be proper to look into the cases he had cited, in order to give a proper answer to them; and therefore the court deferred giving their opinion to this day. But at the same time Lord Mansfield said he would not wish to have it understood in the city that the court had any doubt about the point.

Lord *Mansfield* now delivered the resolution of the court.

After stating the case at large, he declared, that, at the trial he had no sort of doubt that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz., to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will, 900*l.* in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So, on bankruptcies, they cannot be followed as identical *and distinguishable from money; but are always considered as money or [*256] cash.

'Tis pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark;" but this is not true. *The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency.* So in case of money stolen, the true owner cannot recover it; after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but *before money has passed in currency, an action may be brought for the money itself.* There was a case in 1 G. 1, at the sittings, *Thomas v. Whip*, before Lord Macclesfield; which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Lord Macclesfield held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true; (and it is not at all denied;) but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes: for 1 Salk. 126, M., 10 W. 3, at *Nisi Prius*, is in point. And Lord Chief Justice Holt there says, that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee).

Here an innkeeper took it, bona fide, in his business, from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1000*l.* it might have been suspicious: but this was a small note for 21*l.* 10*s.* only: and money given in exchange for it.

Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Lord Chief Justice Holt at Guildhall, in 1698; which *proves nothing [257] for the defendant's side of the question; but it is exactly agreeable to what is laid down by my Lord Chief Justice Holt, in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of currency; and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who bona fide took it in the course of currency, and in the way of his business.

The case of *Ford v. Hopkins* was also cited: which was in Hil. 12 W. 3, coram Holt, Chief Justice, at *Nisi Prius*, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case: it is impossible that it can be a true representation of what Lord Chief Justice Holt said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets, as like to each other. Now no two things can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific: specific actions lie

for them. They may prove extremely unequal in value: one may be a prize; another a blank. Land is not more specific than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property: so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery-tickets.

But Lord Chief Justice Holt could never say, "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and bona fide paid to him;" even though the action was brought by the true owner: because he had determined otherwise but two years before; and because bank-notes are not like lottery-tickets, but money.

The person who took down this case, certainly misunderstood Lord Chief Justice Holt, or mistook his reasons. For this reasoning would prove, (if it was true, as the reporter *represents it,) that if a man paid to a goldsmith 500*l.* in bank-notes, the goldsmith could never pay them [*258] away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery, on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her given bond, with two responsible sureties, (as is the custom in such cases,) to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill; which was dismissed, because she either could not, or would not, give the security required. No dispute ought to be made with the bearer of a cash-note; in regard to commerce, and for the sake of the credit of these notes: though it may be both reasonable and customary to stay the payment, till inquiry can be made whether the bearer of the note came by it fairly or not.

Lord *Mansfield* declared that the court were all of the same opinion for the plaintiff; and that Mr. Justice Wilmot concurred.

Rule—That the *postea* be delivered to the plaintiff.

THE general rule of the law of England is, that no man can acquire a title to a chattel personal from any one who has himself no title to it, except only by sale in market-overt. *Peer v. Humphrey*, 2 *Adol. & Ell.* 595. The case of *Miller v. Race*, however, has established an exception in the case of negotiable instru-

ments, the property in which will pass, like that in coin, along with the possession, when they have been put into that state in which, according to the usage and custom of trade, they are transferred from one man to another by delivery. This was again determined in *Grant v. Vaughan*, 3 *Burr.* 1516, in the case of a

draft by a merchant on his banker; and in *Gorgier v. Mievill*, 3 B. & C. 45, in the case of a bond given by the King of Prussia, by which he declared himself and his successors bound to *every person who should for the time being be the holder of the bond*, and which was proved to be saleable in the market, and (with other bonds of a like description) to pass from hand to hand at a variable price. See *Lickbarrow v. Mason*, 5 T. R. 683, post, 38, respecting bills of lading; *Zwinger v. Samuda*, 7 Taunt. 265; *Lucas v. Dorrein*, *Ibid.* 278, as to dock warrants. [*Brandao v. Barnett*, in the Common Pleas, 1 M. & Gr. 909; 2 Scott, N. R. 96, in the Exchequer Chamber, 6 M. & Gr. 630; 7 Scott, N. R. 30, in the House of Lords, 12 Cl. & Fin. 787, as to Exchequer Bills; *Partridge v. Bank of England*, 9 Q. B. 396, as to dividend warrants.] See also *Lang v. Smyth*, 7 Bing. 284, the facts of which will presently be stated. In the *Attorney-General v. Bouwens*, 4 M. & W. 171, the forms of several foreign securities accustomedly transferable like cash in this country will be found.

A negotiable instrument being clearly transferable by any person holding it, so as by delivery thereof to give a good title to any person honestly acquiring [*259] *it," per *Abbott, C. J.*, 3 B. & C. 47, the next question is, what instruments may with propriety be termed negotiable. And to this it may be answered, That whenever an instrument is such that the legal right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it bona fide, and for value, whatever may be the defects in the title of the person transferring it to him. An instrument is called negotiable when the legal right to the property secured by it passes by its delivery, because, although an instrument may be saleable in the market, and treated in many respects like cash, yet, if by a transfer of it nothing pass but a right to sue on it in the name of the transferor or original party to it, such an instrument is not properly speaking negotiable. Thus, in *Glynn v. Baker*, 13 East, 509, an India bond was held not to be a negotiable instrument, (there being then no act equivalent to 51 G. 3, c. 64, s. 4, which afterwards rendered India bonds negotiable.) In that case the plaintiff

and the defendant had lodged their respective India bonds with the same bankers, who improperly sold the defendant's bonds, and on his demand delivered to him those of the plaintiff to the same amount, and payable to the same obligee, viz., W. G. Sibley; the defendant, not knowing that the bonds handed to him were not his own, afterwards sold them, and received the proceeds. It was held that the plaintiff might recover the amount from him in an action for money had and received; see *Williamson v. Thompson*, 16 Ves. jun. 443. In *Gorgier v. Mievill* this case was cited, and relied on as an authority against the negotiability of the King of Prussia's bond; but *Abbott, C. J.*, said that the case was distinguishable from *Glynn v. Baker*. "There," said his lordship, "it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like Exchequer Bills." It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument, and the property in it passes to a bona fide transferee for value, though the transfer may not have taken place in market-overt. But that if either of the above requisites be wanting, i. e., if it be either not accustomedly transferable, or, though it be accustomedly transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however bona fide, if the transferor himself have not a good title to it, and the transfer be made out of market overt. To illustrate these propositions, bills and notes payable to bearer, or payable to order and indorsed in blank, are beyond all doubt negotiable instruments in the full sense of those words. *Solomons v. Bank of England*, 13 East, 135; *Grant v. Vaughan*, 3 Burr. 1516; *Collins v. Martin*, 3 B. & P. 649; *Peacock v. Rhodes*, Dougl. 636; *Wookey v. Pole*, 4 B. & A. 1; for they are both accustomedly transferable like cash, and are also capable of being sued on by the holder *pro tempore*. But if such a bill

be specially indorsed, its negotiability is at an end, for it becomes thereby incapable of being sued upon by any one except the special indorsee. *Sigourney v. Lloyd*, 8 B. & C. 622, 5 Bingh. 525; *Archer v. Bank of England*, Dougl. 639; *Treuttel v. Barandon*, 8 Taunt. 100. In *Glynn v. Baker*, the court appears to have been of opinion that even had the jury expressly found the India bond to be negotiable, and to pass accustomably by delivery, it would not have been so in contemplation of law. "If it be meant," said Lord Ellenborough, "to liken this to the case of bankers' notes, in *Miller v. Race*, as having acquired in fact a negotiable quality, and being received as cash, or to ordnance debentures, notes, bills, and other securities of the same description, which are circulated daily in the money market, the fact of such negotiability should be stated. *But supposing it were so stated, how could a right of action be made to pass* [*260] *on these securities by such a practice to the holder of them, where by law no such right passes?* There must always be that impediment existing to the legal negotiability of such instruments which distinguishes them from bills of exchange, and securities of that nature, in which the legal interest passes, under the law merchant, by indorsement and delivery to another." *Taddy*, Serjeant, cited a case of *Maclish v. Ekins*, to the same point, a short note of which is to be found, 13 East, 515. See also *Taylor v. Kimer*, 3 B. & Ad. 321, and *Taylor v. Trueman*, 1 M. & M. 453; which were, however, decided on the construction of St. 6 G. 4, c. 94, [the conclusion of Baron Parke's judgment in *Hibblewhite v. M'Morine*, 6 M. & W. 216, his remarks in *Daly v. Thompson*, 10 M. & W. 318], and the expressions of *Ashurst, J.*, 2 T. R. 71, and post. It is submitted, therefore, as at least probable that if the right of suing on an instrument should not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, would be allowed by the courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability. [Accord. *Partridge v. Bank of England*, 9 Q. B. 396, which see as to dividend warrants.] It is, however, right to mention that there is a case of *Renteria v. Ruding*, 1 M. & M. 511, which seems at first sight to militate against

this doctrine. In that case the plaintiff signed a bill of lading for goods shipped in Spain, by *Bernardo Echeluze*, to be delivered in London, to Messrs. *O'Brien*, on being paid freight, primage, and average: there was no mention of assigns in the bill of lading. The defendants having received the goods, and being sued for freight, *Brougham* argued that the bill not being assignable by indorsement, they were not liable. A witness was then called, who proved that bills of lading from Spain were frequently in the same form, and were nevertheless treated as assignable by indorsement. Lord *Tenterden*, after referring to the *Treatise on Shipping*, page 286, 5th edition, and reading "for if a person accept anything which he knows to be subject to a duty or charge, it is natural to conclude he means to take the duty or charge on himself, and the law may very well imply a promise to perform what he so takes upon himself," said, "this seems to me to be the correct principle, and the omission of the words *or their assigns* makes no difference." Now if *Renteria v. Ruding* be taken to prove that a bill of lading omitting the words *assigns* is nevertheless assignable, so as to pass the legal right in the goods to the indorsee, it certainly does appear to militate against the doctrine above contended for, and seems also contrary to the opinion expressed by *Ashurst, J.*, in *Lickbarrow v. Mason*, 2 T. R. 71; where his lordship says, "The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable in this respect; therefore, it is similar to the case of a bill of exchange. *If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument.*" But if *Renteria v. Ruding* be taken only to show that the delivery up of the goods to the defendants was a sufficient consideration to support a promise on their part to pay the freight, &c., and that such a promise might be implied from their knowledge that the goods they accepted were subject to those charges, the case will be distinguishable, and will be similar to that of *Williams v. Leaper*, 3 Burr. 1886, where the defendant, a broker, being about to sell the goods of A., for the benefit of his creditors, the plaintiff, A.'s landlord, came to destrain them; upon which the broker promised

to pay the rent, if the landlord would permit him to retain and sell the goods; the consideration was held sufficient, and the promise binding. In *Williams v. Leaper*, therefore, the landlord's relinquishment of his lien on the goods for rent was a sufficient consideration to support a promise by a party not being the owner of the goods, but who obtained possession of them by the landlord's relinquishment of his lien, to pay the charge upon them for rent: and *pari ratione*, in *Renteria v. Ruding*, the master's relinquishment of his lien on the goods for freight was a sufficient consideration to support a promise by the defendants, who obtained possession of the goods by the Captain's relinquishment of his lien, to pay the charge upon them for freight; and the passage of his work referred to by Lord Tenterden shews that such a promise may be implied; and though *Scaife v. Tobin*, 3 B. & Ad. 523, * (which, [*261] however, is subsequent to *Renteria v. Ruding*,) decides that a person who is not the owner of goods, does not by the mere receipt of them, with the knowledge that they were subject to a charge, bind himself to pay it; yet it is there laid down by Lord Tenterden, that if such a person receive the goods in pursuance of a bill of lading making the payment of such charge a condition precedent to the delivery of the goods, or if he have notice from the master, that if he take the goods he must take them subject to the charge, he will be liable. Now in *Renteria v. Ruding* the defendants claimed to receive the goods by virtue of the bill of lading, which made the payment of freight, &c., a condition precedent to the delivery. And though they might not be, properly speaking, indorsees of the bill; still as they exhibited it, and claimed to receive the goods in pursuance of it, they might fairly be taken to have assented to its terms, so that a promise to pay the charge therein imposed might be implied.

Further—although an instrument may contain nothing on the face of it inconsistent with the character of negotiability, still, if it be not accustomedly transferable in the same manner as cash, it will not be looked upon as a *negotiable instrument*. Thus in *Lang v. Smyth* a question arising whether certain instruments called *bordereaux* and *coupons*, which purported to entitle the bearer to portions of the public debt of the kingdom of Naples, were negotiable instruments;

the jury having found that they did not usually pass from hand to hand like money; that finding was held conclusive to show that they were not negotiable instruments. Whether an instrument which has never been solemnly recognised by the law as negotiable be accustomedly transferable by delivery, or not, is a question which must in each case be left to the determination of a jury. It was submitted to the jury in *Lang v. Smyth*, and held to have been rightly so.

It seems to have been thought in *Lang v. Smyth*, that if a question were to arise respecting the negotiability of a foreign instrument, and it were shown not to be negotiable in the country where it was made, the fact of its accustomedly passing like cash in this country would not make it negotiable.

"These," said Tindal, C. J., "are not English instruments recognised by the law of England, but Neapolitan securities brought to the notice of the court for the first time, and as Judges we are not allowed to form an opinion on them *unless supplied with evidence as to the law of the country whence they come*. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country, as bills of exchange, which pass current by the law merchant, dividend warrants, or exchequer bills, the transfer of which is founded on statutes, which a Judge in an English court is bound to know. It has been urged that in *Gorgier v. Mievile*, the case of the Prussian bonds, no evidence was given of the foreign law. But evidence was given, that, by the usage of merchants in this country, those bonds passed from hand to hand, which usage could have scarcely existed unless they were negotiable in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is not so much what is the usage in the country whence the instrument comes, as in the country where it was passed." The rule to be collected from this seems to be that a foreign instrument is not negotiable here, unless negotiable where it was made; but that evidence that it is accustomedly transferable from hand to hand in this country, is *prima facie* evidence that it also is so abroad. One class of cases in which the negotiability of an instrument becomes important, is where a question arises whether, upon the holder's death, it be subject to probate duty. Now as the ordinary's right

to grant probate at all depends on the locality of the effects within his diocese, it has been held that French *rentes*, American stock, and debts due from a foreigner, being transferable abroad only, must be considered as locally situate abroad, and, consequently, as exempt from probate duty; but that Foreign bills and bonds, given by the Russian, Dutch, and Prussian governments, accustomedly saleable in the market here are chattels in this country liable to probate duty, although the dividends upon the Dutch bonds were payable solely at Amsterdam. Attorney-General v. Bouwens, 4 M. & W. 171; Attorney-General v. Hope, 1 C. M. & Rosc. 530; 8 Bligh, 44; Attorney-General v. Dimond, 1 C. & Jerv. 356.

It has thus been endeavoured to deduce some rules whereby to ascertain when a particular instrument is or is not negotiable. When once decided to be negotiable, it becomes, as has been already stated, exempted from the ordinary rule respecting chattels personal, and property in it may be transferred by a man who has none in it himself, to a person taking it bona fide, and for a good consideration. Grant v. Vaughan, 3 Burr. 1516; Collins v. Martin, 3 B. & P. 649; Wookey v. Pole, 4 B. & A. 1; Peacock v. Rhodes, Dougl. 636; Lawson v. Weston, 4 Esp. 56; Snow v. Saddler, 3 Bing. 610. But a party who has not taken it bona fide, and for good consideration, will not be permitted to retain it: for it stands on the same footing as money, except that it is much *more easily identified, and money itself [262] could not be retained under those circumstances.

This was decided in Clarke v. Shee, Cowp. 197, where the plaintiff's clerk received notes and moneys for his master, and laid them out with defendant in illegal insurances of lottery-tickets; the master, being able to prove their identity, was held entitled to recover them. "When money or notes," said Lord Mansfield, "are paid bona fide, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come *mala fide* into a person's hands, they are in the nature of specific property: and if their identity can be traced and ascertained, the party has a right to recover." Such being the principle, the contest, in each particular case has ever since been whether the circumstances under which

the negotiable instrument has passed to the party claiming to hold it, afford evidence of *mala fides*, so as to bring the case within the latter part of the rule laid down in Clarke v. Shee, by Lord Mansfield. Now, it was very early held that there might be, on the part of a person taking a negotiable instrument, negligence of such a description, and so gross, as would afford cogent evidence of *mala fides*; in other words, as would satisfy any reasonable man that the party guilty of it must, or ought to, have suspected that the dealing in which he was engaged was tainted with fraud. This was laid down in Solomons v. The Bank of England, 13 East, 135. But the case which has, perhaps, gone furthest on the subject, is Gill v. Cubitt, 3 B. & C. 466. That was an action brought upon a bill drawn by Evered on the defendants, and accepted by them. On the 20th of August, 1823, a letter containing this bill, with two others, was enclosed in a parcel, and booked at the Green Man and Still, for Birmingham, where the parcel arrived, but the letter was found to have been opened, and the bills were gone. The plaintiff's nephew swore that on the 21st of August, between 9 and 10, *ante meridiem*, the bill was brought to the office of the plaintiff, a bill-broker in London, by a person whose features were familiar, but whose name was unknown to him, and who desired the bill might be discounted; but the witness, at first, declined to do so, because the acceptors were not known to him: the person, who brought the bill, then said, that a few days before he had brought other bills to the office, and that, if inquiry were made, it would be found that the parties whose names were on this bill were highly respectable: he then quitted the office, and left the bill, and on inquiry the witness was satisfied with the names of the acceptors: the stranger returned after a lapse of two hours, indorsed the bill in the name of *Charles Taylor*, and received the full value for it, the usual discount, and a commission of two shillings being deducted: the witness did not inquire the name of the person who brought the bill or his address, or whether he brought it on his own account or otherwise, or how he came by the bill. It was the practice at the plaintiff's office not to make any inquiries about the drawer or other parties to a bill, provided the acceptor was good. The Lord Chief Justice left it to the jury

whether the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had, they were to find a verdict for the defendant. His lordship asked the jury what they would think if a board were affixed over an office with this notice, "Bills discounted for persons whose features are known, and no questions asked." The jury found for the defendant, and a new trial being moved for, was refused, the Lord Chief Justice saying, he agreed that the case was hardly distinguishable from *Lawson v. Weston*, 4 Esp. 56, but could not help thinking that, if Lord Kenyon had anticipated the consequences, he would have paused before he pronounced that decision. Bayley, J., said, "It is said that the question usually submitted to the consideration of the jury has been whether the bill was taken *bona fide*, and whether a valuable consideration was given for it. I admit that has been generally the case, but I consider it was parcel of the *bona fides* whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which *trade is conducted, a party ought to ask." [*263] "It is a question for the jury," said Holroyd, J., "whether a bill has been taken *bona fide* or not, and whether due and reasonable caution has been used by the party taking it." This case has been stated at some length, because it has been the one usually most relied on by persons seeking [*263a] *to invalidate the transfer of a bill, on the ground of want of caution in taking it. It was followed by *Snow v. Peacock*, 3 Bing. 408; *Down v. Halling*, 4 B. & C. 330; *Slater v. West, Dans. & Lloyd*, 15; *Bechwith v. Corral*, 4 Bingh. 444; *Strange v. Wigney*, 6 Bingh. 677; *Easly v. Crockford*, 10 Bingh. 243; which last is a strong case: the plaintiff there, who was robbed of a bank-note for 200*l.*, was held entitled to recover it from the defendant, who had taken it, as he said, in payment of a bet at the Derby, but could not recollect from whom. In *Snow v. Saddler*, 3 Bingh. 610, the court had held that a person who received a stolen 30*l.* note in payment of a bet at Doncaster, might retain it against the true owner; but the court distinguished the case, on account of the larger amount of this note. See further, *Burn v. Morris*, 4 Tyrwh. 495; *Haynes v. Foster*, 4

Tyrwh. 66; and *Fancourt v. Bull*, 1 Bingh. N. C. 681. However, a disposition has of late been manifested to relax the strictness with which the conduct of the person receiving a bill or note, improperly come by, has heretofore been regarded. In *Crook v. Jadis*, 5 B. & Ad. 909, an accommodation bill for 1000*l.* was fraudulently sold to Howard, for whom the plaintiff discounted it. In an action against the drawer, Lord Denman left it to the jury to find for the plaintiff, if they thought he had not been guilty of *gross negligence*, and the court, on a motion for a new trial, ruled that that was the correct expression. "I never," said Patteson, J., "could understand what was meant by a party taking a bill under circumstances which ought to have excited the suspicion of a prudent man." (Vide *tamen* the observations of Tindal, L. C. J., in *Vaughan v. Menlove*, 3 Bingh. N. C. 475.) This was followed by *Backhouse v. Harrison*, 5 B. & Adol. 1098: there the plaintiff, an officer of a banking company, discounted two discoloured bills, for 20*l.* and 26*l.* 19*s.* 9*d.* for a man who could not write, and was not known in the town. The bills turned out to have been lost, and the jury found, on questions specially submitted to them, that the plaintiff took the bills *bona fide*, but under such circumstances that a reasonable cautious man would not have taken them. They then found a verdict for the defendant, subject to the question whether he was not estopped from setting up the plaintiff's negligence as a defence, by having himself committed the first negligence in not advertising the loss of the bills. The court, without deciding that point, set the verdict aside, on the ground that *gross negligence* had not been found by the jury, and that the evidence was not sufficient to warrant such a finding. "I have no hesitation," said Patteson, J., "in saying, that the doctrine first laid down in *Gill v. Cubitt*, and acted upon in other cases, *that a party, who takes a bill under circumstances which [*263b] ought to have excited the suspicion of a prudent man, cannot recover it, has gone too far, and ought to be restricted. I can perfectly understand that a party who takes a bill fraudulently, or under such circumstances that he must know that the person offering it to him has no right to it, will acquire no title; but I could never understand that a party who

takes a bill bona fide, but under the circumstances mentioned in *Gill v. Cubitt*, does not acquire a property in it. I think the fact found by the jury here, that the plaintiff took the bills bona fide, but under such circumstances that a reasonable cautious man would not have taken them, was no defence. The rule must be absolute for a new trial." *Gill v. Cubitt*, therefore, after overruling *Lawson v. Weston*, may now, perhaps, be itself considered as virtually overruled. See the judgment of the Court of Exchequer, in *Foster v. Pearson*, 5 Tyrwh. 262, where it is observed, that, in consequence of the new rules of pleading, the question, when next raised, will probably be raised on the record, so that it may receive the decision of a court of error. In *Goodman*

v. Harvey, 4 A. & E. 870, the Court of Queen's Bench ruled that there must be actual mala fides, and that the existence of gross negligence even was unimportant except so far as it might be evidence of mala fides. [And in *Uther v. Rich*, 10 A. & E. 784, the court adhered to the decision in *Goodman v. Harvey*, and held that mala fides in the holder of a negotiable security, if relied on, must be distinctly alleged; that the only proper mode of implicating him in an alleged fraud is by averring that he had notice of it, and that an allegation that he was not a bona fide holder is not equivalent to an averment of such notice. See *Arboin v. Anderson*, 1 Q. B. 493, which also turned on the form of the pleadings.]

WHETHER current bank-notes, in the ordinary transactions of business, are to be considered as cash, has given rise to a diversity of opinion. In several cases, it has been held that a delivery of bank-notes current at the time and place of the transaction, in payment, or exchange, or on deposit, as money, discharges or creates a debt, as money would have done, and the notes are at the risk of the person receiving them, although the bank has stopped payment at the time, if that fact be not known to either party; *Bayard v. Shunk*, 1 Watts & Sergeant, 92; *Corbit v. The Bank of Smyrna*, 2 Harrington, 236; *Edmunds v. Digges*, 1 Grattan, 359, 549; *Lowrey v. Murrell*, 2 Porter, 280; *Scruggs v. Gass*, 8 Yerger, 175; *Young v. Adams*, 6 Massachusetts, 182; *Phillips, Judge, &c. v. Blake, Administrator*, 1 Metcalf, 156, approved in *Whiton v. Old Colony Ins. Co.*, 2 id. 1, 5. But in other cases, it has been decided, that notes of an insolvent bank, or of one that has stopped payment, are like counterfeit notes, and operate no discharge of a debt, if the receiver does not render himself chargeable by laches; *Lightbody v. Ontario Bank*, 11 Wendell, 9, 18; S. C., on error, 13 id. 101; *Thomas v. Todd*, 6 Hill, 340; *Fowler v. Van Surdam*, 1 Denio, 557, 559; *Fogg v. Sawyer*, 9 New Hampshire, 365; *Frontier Bank v. Morse*, 22 Maine, (9 Shepley,) 88. Some of these cases take the distinction between antecedent and present debts, which is stated in the note to *Cumber v. Wane*, (*supra*, p. 383-398), in regard to ordinary promissory notes of a third person: but that distinction does not appear to be applicable in the case of bank-notes.

As between a bank, or those claiming in privity with it, and a debtor to the bank, the notes of the bank are cash; and payment into court, or tender made in them, is as against the former, as good as if made in cash; *Northampton Bank v. Balliet*, 8 Watts & Sergeant, 311.

It appears to be settled in the American cases, that the holder of a negotiable note is, *prima facie*, entitled to recover, upon merely producing the

note; but that if the plaintiff prove that the note was fraudulent in its inception, or fraudulently put in circulation, or stolen, or lost, or obtained by duress, there is thrown upon the plaintiff the burden of proving that he is a holder bona fide, and for a valuable consideration. *Holme v. Karsper*, 5 Binney, 469; *Beltzhoover v. Blackstock*, 3 Watts, 20; *Knight v. Pugh*, 4 Watts & Sergeant, 445; *Brown v. Street*, 6 id. 221; *Vathir v. Zane*, 6 Grattan, 246, 263; *Munroe v. Cooper et al.*, 5 Pickering, 412; *Conroy v. Warren*, 3 Johnson's Cases, 259; *Woodhull v. Holmes*, 10 Johnson, 231; *Rogers v. Morton*, 12 Wendell, 484, 487. See *Russel v. Ball, Cook & Cook*, 2 Johnson, 50, where a distinction is taken by LIVINGSTON, J., between notes payable to order and to bearer. The particular question discussed in the latter part of Mr. Smith's note, does not appear to have been involved in these cases. That question seems to be this; Whether, when the defendant has proved the intervention of such unfair and suspicious circumstances as put upon the plaintiff the necessity of showing that he is a bona fide holder for valuable consideration, *whether*, in that case, the plaintiff does not fully rebut the presumption of fraud in his title, by proving a valuable consideration, and thereby put upon the defendant the burden of replying fraud specially in him; or whether the original suspicion still remains, and the plaintiff is bound, in addition to full consideration, affirmatively to prove that the circumstances under which he bought the note, were such as gave him no reason to suspect that there was a flaw in the title of the parties preceding him. The former doctrine, which is in effect that of *Backhouse v. Harrison*, has this obvious consideration to stand upon: that, *prima facie*, the suspicion of collusion between the plaintiff and the intermediate parties, remaining after full consideration is proved, is certainly not stronger than the suspicion which must always exist, of collusion between the defendant and those persons in letting the note get into circulation. In *Dickson et al. v. Primrose et al.*, 2 Miles, 366, it is said that the plaintiff must prove he gave full consideration, "and in some cases he must even show, that he took it without any circumstances of suspicion, or his ownership will not be held bona fides." But in a later case that court adopted the principle of *Backhouse v. Harrison*, and decided that the defendant must prove fraud. But, in Vermont, the recent case of *Sandford v. Norton*, 14 Vermont, 228, 233, inclines to the doctrine of *Gill v. Cubitt*. See S. C. 17 id. 285.

H. B. W.

*ASLIN v. PARKIN.

[*264]

MICH. 32 GEO.—2.

[REPORTED 2 BURR. 665.]

After a judgment by default against the casual ejector, trespass for mesne profits may be brought either in the name of the fictitious plaintiff; or in that of his lessor.

In such an action the judgment in ejectment is evidence of the plaintiff's title and possession from the date of the demise in the declaration in ejectment. The costs of the ejectment may be recovered as damages.

THIS was an action of trespass, for the mesne profits of a house in Sheffield in Yorkshire, brought in the name of the lessee or nominal plaintiff in ejectment, against the tenant in possession, after judgment obtained against the casual ejector by default. The costs of the ejectment were also included and inserted in the declaration, as consequential damages of the trespass therein complained of.

On the trial of this cause before Lord Mansfield, at the summer assizes, 1758, at the city of York, the plaintiff gave in evidence the judgment in ejectment, the writ of possession with the return of execution upon it, the defendant's occupation of the premises, the value of them during that time (which was proved to be 20*l.*) and the costs of the ejectment (amounting to 12*l.* more).

On the part of the defendant it was objected, that as the judgment in the ejectment was by default, against the casual ejector, this action could not be legally maintained in the name of the nominal plaintiff; but ought to have been brought by the plaintiff's lessor: and they ought to have proved the plaintiff to have been in possession when the defendant committed the trespass for which the action is brought.

*In support of this objection, it was argued, that though the law allows fictitious proceedings in ejectment, for the trying of titles; [*265] yet in actions for mesne profits no such fiction prevails: but the suit, the injury, and the defendant are real; and the action in no respect differs from any action of trespass.

That this was a possessory action; which could in no case be maintained, unless the plaintiff's possession was either proved or admitted: and as, in the present case, the plaintiff could not possibly prove an actual entry, there was no evidence of his possession, that could affect, or be received against, the present defendant.

It was admitted, that an action of this kind might be brought in the name of the nominal plaintiff in ejectment, where the tenant had appeared

and confessed lease, entry, and ouster; because being thereby become a party to the record in ejectment, and having confessed the entry of the plaintiff, he is estopped by that confession, and by the judgment against him, from controverting afterwards the plaintiff's possession; but where the judgment in ejectment was by default, against the casual ejector, there was no such confession of the tenant, no matter of record to estop him; but he was equally at liberty to deny the plaintiff's possession, and to put him upon proving it, as in any other action of trespass; and having never been a party to the judgment in ejectment, neither that judgment nor the writ of possession upon it, (as they were merely between the nominal plaintiff and a third person, the casual ejector,) could be any conclusion or evidence against the present defendant.

It was therefore insisted, that this action ought to have been brought by the lessor of the plaintiff, in his own name; who might have proved an actual entry under the writ of possession; and by that entry, the possession he thereby obtained would relate back to the commencement of his title: but being brought in the name of the nominal plaintiff, and the defendant being a stranger to the judgment in ejectment, the plaintiff had failed of maintaining his action.

In support of this objection, the defendant's counsel urged that although the distinction was carried no farther, in the case of *Jefferies v. Dyson*, (2 Strange 960, II. 7 G. 2, B. R.) *than to admit the tenant in possession (where the judgment was against the casual ejector, by default,) to controvert the title of the plaintiff, upon an action for the mesne profits, yet both parts of that case had been since contradicted; and it has been since holden, "that the defendant should not controvert the plaintiff's title:" but (where the tenant had not entered into the common rule) "the plaintiff must prove his own actual possession; and can only recover damages from that time." For this, they cited a case of *Stanynought v. Cousins*, II. 19 G. 2, C. B. (2 Barnes, 367), and some circuit traditions of nonsuits for want of the plaintiff's proving his possession, where the judgment was by default against the casual ejector.

Lord *Mansfield* reserved the point, at the assizes; and afterwards proposed it to all the Judges, and had their opinion; which he thought fit now publicly and particularly to declare.

Upon principles, his lordship said, he was clearly of opinion against the objection, on the trial, without hearing the counsel for the plaintiff. But as authorities were then referred to, and as the point related to the effect of that proceeding which is now almost the only remedy, in practice, for recovering land wrongfully withheld; he thought it of great consequence that the matter should be considered by all the Judges. He therefore reserved the case, declaring "he did it with that view; and that he would endeavour to get their opinion without any delay or expense to the parties."

Accordingly, his lordship laid it before them upon the first day of term; and they took till last Thursday, the 16th of November, to look into the cases, so far as they could, with any accuracy, be traced. And besides those that are in print, they had seen some in manuscript, different ways; which were now, he said, totally immaterial to be mentioned:

Because all the Judges are unanimously of opinion "that the nominal plaintiff, and the casual ejector, are judicially to be considered as the fictiti-

ous form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the *merits, without being entangled in the nicety of pleadings on either side." [*267]

"That the lessor of the plaintiff, and the tenant in possession, are substantially, and in truth, the parties, and the only parties, to the suit. The tenant in possession must be duly served: and if he is not, he has a right to set aside the judgment. If, after he is duly served, he does not appear, but lets judgment go by default, such judgment is carried into execution against him by a writ of possession."

"That there is no distinction between a judgment in ejectment upon a verdict, and a judgment by default. In the first case the right of the plaintiff is tried and determined against the defendant: in the last case it is confessed."

"An action for the mesne profits is consequential to the recovery in ejectment. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; and in either shape it is equally his action."

"The tenant is concluded by the judgment, and cannot controvert the title. Consequently, he cannot controvert the plaintiff's possession; because his possession is part of his title: for the plaintiff, to entitle himself to recover in an ejectment, must show a possessory right not barred by the statute of limitations."

"This judgment, like all others, only concludes the parties, as to the subject-matter of it. Therefore, beyond the time laid in the demise, it proves nothing at all: because, beyond that time, the plaintiff has alleged no title, nor could be put to prove any."

"As to the length of time the tenant has occupied, the judgment proves nothing; nor as to the value. And, therefore, it was proved, in this case, (and must be in all) how long the defendant enjoyed the premises; and what the value was; and it appeared that the time of such occupation by the defendant was within the time laid in the demise."

This unanimous resolution of all the Judges, upon short plain principles, will not only be a certain and uniform rule, upon actions for mesne profits; but may tend to put this fictitious remedy by ejectment upon a true and liberal foundation; to attain speedily and effectually the complete ends of justice, according to the real merits of the case.

*My Brother Wilmot tells me, that he had the very same question made before him, upon the Oxford circuit, the last assizes: but the cause went off upon another point. [*268]

I am therefore glad that the general rule is now settled; and that the settling of it has occasioned no expense or delay to the particular parties in this cause.

The rule consequently was, that the *postea* be delivered to the plaintiff, that he might have judgment.

SEE *Goodtitle v. Thoms*, 3 Wils. 118. Although *Aslin v. Parkin* decides that trespass for mesne profits may be brought, after a judgment by default, in the name of the fictitious plaintiff, still, if it be sought to recover profits antecedent to the day of the demise laid in the previous ejectment, the action should be brought in the name of the real plaintiff, for the title of the fictitious plaintiff exists, of course, only in the proceedings in ejectment, from which it appears to have commenced with the demise there laid. {*Dictum*, S. P. *Osbourne v. Osbourne*, 11 Serg. & Rawle, 55, 58.} So if the action be brought against an occupier *antecedent* to the ejectment, for as to him the record of the ejectment is no evidence. *Decosta v. Atkins*, B. N. P. 87. See *Hunter v. Britts*, 3 Camp. 456; {*Chirac v. Reinecker*, 11 Wheaton, 280; 2 Peters, 613; *Reid v. Stanley*, 6 W. & S. 369, 375; *Vance v. Inhabitants of C. T.*, 7 Blackford, 241;} *Denn v. White*, 7 T. R. 112. {The judgment in ejectment is conclusive of the title from the time of the demise laid, or, where the old form is abolished, from the time of the writ issued: if the plaintiff claims beyond that time, as to such time the defendant may controvert the title; *Van Alen v. Rogers*, 1 Johnson's Cases, 281; *Jackson v. Randall*, 11 Johnson, 405; *Doe v. Dupuy*, 4 J. J. Marshall, 388; *Hylton v. Brown*, 2 Washington C. C. 165; *Shotwell v. Boehm*, 1 Dallas, 172; *Huston v. Wick-ersham*, 2 W. & S. 308; *Postens v. Postens*, 3 id. 182; *Man v. Drexel*, 2 Barr, 202; *Drexel v. Man*, id. 271. In *West v. Hughes*, 1 Harris & Johnson, 574, it was held, that though the defendant might controvert the plaintiff's title before the time laid in the demise, yet for the time between the demise laid, and the execution of the habere facias, the defendant in the ejectment is liable, whoever was in possession, unless the profits came to the plaintiff.} Nor will it be evidence in trespass for mesne profits against a person who entered *subsequently* to the ejectment, *unless* it be proved that he came in *under* the defendant in ejectment, so as to make him privy to the judgment. *Doe v. Harvey*, 8 Bing. 242. But if he came in *under* the defendant in ejectment, it will be evidence. *Doe v. Whitcombe*, 8 Bing. 46. {S. P. *Jackson v. Stone*, 13 Johnson, 447; *Morgan v. Varick*, 8 Wendell, 587; and though the plaintiff

after the recovery in ejectment, convey the land to the defendant, he may still maintain trespass for mesne profits, for the tort remains. *Fenn d. Duffield v. Stille*, 1 Yeates, 154; 2 Dallas, 156. The record of the recovery in ejectment is evidence against parties and privies; *Chambers v. Lapsley*, 7 Barr, 24; but not against strangers; *Leland v. Tousey*, 6 Hill, 328.} [There is a case in 8 Mee. & W. 158, of *Doe d. Parsons v. Heather*, in which the day of the year was wholly omitted in laying the demise which was stated to have been on the 31st October. It was held to be no ground of non-suit, and yet not an amenable variance. In an action for mesne profits, such a record would probably have been inoperative on account of uncertainty.]

It is stated in *Aslin v. Parkin*, that "the tenant is concluded by the judgment, and cannot controvert the title;" and this was long considered in practice as *literally* true, although *Vooght v. Winch*, 2 B. & A. 662; *Outram v. Morewood*, 3 East, 365; *Stafford v. Clarke*, 2 Bing. 381; *Hooper v. Hooper*, *McClell. & Young*, 509; *Wilson v. Butler*, 4 Bing. N. C. 756; and *Bowman v. Rostrom*, 2 Ad. & Ell. 295, shew clearly that a judgment is, generally speaking, no estoppel, unless pleaded as such, where there has been an opportunity of doing so, see post, vol. 2. However, it has been lately [since the new rules of pleading] decided that there is now no difference in that respect between a judgment in ejectment and one in any other action. *Doe v. Huddart*, 2 C. M. & Rosc. 316, 5 Tyrwh. 846. That it operates as an estoppel when pleaded as such was decided in *Doe v. Wright*, 2 P. & Dav. 672; 10 A. & E. 763, S. C. See post, vol. 2, note to *Duchess of Kingston's case*. {See *Man v. Drexel*, 2 Barr, 202, 204.} [But the replication by way of estoppel must be confined to the period after the day of the demise in the ejectment.] {*Doe v. Wellsman*, 2 Exch. 368.}

"The right to mesne profits is a necessary consequence of a recovery in ejectment; and the defendant could not set up a title in bar, even if he clearly had a better title;" *Benson* and others v. *Matsdorf*, 2 Johnson, 369; *Jackson v. Randall*, 11 id. 405; *Van Alen v. Rogers*; *Lloyd v. Nourse* and wife, 2 Rawle, 49; *Chambers v. Lapsley*, 7 Barr, 24; and this is equally the case

where the judgment in ejectment has gone by default: *Baron v. Abeel*, 3 Johnson, 481; *Langendyck and wife v. Burhans*, 11 id. 461;—in fact, the judgment in ejectment has just the same effect as other judgments; *Chirac v. Reinecker*. But there is this difference, as respects the action for mesne profits, between the case where the judgment in ejectment has gone by default against the casual ejector, and where it has been given after the consent-rule has been entered into, that, as trespass is an action brought for an injury to the possession, it cannot be maintained by one who is disseised, or out of possession, until he has revested his possession by entry, which entry relates back to the time of the right accrued, or, more correctly speaking, converts the original disseisin into a trespass; *Harker v. Whitaker*, 5 Watts, 474, 476; *Reid v. Stanley*, 6 Watts & Sergeant, 369, 376; *Dewey v. Osbourne*, 4 Cowen, 329; *Morgan v. Varick*, 8 Wendell, 587; *Cox et al. v. Callender*, 9 Massachusetts, 533: Accordingly, as the consent-rule confesses entry, judgment, after that, is sufficient, alone, to sustain trespass; but on judgment by default against the casual ejector, there must be an entry, or a delivery of possession by writ, before trespass can be brought. *Lessee of Brown v. Galloway*, 1 Peters's C. C. 291; *Jackson v. Combs*, 7 Cowen, 36.}

In one case, the action of trespass for mesne profits is rendered unnecessary by statute 1 G. 4, c. 87, s. 2. When, in ejectment brought by landlord against tenant, the tenant or his attorney has been served with due notice of trial, the plaintiff will not be nonsuited, in case of the tenant's non-appearance. And whether the tenant appear or no, the plaintiff after proving his title, may go on to prove the mesne profits down to the day of the verdict, or some preceding day to be specially mentioned therein, and will recover the land, together with the mesne profits as damages: and it is provided that this shall not bar the landlord from bringing trespass for the mesne profits which shall accrue from the verdict, or the day specified therein, down to the day of delivery of possession of the premises recovered in the ejectment. [It is not necessary to prove notice of trial in order to let the plaintiff into proof of the mesne profits under this act, *Doe d. Thompson v. Hobson*, 12 A. & E. 136.]

In *Aslin v. Parkin*, the costs of the previous ejectment (where judgment, as will be remembered, went by default) were included in the declaration in the action of trespass for mesne profits as special damage. See *Doe v. Davis*, 1 Esp. 358; *Brooke v. Bridges*, 7 B. M. 471. In *Nowell v. Roake*, 7 B. & C. 404, an ejectment was brought in the Common Pleas, and judgment given for the defendant, which was reversed on error. The plaintiff brought trespass for mesne profits in the King's Bench, and recovered the costs in error, *as between attorney and client*, although the Court of Error itself could not have given costs; *Bell v. Potts*, 5 East, 49; *Wyrrie v. Stapleton*, Str. 615. [But see *Doe v. Filliter*, 13 M. & W. 80, per cur.] If the ejectment was defended, the taxed costs are recoverable as damages in this action; **Doe v. Davis*, *Symonds v. [269]* Page, 1 C. & J. 29; but no *extra* costs are so, *Doe v. Davis*, 1 Esp. 358; *Brooke v. Bridges*, 7 B. M. 471; *Doe v. Hare*, 2 Dowl. P. C. 245; [and where the plaintiff delayed to tax his costs, in the hope of recovering untaxed costs, the court would not compel him indeed to tax them, but recommended an application for the delivery of the plaintiff's bill, and to tax it at the defendant's instance, *Doe v. Filliter*, 11 M. & W. 80, which having been done, the defendant paid into court the amount of the taxed costs, and it was holden that the plaintiff could recover no more, *Doe v. Filliter*, 13 M. & W. 80.]

In estimating the damages, the jury are also allowed to take into consideration the trouble and inconvenience sustained by the plaintiff; in consequence of the defendant's trespasses, over and above the mere rent of the premises, so as completely to compensate him for the injury he has sustained. *Goodtitle v. Tombs*, 3 Wils. 121. This action could not formerly have been brought against, or by, an executor or administrator, the rule *actio personalis moritur cum persona* being applicable to it. But by 3 & 4 W. 4, c. 42, s. 3, it now may, provided it be brought within six months after the defendant shall have taken administration on himself, and provided the trespasses were committed within six months before the death of the trespasser; and by the same section it may be brought by an executor, provided the trespasses were committed within six months before the death, and the action be commenced

within a year after the death. By the same statute, money may be paid into court, in such an action, under a Judge's order.

{In *Denn v. Chubb*, 1 Coxe, 466, the assessment of mesne profits, (which were there recovered in ejectment from the time of demise laid) was allowed to include all the plaintiff's reasonable and necessary expenses, taking in counsel fees; and in *Baron v. Abeel*, 3 Johnson, 481, the costs of the previous ejectment. In Kentucky, the principle established is, that the plaintiff in an action for mesne profits, is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining, by legal means, the restoration of the property which the defendant has wrongfully taken or withheld from him: and he may, therefore, recover any counsel fee which he has paid, or bound himself to pay, in respect to the ejectment, if such fee be not unreasonable. *Doe, &c. v. Perkins*, 8 B. Monroe, 198, 200. In Maryland, the measure of damages is the rent; torts done to the property being properly remediable in a separate action of trespass; *Gill v. Cole*, 1 Harris & Johnson, 403; elsewhere, the plaintiff is not limited to this, but may recover beyond the rent; *Dewey v. Osborne*; and for all actual damage; *Houston v. Wickersham*. As to the general measure of the damages, in *Lessee of Brown v. Galloway*, Judge WASHINGTON said, that there is no general rule, but the jury will decide from all the circumstances; and in *Murray v. Gouverneur*, 2 Johnson's Cases, 438, it was said that trespass for mesne profits "is a liberal and equitable action, and will allow of every kind of equitable defence." See the principle of equity strikingly applied in *Ewalt v. Gray*, 6 Watts, 427. See also *Alexander v. Herr*, 1 Jones, 537. The question of compensation for improvements is one of considerable interest, inasmuch as there is a conflict between the civil and common law on the subject. The following points seem to be settled. In the action for mesne profits, the value that repairs or improvements are to the plaintiff, may be set off, *to the extent of the plaintiff's claim for mesne profits*, if the defendant was an innocent, bona fide possessor, and not otherwise: *Green v. Biddle*, 8 Wheaton, 1, where the subject is ably considered by WASHINGTON, J.; and see *Hylton v. Brown*, *Murray v. Gouverneur* et al.; *Frear v. Harden-*

bergh, 5 Johnson, 272; *Jackson v. Loomis*, 4 Cowen, 168; *Marie v. Semple*, Addison, 215; *Houston v. Wickersham*; *Dowd v. Fawcett*, 4 Devereux, 92: But beyond this, at law, compensation is not recoverable for improvements, if the occupancy were under a void title; *Green v. Biddle*; see *McKee v. Lamberton*, 2 Watts & Sergeant, 107; *Jackson v. Loomis*: And equity interferes to clog a recovery with conditions of compensation only, 1, where there is fraud, and, 2, where the claimant's title is only equitable, and being obliged to ask the aid of equity, he will be compelled to do equity to the occupant. See *Werkheiser v. Werkheiser* and others, 3 Rawle, 326, 334. See the whole subject in *Green v. Biddle*; *Southall v. McKeand et al.*, 1 Washington, 336; *Pugh's Heirs v. Bell's Heirs*, 1 J. J. Marshall, 399; *Putnam v. Ritchie*, 6 Paige, 390; *Bright v. Boyd*, 1 Story, 478. In the last case, in equity, *Storv, J.*, inclined to adopt the civil law principle further, and perhaps to its full extent, and to compel compensation for valuable improvements, where the occupant had held "under a title which turns out to be defective, he having no notice of the defect;" but the numerous extracts from digests of Scotch and Roman law which are relied on for that opinion, furnish no answer to the observation of WASHINGTON, J., in *Green v. Biddle*, that to clog the owner's recovery of his land with the necessity of paying before he gets it, is to take from a man the enjoyment of his legal property without any act or default on his part; which is against all reason and justice. The land and the improvements have become inseparable by the act of the improver: the equity of the owner to have his land is at least as clear as the equity of the other to have the value of his improvements; and the former has the legal title to both. There cannot be presumed entire ignorance of the defect, where there is a better legal title outstanding; for an occupant is bound, both in law and equity, to know all legal defects in his title. See *Collins and others v. Rush*, 7 S. & R. 147; *Allen v. Flock*, 2 Penrose & Watts, 159; and the remarks of KENNEDY, J., in *Coney v. Owen*, 6 Watts, 435, 444, on the equity of improving men out of their rights; and *Folk v. Beidleman*, id. 339; and *Lewis v. Bradford*, 10 id. 67, 81.}

When the action is brought, as in *Aslin v. Parkin*, in the name of a fictitious plaintiff, the court will stay proceedings, until security be given for the defendant's costs, otherwise he would have no means of recovering them: *B. N. P. 89.* [*S. P. Jackson v. Peer*, 4 *Cowen*, 147.]

It is remarked in *Aslin v. Parkin*, that as to the length of time the defendant has been in possession, the judgment in ejectment proves nothing; the consent rule, however, where there is one, may be put in, and will show the defendant to have been in possession at the time of the service of the declaration in ejectment. *Doe v. Gibbs*, 2 *C. & P.* 615. [*Jackson v. Combs*, 7 *Cowen*, 36. See *Ainslie v. The Mayor, &c.*, of New York, 1 *Barbour's S. Ct.* 169;] [actual possession by the defendant is not necessary in this action, any more than in use and occupation. Possession by tenant will render the landlord liable. *Doe v. Harlow*, 12 *A. & E.* 40.]

One consequence of the plaintiff in ejectment being a fictitious person, is, that an ejectment may be brought on the demise of one partner against the firm; for the plaintiff being *John Doe*, and not his lessor, the ordinary rule that the same person cannot at once be plaintiff and defendant, does not apply. *Francis v. Doe*, 4 *M. & W.* 331. [And, in like manner, it may be brought on the demise of a husband against his wife. *Doe d. Merigan v. Daly*, 8 *Q. B.* 934]

[It was ruled by Judge *WASHINGTON*, that, by giving notice, the plaintiff may always recover the value of the mesne profits in the ejectment; *Lessee of Batin v. Bigelow*, 1 *Peters's C. C.* 452; and that where the plaintiff's title has expired before trial, he may proceed for damages for the trespass and for mesne profits; *Lessee of Brown v. Galloway*, *id.* 292; but probably in the latter case also, notice should be given; else, the practice would be to enter judgment for nominal damages and full costs; *Murray v. Garretson*, 4 *Sergeant*

& *Rawle*, 130; or to enter the regular judgment, with perpetual stay of the writ of possession; *Jackson v. Davenport*, 18 *Johnson*, 295, and to leave the plaintiff to his action of trespass thereupon. In like manner, in Pennsylvania, if notice be given, *Cook v. Nicholas*, 2 *Watts & Sergeant*, 27, the plaintiff may recover for mesne profits down to the time of the judgment; *Dawson v. McGill*, 4 *Wharton*, 230: but the remarks of *HUSTON, J.*, in *Huston v. Wickersham*, questioning the regularity of this practice, certainly have force, and point to the propriety of requiring the claim to mesne profits to be suggested of record, and notice of it to be endorsed upon the declaration or writ. In New Jersey and Connecticut, *Denn v. Chubb*, 1 *Coxe*, 446, *Starr v. Pease*, 8 *Connecticut*, 541, the same practice is allowed; but in the latter, damages are recoverable only down to the issuing of the writ. In Vermont, by statute damages are recovered with the possession in lieu of mesne profits; but no damages are recovered unless the possession is; i. e. unless the title continues to the time of judgment. See *Burton v. Austin & Blake*, 4 *Vermont*, 105; *Smith v. Benson*, 9 *id.* 105. In New York, the action of trespass for mesne profits, is abolished by 2 *R. S.* 310, s. 43, 44: and the plaintiff recovers by suggesting his claim on the record of the judgment in ejectment, within one year: See *Jackson v. Leonard*, 6 *Wendell*, 534; *Broughton v. Wellington*, 10 *id.* 566; and the plaintiff is prevented by the statute from recovering mesne profits for more than six years, and the defendant need not plead this statute of limitations. *Jackson v. Wood*, 24 *id.* 443. But this statute abolishing trespass for mesne profits, applies only to such mesne profits the right to which results legally from the recovery in ejectment; and therefore only to cases where the claim for mesne profits is against the same persons who were defendants in the ejectment; *Leland v. Tousey*, 6 *Hill*, 323.]

{*H. B. W.*}

[*270] *CARTER v. BOEHM.

EASTER.—5 GEORGE 3.

[REPORTED 3 BURR. 1905.]

Insurance on Fort Marlborough against foreign capture, effected by its Governor. The weakness of the fort, and the probability of its being taken by the French, and that the insured knew these facts, but had not communicated them, were offered to be proved as a defence to an action on the policy. It was also objected that the insurance was against public policy. The plaintiff proved that the office of Governor was mercantile, not military; and that the fort was never calculated to resist European enemies. Held that the jury were justified in finding for the plaintiff.

The opinion of an insurance broker as to the materiality of the facts not communicated was thought inadmissible as evidence.

What concealments vitiate a policy.

THIS was an insurance cause, upon a policy underwritten by Mr. Charles Boehm, of *interest, or no interest; without benefit of salvage*.† The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

It was tried before Lord *Mansfield* at Guildhall; and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder Eyre, on behalf of the defendant, moved for a new trial.

His objection was, "that circumstances were not sufficiently disclosed."

A rule was made to shew cause: and copies of letters and depositions were ordered to be left with Lord *Mansfield*.

N. B. Four other cases depended upon this.

[*271] *The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning, and Mr. Wallace, shewed cause on Thursday, the first of this month. But first,

Lord *Mansfield* reported the evidence. That it was an action on a policy of insurance for one year; viz. from 16th of October, 1759, to 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra in the East Indies, by its being taken by a foreign enemy. The event happened: the fort was taken, by Count D'Estaing, within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the Governor's brother, the plaintiff, to him: and the use made of these instructions was to shew "that the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

† A policy containing these words would now be illegal, in consequence of 14 Geo. 3, c. 33, against wager policies, *Patterson v. Powell*, 9 Bing. 32.

Both sides had been long in Chancery: and the Chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The first was a letter from the Governor to his brother Roger Carter, his trustee, the plaintiff in this cause: the second was from the Governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the Governor had 20,000*l.* in effects, and only insured 10,000*l.*; and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's: which proved that this was not a fort proper or designed to resist European enemies; but only calculated for defence against the natives of the island of Sumatra; and also that the Governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report;

*The counsel for the plaintiff proceeded to shew cause against a new trial. [*272]

They argued, that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this contract: all which circumstances were universally known to every merchant upon the Exchange of London. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. *Dunning* laid it down as a rule—"That the insured is only obliged to discover facts; not the ideas or speculations which he may entertain upon such facts."

They said, this insurance was, in reality, no more than a wager; "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not."

Sir *Fletcher Norton* and Mr. Recorder *Eyre* argued, contra, for the defendant, the underwriter.

They insisted, that the insurer has a right to know as much as the insured himself knows.

They alleged, too, that the broker is the sole agent of the insured.

These are general, universal principles, in all insurances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did not believe that the insurer would have meddled with the insurance, if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked;" but, "whether it shall be attacked and taken."

Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept con-

cealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery; though he acted for the Governor. Indeed, a Governor ought not, in point of policy, [*273] to be permitted to insure at all: but if he *is permitted to insure, or will insure, he ought to disclose all facts.

It cannot be supposed that the insurer would have insured so low, at 4l. per cent., if he had known of these letters.

It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose: and the presumption was "that the fort, the powder, the guns, &c., were in a good and proper condition." If they were not, (and it is agreed that in fact they were not, and that the Governor knew it,) it ought to have been disclosed. But if he had disclosed this, he could not have got the insurance. Therefore, this was a fraudulent concealment: and the underwriter is not liable.

It does not follow, that because he did not insure his whole property; therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

Lord *Mansfield* now delivered the resolution of the Court.

This is a motion for a new trial.

In support of it, the counsel for the defendant contend, "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars does not amount to a concealment which ought, in law, to avoid the policy; either as a fraud or, as varying the contract."

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2ndly. To state particularly the case now under consideration.

3rdly. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

[*274] The special facts, upon which the contingent chance is to *be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void.† Although the suppression should happen through mistake, without any fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

The policy would equally be void, against the underwriter, if he con-

(†) *Fitzherbert v. Mather*, 1 T. R. 12.

cealed; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

But either party may be innocently silent as to grounds open to both to exercise their judgment upon. *Aliud est celare; aliud tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumentum tui causâ velis eos, quorum intersit id scire.*

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent; he need not mention what the underwriter knows—*Scientia utrinque par pares contrahentes facit.*

An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the underwriter ought to know;† what he takes upon himself the knowledge of; or what he waives being informed of.

The underwriter needs not be told what lessens the risk *agreed and understood to be run by the express terms of the policy. He [*275] needs not be told general topics of speculation: as, for instance, *the underwriter is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.*

If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity; and, therefore, neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the

(†) See *Elton v. Larkins*, 8 Bing. 198; *Friere v. Woodhouse*, Holt, 572; *Noble v. Kenaway*, Dougl. 510; *Vallance v. Dewar*, 1 Camp. 503; *Stewart v. Bell*, 5 B. & A. 238; [*Mackintosh v. Marshall*, 11 M. & W. 116.]

nature of the contract; *which one privately knows*, and the other is ignorant of, and has no reason to suspect

The question, therefore, must always be "whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment; fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough, from being destroyed [276] by, taken by, or surrendered unto, any *European enemy, between the 1st of October, 1759, and 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify, to that amount, Roger Carter, the Governor of Fort Marlborough, in case the event insured against should happen. The Governor's instructions for the insurance, bearing date at Fort Marlborough, the 22d of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company which the Company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial, "whether a policy against the loss of Fort Marlborough, for the benefit of the Governor, was good;" upon the principle which does not allow a sailor to insure his wages.†

But considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a Governor, was really but a merchant; considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share: considering, too, that the objection did not lie, upon any ground of justice, in the mouth of the underwriter, who knew him to be the Governor at the time he took the premium—and as, with regard to principles of public convenience, the case so seldom happens, (I never saw one before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the Bar.

Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy; and if it had, we are all of opinion "that we are not warranted to say it is void upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went [277] into a court of equity; where they have *had an opportunity to sift everything to the bottom, to get every discovery from the Governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

† i. e. Because of its tendency to diminish his exertions for the safety of the thing insured. *Webster v. De Tastet*, 7 T. R. 157; *Wilson v. R. E. A. Co.* 2 Camp. 626.

The plaintiff proved, without contradiction, that the place called Ben-coolen, or Fort Marlborough, is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against European ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general, well known by most persons conversant or acquainted with India affairs, or the state of the Company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour, by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any act by the French, until they attacked Nattal in February, 1760. That on the 8th of February, 1760, there was no suspicion of any design by the French. That the Governor then bought, from the witness, goods to the value of 4,000*l.*, and had goods to the value of above 20,000*l.*, and then dealt for 50,000*l.* and upwards. That on the 1st. of April, 1760, the fort was attacked by a French man-of-war of 64 guns, and a frigate of 20 guns, under the Count D'Estaign, brought in by Dutch pilots; unavoidably taken; afterwards delivered to the Dutch; and the prisoners sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760; or that there was the least intelligence or alarm "that they might make the attempt," till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence, that the Governor had acted, as in full security, long after the month of September, 1759; and had turned his money into goods, *so late as the 8th of February, 1760. [*278] There was no attempt to show that he had not lost by the capture very considerably beyond the balance of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the Pitt, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22nd of September, 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his lordship repeated.) (a)

They relied too upon the cross-examination of the broker who negotiated the policy, "that, in his opinion,† these letters ought to have been shown,

(a) The former of them notifies to the East India Company, that the French had, the preceding year, a design on foot, to attempt taking that settlement by surprise; and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being sadly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there.

† See *Rickards v. Murdock*, 10 B. & C. 527; *Campbell v. Richards*, 5 B. & Ad. 846; 2 Nev. & M. 546.

or the contents disclosed; and if they had, the policy would not have been underwritten."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void"—

1st. Because the state and condition of the fort, mentioned in the Governor's letter to the East India Company, was not disclosed.

2ndly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3rdly. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement, by surprise, the year before.

They also contended that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly—It remains to consider these objections, and to examine "whether this verdict is well founded."

To this purpose it is necessary to consider the nature of the contract, at the time it was entered into.

The policy was signed in *May*, 1760. The contingency was, whether Fort Marlborough was or would be taken by an European enemy, between October, 1759, and October, 1760.

[*279] The computation of the risk depended upon the *chance, "whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The underwriter at London, in *May*, 1760, could judge much better of the probability of the contingency, than Governor Carter could at Fort Marlborough, in September, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough, in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company; and particularly from the Governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprise begun, in September, 1759, to the knowledge of the Governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted.

But the Governor had no notice of any design subsisting in September, 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the Dutch, which tempted Count D'Estaing to break his parole.

This being the circumstances under which the contract was entered into,

we shall be better able to judge of the objections upon the foot of concealments.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the Governor. He knew the Governor must be acquainted *with the state of the place. He knew the Governor could not disclose it, consistent with his duty. [*280] He knew the Governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways: *It was not a matter within the private knowledge of the Governor only.*

But, not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted, that a ship insured is seaworthy.

What is that condition? All the witnesses agree, "that it was only to resist the natives, and not an European force." The policy insures against a total loss; taking for granted "that if the place was attacked, it would be lost."

The contingency, therefore, which the underwriter has insured against is, "whether the place would be attacked by an European force;" and not "whether it would be able to resist such an attack, if the ships could get up the river."

It was particularly left to the jury to consider, "whether this was the contingency in the contemplation of the parties:" they have found that it was.

And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land attack by the natives.

The 2nd concealment is, his not having disclosed, that, from the *French* not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the case: it is mere speculation of the Governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror, in his own dominions. The practicability of it, in this case, depended upon the *English* naval force in those seas; which the underwriter could better judge of at *London*, in May, 1760, than the Governor could at Fort Marlborough, in September, 1759.

*The third concealment is, that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design [*281] of the *French* the year before.

What the letter was; how he mentioned the design; or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India

Company: which was objected to; and, therefore, not read. The nature of that intelligence, therefore, is very doubtful. But, taking it in the strongest light, it is a report of a design to surprise, the year before; but then dropped.

This is a topic of mere general speculation; which made no part of the facts of the case upon which the insurance was to be made.

It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud; I agree it.† But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance: because it does not follow that they will cruise this year at the same time, in the same place; or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risk than increase it: for, the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again; especially by a vanquished enemy.

The jury considered the nature of the Governor's silence, as to these particulars: they thought it innocent; and that the omission to mention them did not vary the contract. And we are all of opinion, "that, in this respect, they judged extremely right."

There is a silence, not objected to at the trial, nor upon this motion, which might with as much reason have been objected to as the two last omissions; rather more.

It appears by the Governor's letter to the plaintiff, "that he was principally apprehensive of a Dutch war." He certainly had, what he thought, [*282] good grounds for this apprehension. Count D'Estaing, being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots: and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation, and general intelligence: therefore, they agree it is not necessary to communicate such things to an underwriter.

Lastly: great stress was laid upon the opinion of the broker.

But we all think the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent, or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause: and, therefore, it is improper and irrelevant in the mouth of a witness.‡

There is no imputation upon the Governor, as to any intention of fraud. By the same conveyance, which brought his orders to insure, he wrote to the Company every thing which he knew or suspected: he desired nothing

† Acc. Beckwaite v. Walgrove, cited 3 Taunt. 41; see Durrell v. Bederley, 1 Holt, 263.

‡ Accord. Campbell v. Rickards, 5 B. & Ad. 846; 2 N. & M. 546; overruling Rickards v. Murdock, 10 C. & C. 527. See Chapman v. Walton, 10 Bing. 57.

to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February 1760, shewed that he thought the danger very improbable.

The reason of the rule against concealments is, to prevent fraud and encourage good faith.

If the defendant's objections were to prevail, in the present case, the rule would be turned into an instrument of fraud.

The underwriter, here, knowing the Governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be *void; in order to gain, if [*283] the alternative turned out one way; and to make no satisfaction, if it turned out the other. He drew the Governor into a false confidence, "that, if the worst should happened, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the Governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought that omission an objection, at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, "that it should never be so turned, construed, or used, as to protect or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded; and there ought not to be a new trial; consequently that the rule for that purpose ought to be discharged.

Rule discharged.

THIS case is inserted on account of the masterly exposition of some of the leading principles of insurance law contained in the judgment of the Lord Chief Justice. It would not be proper to pass from it, without informing the reader that a great deal of controversy has since taken place upon one of the subjects incidentally touched upon by his lordship, viz., the admissibility of the broker's evidence as to his opinion on the materiality of the facts not communicated. "Great stress," says his lordship, "was laid on the opinion of the broker: but we all think the jury ought not to pay the least regard to it.

It is mere opinion, which is not evidence. It is opinion after an event. It is opinion, without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could be drawn only from the same premises from which the court and jury were to determine the cause; and, therefore, it is improper and irrelevant in the mouth of a witness." Very similar were the expressions of Gibbs, C. J., in *Durrell v. Bederley*, Holt, 283: "It is my opinion that the evidence of the underwriters, who were called to give their opinion of the materiality of the rumours, and the effect they would have had upon the

premium, is not admissible. *It is not a question of science*, upon which scientific men will most likely think alike, but *a question of opinion*, liable to be governed by fancy, and in which the diversity might be endless." And upon the ground thus stated by Gibbs, C. J., it has been frequently sought to distinguish *Lindenau v. Desborough*, 8 B. & C. 586, in which, in an action on a life policy, the [*284] evidence of medical men, *as to the materiality of certain symptoms which had not been communicated, was received and laid before the jury, from the question as to the admissibility of the opinions of brokers and underwriters. In *Rickards v. Murdock*, 10 B. & C. 257, such evidence was, however, admitted. That was an action on a policy, effected by the plaintiff, as agent for Mr. Campbell, of Sydney, upon goods by the ship *Cumberland*. Upon the trial it appeared that Mr. Campbell, having shipped the goods in question by the *Cumberland*, wrote by another ship (the *Australia*) to the plaintiff, desiring him to effect an insurance thereon, and telling him, at the same time, that, in order to give every chance for the *Cumberland's* arrival, he had directed the person intrusted with that letter not to deliver it till thirty days after the *Australia's* reaching London. These instructions were obeyed; the *Cumberland* not having arrived at the expiration of the prescribed period, the letter was delivered to the plaintiff, who thereupon handed the letter to their broker, desiring him to effect the insurance, which he accordingly did with the Indemnity Insurance Company, whom the defendant represented. But he read to the company's manager that part of the letter only which contained the instruction to insure, the nature of the goods, and the time of their sailing. At the trial it was contended that the other circumstances respecting the mode in which the letter was conveyed to England, and the time it had remained there, were material, and ought to have been communicated, and that their suppression vitiated the policy: and several underwriters were called, who deposed that, in their opinion, the whole of the letter ought to have been communicated, and that the parts suppressed were material. This evidence was objected to, but admitted; and, on a motion for a new trial, after a verdict for the defendant, Lord Tenterden, delivering the judgment of

the court, said, "Several witnesses were examined, who stated that they thought the letter material; but it has been contended that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained but by the evidence of persons conversant with the subject-matter of the inquiry."

This opinion seems to be embraced by the Court of Common Pleas, in *Chapman v. Walton*, 10 Bing. 57. In that case the defendant, who was a broker, had effected policies for Richardson, in which the voyage was described to be, "at and from London to St. Thomas, with leave to call at Madeira and Teneriffe." Richardson afterwards received a letter from his supercargo, who stated that he intended to sail the next day "for the Canaries," and thence to one or more of the West India Islands, say Barbadoes, St. Kitt's and St. Thomas, where he was told that he should be able to dispose of the part of his cargo unsold "in the Canaries." With respect to linsens, he said he had no fear, "as in Canary any reasonable quantity is desirable." This letter Richardson handed to the defendant, telling him "that the voyage was altered, and that he left him to do the needful with it." The defendant got the policies altered, by adding leave to proceed to St. Kitt's and Barbadoes for all purposes. The vessel was lost at the Grand Canary Island. Actions were brought on the policies, which turned out unsuccessful on account of the voyage not being covered by the alterations, and this action was brought by the assignees of Richardson, who had become a bankrupt, against the defendant, for negligence in not having procured the proper alterations to be made. The plaintiffs contended that it was the defendant's duty to have procured the insertion of "liberty to proceed or touch at any of the Canary Islands." The defendant's counsel, on the other hand, called several policy-brokers, and putting into their hands the policies, the bills of lading, and invoices, of the goods, and the supercargo's letter, asked them *what alterations of the policies a skilful insurance-broker, ought, in their judgment, to have procured, having these documents in his possession, and being instructed to do the needful*. To which question they replied that they thought he would do ample justice by procuring the alterations as made. The jury hav-

ing found for the defendant, the court discharged a rule for a new trial, [*285] *moved on the ground that this evidence had been improperly admitted. "It is objected," said the Lord Chief Justice, delivering the judgment of the court, "that to allow this question to be put to the witnesses is, in effect and substance, to allow them to be asked, what is the meaning of the letter?—that is, to ask them whether the letter told the defendant that the vessel was going to the Canaries, whereas the letter ought to be allowed to speak for itself, or, if there were any doubt upon the meaning, it ought to be determined by the court and jury, and not by the evidence of insurance-brokers, or any other witnesses. It may be admitted that, if such were the real nature of the question, the evidence offered would have been inadmissible. . . . But it is not a simple abstract question, as supposed by the plaintiffs, what the words of the letter mean; it is what others conversant with the business of a policy-broker would have understood it to mean, and how they would have acted upon it under the same circumstances. The time of year at which the voyage is performed—the nature of the cargo on board—the objects of the voyage, as disclosed in the letter—above all, the circumstances that the original voyage described in the policy itself comprehended Teneriffe, the greatest and most important of the Canary Islands, would all operate in the minds of experienced men in determining whether it was intended that the alteration should include a liberty to touch and stay at the Canaries in general; and this conclusion it appears to us, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence, because they would not have the experience upon which a judgment could be formed. The decision in this case appears to be consistent with the principle laid down by Mr. Justice Holroyd, in *Berthon v. Loughman*, 2 Star. N. P. 258, that a witness conversant with the subject of insurance might give his opinion, as a matter of judgment, whether particular facts, as disclosed, would make a difference as to the amount of the premium—a principle which has been confirmed by the later case of *Rickards v. Murdock*, 10 B. & C. 527: and it is difficult to reconcile the opinion given by Lord Chief Justice Gibbs, in the case of *Dur-*

rell v. Bederley, Holt, N. P. C. 283, with the judgment of the Court of King's Bench in the case last above referred to. We think, therefore, both on principle, and on the authority of the decided cases, the evidence was properly admitted."

It is remarkable that the above case, which was decided in Trinity Term 1833, and contains a recognition of the opinion of the King's Bench in *Rickards v. Murdock*, should not have been alluded to in any stage of *Campbell v. Rickards*, 5 B. & Adol. 840, decided in the Michaelmas Term of the same year. *Campbell v. Rickards* arose out of the same transaction as *Rickards v. Murdock*. The action brought against the insurance-office, having, as we have seen, failed in consequence of the suppression by the broker, who was employed by *Rickards & Co.* to effect the policy, *Campbell*, the merchant of Sydney, upon whose goods the policy had been effected, brought this action against *Rickards & Co.*, to recover compensation for the loss which he had sustained by their negligence; in not taking care that the policy effected should be valid. At the trial, several brokers and underwriters were called for the plaintiff, and the same letter which was produced in *Rickards v. Murdock* being put into their hands, they were asked, "*whether it was material to have communicated the fact that that letter had arrived in this country thirty days before effecting this insurance?*" The answer was that it was material. The jury having found a verdict for the plaintiff, and a new trial being moved for, on the ground that the evidence had been improperly admitted, the rule was made absolute. The Lord Chief Justice Denman, delivering the judgment of the court, referred to the opinion of Lord Mansfield in *Carter v. Boehm*, and that of Chief Justice Gibbs in *Durrell v. Bederley*. "In some more recent cases," continued his lordship, "such questions have certainly been proposed to witnesses, but they have passed without objection, and it may be observed that the answers will often imply no more than scientific witnesses may properly state—their opinion on some question of science. This is especially true of [*286] *medical opinions. In *Rickards v. Murdock*, indeed, out of which the present case arises, this kind of testimony was received. In giving judgment on the motion for a new trial, Lord Tenterden

did not expressly defend its admissibility, but his words are in the alternative. 'If such evidence be rejected, the court and jury must decide the point by their own judgment, unassisted by that of others. If they are to decide, all the court agree in thinking the letter was material, and ought to have been communicated, and that a jury would have been bound to come to that conclusion.' Now, this mode of disposing of the question does not appear to the court, on reflection, to be quite correct; but we think that, as the jury are to decide on the materiality of facts, and the duty of disclosing them, this verdict, founded in some degree on evidence that could not be legally received, ought to be set aside. The rule for a new trial must therefore be made absolute."

Such being the state of the authorities, the question of admissibility can be hardly even now considered as settled; for opposed to the decision of the King's Bench, in *Campbell v. Rickards*, is the opinion of the Judges of that Court in *Rickards v. Murdock*, recognised by the Court of Common Pleas in *Chapman v. Walton*. The difference is, however, perhaps less upon any point of law than on the application of a settled law to certain states of facts; for, on the one hand, it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other [*286*a*] words, when *it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it; see *Folkes v. Chadd*, 3 Dougl. 157; *R. v. Searle*, 2 M. & M. 75; *Thornton v. R. E. Assurance Co.*, Peake, 25; *Chaurand v. Angerstein*, Peake, 43; [*McNaghten's case*, 10 Cl. & Fin. 200; *Greville v. Chapman*, 5 Q. B. 731; and *Fenwick v. Bell*, 1 Carr. & Kir. 312, *Coltman, J.*; but see *Silk v. Brown*, 9 Car. & P. 601, *Coleridge, J.*] while, on the other hand, it does not seem to be contended that the opinions of witnesses can be received when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. Now, the question of materiality in an assurance seems one which may possibly hap-

pen to fall within either of the above two classes, for, setting out of the question the cases of life-policies, where the medical evidence is unquestionably scientific, and necessary in order to enable the jury to come to a right conclusion, it is submitted that it may happen, even in cases of sea-policies, that a communication, the materiality of which is in question, may be one respecting the importance of which no one except an underwriter can, in all probability, form a correct opinion. If such a case were to occur, it possibly would not be considered as falling within the decision in *Campbell v. Rickards*. In that case the facts concealed were of the very simplest nature; a vessel which sailed after the one insured had arrived thirty-nine days before it, and it was easy, without much experience in the business of an underwriter, to divine the probable fate of the ship insured under those circumstances.

[In Mr. Arnould's valuable work on the law of marine insurance and average, Vol. I. pp. 571—573, the conflicting opinions on the subject of the above note are considered, and the American decisions are stated to be in the same unsettled state as our own. The author marshals the authorities in both countries as follows:—Lord Mansfield in *Carter v. Boehm*; *Gibbs, C. J.* in *Durrell v. Bederley*; and Lord Denman in *Campbell v. Rickards*, supra, against receiving the evidence; Lord Kenyon in *Chaurand v. Angerstein*; *Holroyd, J.*, in *Berthon v. Loughnan*; Lord Tenterden in *Rickards v. Murdock*; and *Tindal, C. J.* in *Chapman v. Walton*, supra; (and see *Elton v. Larkins*, 5 C. & B. 392), expressly in favour of its reception; and tacitly so, by receiving and acting upon it without objection, Mansfield, C. J., *Littledale v. Dixon*, 1 N. R. 151; and Lord Ellenborough, *Haywood v. Rogers*, 4 East, 590. In America there are the opinions of Chancellor Kent, 3 Kent's Com. 234, note (b), edit. 1844; Judge Storey, in *McLanahan v. Universal Ins. Co.*, 1 Peters, 188; *Duer on [*286*b*] Representations, 190; and Mr. Duer, in his work on Representations, 184—191, note xix, to the same effect. The latter writer has pointed out that the evidence was refused in *Carter v. Boehm*, on account of the *unusual* nature of the risk, namely, the capture of a fort in the East Indies; so that in the language of Lord Mansfield, the evidence was "mere opinion, *without the*

least foundation from any previous precedent or usage." And the author first referred to concludes that the arguments in favour of the admission of the evidence far outweigh those which have been urged against it.]

It would seem that the insured is not bound to communicate to the insurers, the particulars of those general facts which, in one form or other, must be present in every contract of insurance. As the insurer must know that they exist, if he wish to learn in what form they exist, he should inquire; and so put the assured to the necessity of confessing, what is the true state of the case. Thus under ordinary circumstances, the insured is not bound to communicate the age of the vessel, nor how she was built; *Poppleston v. Kitchen*, 3 Wash. C. C. Rep. 139. Nor can he be charged with concealment, for not stating the time of sailing, or the character of the property as to ownership, or neutrality; *Barnwall v. Church*, 1 Caines, 237; *Elting v. Scott*, 2 Johnson's Rep. 157; *Seton v. Low*, 1 Johnson's Cases, 1; *Buck v. Chesapeake Insurance Co.*, 1 Peters, 161; *Fiske v. The New England Insurance Co.*, 15 Pick. 310. Under ordinary circumstances, the mind of the insurers may as readily be directed to points of this sort, as that of the insured, and the one cannot be liable for concealing what the other did not think it worth while to know. Thus where the premises insured, were described in the written application for insurance, as a dwelling-house, with an out-house and kitchen disconnected from it, and some distance in the rear, but nothing was said with regard to the existence of a kitchen in the dwelling-house, which was habitually used, while that in the out-house was not, the court held, that there was no misrepresentation or concealment, because if the insurers wished to know the exact use and appropriation of the rooms in the dwelling-house, they were bound to inquire, and not put it upon the insured to enter a multitude of details, no one of which might be more important than another. But if circumstances occur within the knowledge of the insured, which render any fact especially or peculiarly important to the risk, it will be his duty to state them, and to bring forward all the information which he possesses on the subject. When, therefore, the insured is aware, that the vessel has been at sea for a longer period, than is usually requisite for the voyage, and that vessels which sailed some time after her, have arrived, he will be bound to mention the day in which she sailed, in effecting the insurance. *Vale v. The Phoenix Ins. Co.*, 1 W. C. C. R. 283; *Johnson v. The Phoenix Ins. Co.*, ib. 378; *McLanahan v. The Universal Ins. Co.*, 1 Peters, 170; *Livingston v. Delafield*, 3 Caines, 53; *Ely v. Hallett*, 2 id. 57. But where the peculiar circumstances which render a fact material to the risk insured, are publicly and generally known, no special information need be conveyed to the insurer. Thus where a cargo which would be innocent in time of peace, becomes contraband of war, on the breaking out of hostilities, it is not necessary to apprise the insurer of its nature, and of the danger of condemnation, which grows out of it, because he is bound to take notice of the increased risk produced by a public event, and to provide against it by an increase of premium, or by stipulating for the neutrality of the goods insured.

Seton v. Low, 1 Johnson's Cases, 1; Skidmore v. Desdoity, 2 id. 77; Ishel v. Rhineland, ib. 120, 487; Le Roy v. The United Ins. Co., 7 Johnson, 343; The Ins. Co. v. Bathurst, 5 Gill & Johnson, 159.

Where, however, a material fact is so far out of the usual course of trade, that it could not have been anticipated and provided for by the insurer, it will be the duty of the insured to apprise him of it, although its materiality may be due to a public and well known cause. Thus where goods insured from Newport to Port Passage, in Spain, were brought from Lagaira to Newport, and reshipped from thence without being landed, which rendered them liable to confiscation under the British Orders in Council, it was decided, that although those orders were public, and therefore unnecessary to be communicated, yet as the particular circumstances attendant on the shipment of the goods, which occasioned their condemnation, were of a private nature, they ought to have been stated to the insurer. *Kohne v. The Ins. Co. of N. A.*, 6 Binney, 224. And where a vessel was insured at and from Charleston to Marseilles, the omission to state, that the vessel merely touched at Charleston, and sailed, in the first instance, from Havana, which was a belligerent port, was held to vitiate the insurance, because although the insurers were bound to take notice of the war, which was a public event, they were not of the particular course of the voyage, which was the proximate cause of the loss. *Stoney v. The Union Ins. Co.*, 3 M'Cord, 387.

A decision will be found in *Stocker v. The Merrimack M. & F. Ins. Co.*, 6 Mass. 220, which is somewhat inconsistent with that of *Seton v. Low*, and with the general principle, that the insurer is bound to anticipate and provide for every risk, which is caused by a public event, and cannot complain of not being put on his guard against consequences, which it is his duty to know. In *Stocker v. The Merrimack M. & F. Ins. Co.*, insurance had been effected on freight from one neutral port to another, and the cargo was condemned as belligerent property, and freight refused to the owners of the vessel. The court admitted, that the transportation of belligerent property by a merchant was lawful, and did not in itself vitiate the insurance, but they held, that as the character of the cargo was more directly within the knowledge of the insured, he was guilty of a concealment in not communicating it to the insurer. A similar opinion was expressed in *Richardson v. The Maine Ins. Co.*, 6 Mass. 102. These cases appear inconsistent with the decisions in New York, which hold that the insurer is bound to presume that trade continues to flow in the same channels after war has commenced, as it did before, and should, therefore, provide against any increase of risk, which the war may have occasioned. In *Stocker v. The Merrimack Ins. Co.*, however, the cargo was described in the bill of lading as belonging to the owner of the vessel, with a view of screening its real character, and the prize court, by which it was condemned, founded their decree upon this circumstance. The decision may, therefore, be sustained, without adopting the doctrine, that the insured was guilty of a concealment in not stating, that the cargo was belligerent property. For although the owner of a vessel may be entitled to carry belligerent property, without informing the insurers, it does not follow he is equally justifiable in being silent as to his intention to cover it by false papers. There can be no doubt, that carrying papers which increase the risk, without communicating the fact to the insurer, will vitiate the insurance; *Livingston v. The Mar.*

Ins. Co., 6 Cranch, 274; 7 id. 506; unless it appear, that the use of such papers was necessary, and usual for the purposes of the voyage, insured; *Le Roy v. The United Ins. Co.*, 7 Johnson, 343. And in *Ohl v. The Eagle Ins. Co.*, 4 Mason, 390, every policy was said to carry with it a representation, that the papers of the vessel disclose her true character; and if so, the decision in *Stocker v. The Merrimack Ins. Co.*, rests on the ground of misrepresentation, as well as of concealment.

No information need be communicated to the insurer which he knows to be possessed by the insured, and does not think fit to ascertain by inquiry. Thus, where the insured stated, in applying for insurance, that a vessel which sailed before that to which his application related, had arrived, he was held not to be bound to go further, and state that she had been in port for more than a month. For as the attention of the insurer was directed to the subject, he was bound to ask for further information if he wished to obtain it; *Alsop v. The Commercial Ins. Co.*, 1 Sumner, 451. But when the insured has received information which he is not known to possess, and would not necessarily or ordinarily have, he will be bound to disclose it, without waiting for an inquiry which there is nothing to induce the insurer to make. Thus, where the contents of a letter were communicated to the insured, in which it was stated that a violent hurricane had occurred at the port of destination, about the time at which the vessel might have been expected to arrive, he was held to be guilty of concealment in not communicating this specific information to the insurer, although the latter not only knew of the storm, but that it had been one of great severity. *Moses v. The Delaware Ins. Co.*, 1 W. C. C. R. 385.

There are two general principles, which will often be found conclusive of the question, whether the omission to state a particular fact, or set of facts, has or has not been a concealment. In the first place there can be no concealment, if the existence of the fact is implied by the terms of the policy; and in the next, the assured is not bound to state any of the usual or accustomed incidents of the voyage or trade, on which the insurance is effected, even when they are in the highest degree material to the risk. *Livingston v. The Maryland Ins. Co.*, 7 Cranch, 306; *Le Roy v. The United Ins. Co.*, 7 Johnson, 203. Thus, where on the face of the policy, the insurance is effected for whomsoever it may concern, the insurer need not be told that the ostensible is not the real owner of the property, nor that it belongs wholly or in part to a belligerent. *Elting v. Scott*, 2 Johns. Rep. 157; *Buck v. Chesapeake Ins. Co.*, 1 Peters, 161. And as nothing need be told which is necessarily to be inferred from the nature of the trade, the insurers were held liable under a policy of insurance, at and from New York to the port of Sisal, with liberty to proceed to one other port on the coast of Yucatan, for a loss which happened while the vessel was taking in her lading at a bad anchorage, in the open sea on that coast. As it appeared that there were no ports, in the ordinary sense of the term, at the place of destination, and as the usual and necessary course of commerce had been pursued, a representation by the insured was held unnecessary to the validity of the policy. *Delonguemere v. The New York Fireman Ins. Co.*, 10 Johns. 120. Nor will the rights of those interested in the insurance be compromised, by the existence of false papers on board the vessel, describing property which has been represented or warranted as neutral, as belonging

to a belligerent, when it is both essential and customary for vessels carrying neutral property on the voyage insured in the policy, to be provided with papers of that description. *Le Roy v. United Ins. Co.*, 7 Johns. Rep. 343; *Livingston v. Md. Ins. Co.*, 7 Cranch, 536; *Calbreath v. Graey*, 1 W. C. C. R. 222. *Seton v. Low*, 1 Johnson's Cases, 1; *Skedmore v. Desdoity*, 2 Id. 77; *Ishal v. Rhinelander*, Id. 120, 487; *The Ins. Co. v. Bathurst*, 5 Gill & Johnson, 159. And where it appeared that steamboats of the class of that insured, were often built on the hulls of old keel boats, it was held unnecessary to inform the insurer that such was the case in the particular instance in question. *The Lexington Ins. Co. v. Power*, 16 Ohio, 324.

Whenever it becomes the duty of the insured to make a representation to the insurers, it must be made with accuracy, and with the full degree of care which a prudent man would exert in providing materials or information for the transaction of his own business. *Gates v. The Madison County Ins. Co.*, 3 Barbour, 73. Thus where the insured was aware that there had been a violent storm on the coast a few hours after the vessel sailed, a general statement that there had been blowing weather after her departure, without stating the time when or the degree of violence, was held to be such a concealment as would avoid the insurance. The insured cannot recover unless he has communicated all the knowledge within his reach, material to the risk insured, of which the insurer may reasonably be presumed to be ignorant. But if that be done, his duty will be discharged, and he will not be responsible for not stating other facts, which have been concealed from him by the bad faith or negligence of third persons, or even, as it would seem, of his own agents. *Briggs v. The Union Ins. Co.*, 1 W. C. C. R. 506; *Ruggles v. The Girard Ins. Co.*, 4 Mason, 74; *The General Ins. Co. v. Ruggles*, 12 Wheaton, 408. Thus it was held in the case last cited, that the intentional omission of the master to communicate the loss of the vessel, did not vitiate a subsequent insurance effected by the owner, there being no reason to charge him with collusion with the master. The point was, however, decided the other way in *Gladstone v. King*, 1 Maule & Selwyn, 35, on the ground of the intimate relation between the master and owner, and the necessity for making it the interest of the one, that correct information should be given by the other.

The duty of the insured to communicate everything to the insurer, which is material to the risk assured by the latter, does not necessarily terminate on his making an accurate statement of all the facts known to him at the time of the application for insurance; for if other facts come to his knowledge subsequently and before the insurance is effected, he must use due diligence in communicating them to the insurer. *Watson v. Delafield*, 2 Caines, 224, 1 Johnson, 150, 2 Johnson, 506. In this case, the insured sent letters in triplicate, by different vessels from Jamaica to Baltimore, directing insurance to be made on his effects, on board a ship in which he was about to sail for the United States. He was subsequently saved from the wreck of this ship, which was lost during the passage, by one of the vessels in which he had sent the order for insurance. And his neglect to withdraw the letter containing this order from the letter bags of the vessel, and to write immediately on landing at Norfolk, announcing the loss and countermanding the insurance, was held to be a concealment which vitiated the policy. But good faith and reasonable diligence, are all that can be

required from the insured in communicating information to the insurer, either at the time of the applying for the insurance or subsequently; and when these have been duly exercised, he will be entitled to enforce the policy against the insurers. *McLanahan v. The Universal Ins. Co.*, 1 Peters, 170; *Andrews v. The Marine Ins. Co.*, 9 Johnson 32. Thus, even in the extreme case where the insured hears of the loss of the vessel, after sending the application for insurance, it will be enough to forward the intelligence by the next mail, without resorting to any more speedy but less regular public conveyance. *Green v. The Merchants Ins. Co.*, 10 Pick. 402.

Good faith and diligence, are not, however, always sufficient to exonerate the insured from liability for misapprehension, or mistake in his communication to the insurer. The contract of insurance is based upon the representations of the insured, and necessarily fails when they are unfounded. Thus, where there is a failure on the part of the insured, to disclose a material fact within his own knowledge, the insurance will be equally vitiated, whether the omission result from design, or from ignorance of the materiality of the fact, or, the duty of disclosing it to the insurer. And although the insured cannot incur any danger from making an honest statement of his belief, or opinion, as such, and will always be safe in submitting all the evidence within his reach, to the insurer, and leaving the latter to draw his own conclusions from it; *Rice v. The New England M. Ins. Co.* 4 Pick. 439; *Allegre's adm'r v. The Maryland Ins. Co.* 2 Gill & Johnson, 136; yet, if he goes beyond this, and makes unqualified statements, he cannot get rid of the consequences of their incorrectness, by showing that they were made in good faith, and under the influence of mistaken impressions derived from third persons. *McDowell v. Frazer, Douglas*, 260. It has, notwithstanding, been doubted, whether the full severity of the rule, which makes a misstatement, or concealment fatal to the validity of a marine insurance, where the insured has acted, not only without an intent to defraud, but in the fullest good faith, is applicable to insurances against fire, when the insurer is usually much better able to protect himself by special provisions in the policy of insurance, and by actual inspection of the property insured. "In marine insurance," said BRONSON, J., in *Burnett v. Saratoga M. Ins. Co.* 5 Hill, 188, "the misrepresentation, or concealment by the assured, of a fact material to the risk, will avoid the policy, although no fraud was intended. It is no answer for the assured, to say that the error or suppression was the result of mistake, accident, forgetfulness, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract, which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless, a fraud upon the underwriter, and avoids the policy. *Bridges v. Hunter*, 1 Maule & Selw. 13; *Macdowell v. Fraser, Doug.* 269; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Comm. Ins. Co.* 10 Pick. 535; *N. Y. Bowery Ins. Co. v. The N. Y. Ins. Co.* 17 Wend. 359; 1 Marsh. (Condy) 451, 453, 465; 1 Phil. 214. 303.) The assured is bound, although no inquiry be made, to disclose every fact within his knowledge, which is material to the risk. But this doctrine cannot be applicable, at least, not in its full extent, to policies against fire. If a man is content to insure my house without taking the

trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint, that the hazard proved to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is, therefore, the practice of companies which insure against fire, to make inquiries of the assured, in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect, as in the case of a marine risk. (Sec 1 Phil. Ins. 284, 285, ed. of 1840). It is not necessary for the purpose of avoiding the policy, to show that any fraud was intended. It is enough that information material to the risk was required and withheld."

The same distinction between insurance against fire and marine insurance, was taken by Chancellor Walworth in *Snyder v. the Farmer's Ins. Co.* 16 Wend. 481; and again by the Supreme court of Kentucky in the case of *The Louisville Ins. Co. v. Southard*, 8 B. Monroe, 634. The insured are, however, held to greater strictness of disclosure, in one important particular by some of the courts of this country in fire insurances, than in those of any other description. It is well settled that in marine insurances, the insurer is not entitled to a representation of the nature of the interest of the insured, even when it is not based on property, and is wholly remote and contingent in its character. *Hancox v. The Fishing Ins. Co.* 3 Sumner, 132; *Crowley v. Cohen*, 3 B. & A. 478; *Locke v. The N. A. Ins. Co.* 13 Mass. 61; *Bartlett v. Walter*, *Ib.* 267. But it has been decided by the Supreme Court of the United States, and by some of the state courts, that in the case of insurances against fire, the nature and extent of the interest insured, are material to the risk, and must be represented truly to the insurer. *The Columbian Ins. Co. v. Lawrence*, 2 Peters, 25; 10 Id. 507; *Carpenter v. The Washington Ins. Co.* 16 Id. 495; *Catron v. The Tennessee Ins. Co.* 6 Humphreys, 170; *The Illinois M. F. Ins. Co. v. The Marseilles Man. Co.* 1 Gilman, 236. The courts of New York and Massachusetts have refused their assent to this doctrine, and hold that the insured is not bound to communicate the nature of his interest in the property, whether the insurance be against fire, or a marine insurance, unless he is called upon to do so by the insurer, when of course, he will be bound to state it accurately and fully. *Tyler v. The Etna F. Ins. Co.* 12 Wend. 507; *The Etna F. Ins. Co. v. Tyler*, 16 Id. 385; *Niblo v. The N. A. F. Ins. Co.* 1 Sandford, S. C. R. 551; *Bixby v. The Frankford Ins. Co.* 8 Pick. 86; *Strong v. The M. Ins. Co.* 8 Id. 40; *Curry v. The Commonwealth Ins. Co.* 11 Id. 535; *Fletcher v. The Com. Ins. Co.* 18 Id. 417. And there can be little doubt that these decisions are consistent with the principles, both of fire and marine insurance, as generally understood and applied in this country and in England.

When the representations of the insured are substantially true, the policy will not be vitiated by mistakes in immaterial particulars. A warranty on the other hand, must be literally fulfilled, and any breach, either in form or

substance, will avoid the insurance. It is therefore, important to distinguish between a warranty and a representation. A representation is a collateral statement of a fact material to the contract, while a warranty is a stipulation forming part of the contract, and is construed as a condition. All statements contained in the policy itself, are *prima facie* warranties, while extraneous statements, are regarded merely as representations, even when made formally in writing, and in answer to written or printed questions, propounded by the insurers. But although statements, which are not introduced into the policy, are ordinarily collateral to the contract, they may undoubtedly be incorporated with it by express agreement, and will then cease to be mere representations, and become warranties. A reference in the policy to a representation, will not, necessarily, make it a part of the contract, or render it absolutely binding on the insured, for the intention may be merely to prove its existence as a representation, and not to give it another and more unfavorable character. *The Jefferson Ins. Co. v. Cothral*, 7 Wend. 72; *Snyder v. The Farmers' Ins. Co.* 13 Id. 92; 16 Id. 481; *The Louisville Ins. Co. v. Southard*, 8 B. Monroe, 634. But when the representations of the insured are expressly referred to in the policy, as forming part of the contract, they will acquire the character of warranties, and invalidate the policy, unless strictly complied with, whether they are or are not material to the risk assumed by the insurer. *Jennings v. The M. Ins. Co.* 2 Denio, 75; *Murdock v. The Chenango Ins. Co.* 2 Comstock, 210; *Routledge v. The Chenango Ins. Co.* 3 Hill, 501. And even when the reference to the statements of the insured, is not such as to render them warranties, as when they are expressly referred to as representations, it will still be *prima facie*, if not conclusive evidence of their materiality to the risk, and render any misrepresentation or concealment in making them, fatal to the validity of the insurance. *Houghton v. The Man. M. F. Ins. Co.* 8 Metcalf, 114; *Burrill v. The Saratoga M. F. Ins. Co.* 5 Hill, 188.

Although the representations of the assured form the basis of the contract with the insurer, they do not enter into, or form part of the contract itself. When coupled with evidence of fraud, they will sustain an action in tort, but cannot serve to support any suit founded in contract. Their effect is purely negative, for they impose no obligation on the insured, although they may invalidate his claim against the insurer. This has given rise to the inference, that as a promissory representation is ineffectual as a promise, it must be equally so as a representation, and may be violated by the insured, without impairing the insurance. Thus, where the insured gave a verbal promise at the time of effecting the insurance, to discontinue the use of an open fireplace in the premises insured, and use a stove, the court of errors reversed the decision of the Supreme Court, and held that the failure to comply with this promise, was not a bar to a recovery against the insurer. *Alston v. The Mechanic's F. Ins. Co.* 1 Hill, 510; Id., 329. The ground taken by the court was, that if the promise was meant to be a part of the contract, it should have been introduced into the policy, and if it was not, it could not bind the insured. The law was held the same way in *Whitney v. Haven*, 13 Mass. 172, and *Bryant v. The Ocean Ins. Co.* 22 Pick. 200. And the reasoning on which these cases proceed, would be conclusive if the effect of a representation, were the same on a policy of insurance, as on other written contracts.

Nothing is better settled, than that when an ordinary contract is reduced to writing, evidence cannot be given of antecedent or cotemporaneous statements, or stipulations not embraced in the writing, unless for the purpose of proving mistake or fraud. If this rule were applied to policies of insurance, it would exclude all representations, whether present or promissory, which are not incorporated with the contract, or shown to be fraudulent. But the effect of the representations of the insured upon the policy of insurance, is so far an exception to the ordinary rules of evidence, that although they form no part of the agreement between the parties, they describe and define the nature of the risk insured, and control the contract by specifying and ascertaining its subject matter. And when thus regarded, there seems no sufficient reason why they should be limited to the present, and should not extend into and embrace the future. It must be remembered, that the subject matter of the contract of insurance is risk; and that the risk depends upon the nature and condition of the property insured. It has been held in some cases, that even when no representations are made to the insurer, any change in the property, which increases the risk, will avoid the insurance, unless it is manifestly within the scope of the powers, expressly or impliedly reserved to the insured. *Jolly v. The Baltimore Eq. Soc.* 1 Harris & Gill, 294. And it would seem to follow, that when the insured gives a specific description of the risk on which he requests insurance, any subsequent variation by which it is materially increased, will discharge the insurer. It can hardly be supposed that if property be insured as a dwelling house, it can subsequently be converted into a carpenter's shop, without discharging the insurers, or that they would be liable for the condemnation of a cargo represented as neutral, and subsequently filled up with goods of a belligerent character. It may always be shown that a contract is inapplicable to the subject to which it is sought to apply it, and the peculiarity of the contract of insurance seems to be, that the existence of a written agreement, does not exclude parol evidence of the representations of the insured, when offered, not for the purpose of contradicting the writing, but of showing the nature of the risk to which it relates. Whether therefore, these representations are present, or promissory, they would seem to have the same character, and to be equally admissible. It was said in *Stetson v. The Mass. M. F. Ins. Co.* 4 Mass. 330, that when the extent and nature of the risk, depends upon the continuance of the premises in the condition in which they were represented, they cannot be altered to the detriment of the insurer, without invalidating the insurance. And it seems to be admitted, even in the more recent decisions, that where representations are referred to in the policy, they must be substantially fulfilled throughout the continuance of the risk insured, although not so far incorporated with the contract, as to have the character of a warranty. (Supra.)

The point has not been expressly or finally decided in England, but there seems little doubt that statements made to the insurer, are equally binding, whether they relate to the present or future condition of the property insured; *Edwards v. Fortner*, 1 Campbell, 330; *Dennistown v. Lillie*, 3 Bligh, 202. But it is well settled, both in that country and in this, that expressions of belief, expectation or intention, are not binding on the insured, and that their non-fulfilment will not avoid the insurance, unless they are made in bad faith, and with the view of misleading the insurer;

Catlin v. The Springfield F. Ins. Co., 1 Sumner, 434; Tillon v. The Mc. Ins. Co., 7 Barbour, 570; Allegre v. The Maryland Ins. Co., 2 Gill & Johnson, 136. All such representations have in fact but one character, and turn solely on the mental condition of the party who makes them. If that be stated truly at the time, the statement cannot be falsified by the subsequent course of events. And the rule that in the absence of fraud, the insured is not liable for any thing more than the truth of the statements which he makes, as he makes them, applies with equal force, whether he states the opinion of others, or his own. A representation, therefore, that the vessel insured, is said to sail remarkably fast, can have no effect on the insurance, unless it is shown, either that she had not the reputation of being a fast sailer, or that the insured knew that she did not deserve it; Tidmarsh v. The Wash. Ins. Co., 4 Mason, 439.

It is well settled, that unless a representation or concealment is material, it will not avoid the policy; Curry v. Com. Ins. Co., 10 Pick. 535; Strong v. Manufacturers' Ins. Co., Id. 40; Farmers' Ins. and Loan Co. v. Snyder, 16 Wend. 481; Tyler v. Aetna Insurance Company, 12 Id. 507; 16 Id. 385; Flinn v. Headlam, 9 B. & C. 693. When, therefore, the insurer sets up a representation or concealment by the insured, in bar of an action brought on the insurance, he must prove its materiality, as well as its existence; Fiske v. The New England Ins. Co., 15 Pick. 310. In some cases, however, the nature of the concealment may be sufficient proof of its materiality, without the aid of extrinsic evidence; Elkin v. Janson, 13 M. & W. 655; and it would seem that in general, the statement of a fact by one party, as a ground for action by another, must be some evidence of its materiality to the contract between them. And there can be no doubt, that where the policy contains a proviso, that any concealment or misrepresentation in the answers of the insured to the questions put to him by the insurer, shall avoid the insurance; the burden of excusing or explaining a misstatement, will rest on the former; Burrett v. The Saratoga M. Ins. Co., 5 Hill, 188; Gates v. The Madison County M. Ins. Co., 3 Barb. 73.

It was held by the Supreme Court of the United States, in Hodgson v. The Marine Ins. Co., 5 Cranch, 100, that as a misrepresentation or concealment does not invalidate an insurance, unless it is fraudulent or material to the risk insured, a plea, setting forth that the insurers had been induced to insure and value the vessel at a much higher rate than she was worth, by misstatements as to her age and tonnage, was bad on demurrer, for want of a positive averment of materiality, or of fraud. But it has been repeatedly held in this country, that the real value of the property, as compared with the value insured, may be material to the risk, in the case of insurances against fire, if not of marine insurances, by diminishing the interest of the insured in its preservation; The Columbia Ins. Co. v. Lawrence, 2 Peters, 25; Carpenter v. The Washington Ins. Co., 16 Peters, 495. "Generally speaking," said Marshall, C. J., in The Columbia Ins. Co. v. Lawrence, "insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects it ought to be communicated to him. Underwriters do not rely so much upon the princi-

ples, as on the interest of the assured; and it would seem, therefore, to be always material, that they should know how far this interest is engaged in guarding the property from loss."

Thus, where the insurers refused to insure the property, on the ground that it was already insured for as much as it was worth, and subsequently altered their determination, on being told that additional buildings had been erected since the first insurance, they were held to be discharged by the untruth of this statement, whether it were or were not fraudulent on the part of the insured; 1 Story, C. C. R. 56. And the presumption that the interest of the insured in the safety of the property, is material to the risk assumed by the insurers, has been carried in some cases to the extent of deciding that his title must be represented truly to the insurer at the time of effecting the insurance, because it has a direct and necessary bearing on his interest, (*supra*, 550.) But a different view has been taken on this point by the courts of New York and Massachusetts, and it has been decided that although the insured must prove that he has some interest or title, in order to recover against the insurers, the nature or extent of his title need not be disclosed in the application for insurance. It has, notwithstanding, been held in New York, that the character of the insured may be material to the risk assumed by the insurer, and that when the plaintiffs effected a reinsurance with the defendants, in consequence of learning that the owner of the property covered by the original insurance, was suspected of having set fire to his house on a former occasion, their failure to communicate this information to the defendants, vitiated the policy executed by the latter; *The N. Y. Bowery F. Ins. Co. v. The N. Y. Ins. Co.*, 17 Wend. 359.

The materiality of a representation or concealment must be judged by the state of facts at the time, and not by what occurs subsequently; *Marshall v. The Union Ins. Co.*, 2 W. C. C. R. 359. Thus, where a foreign prize court bases a decree condemning the property insured, upon circumstances which did not justify the condemnation, and would not have occasioned it in the ordinary course of events, the insurance will be valid, although these circumstances have not been disclosed to the insurer; *Sperry v. The Delaware Ins. Co.*, 2 W. C. C. R. 249; *Earl v. Shaw*, 1 Johnson's Cases, 315; *Daguet v. Rhineland*, 2 Id. 476. But as the materiality of a concealment to the risk, is a question of fact and not of law; the insured cannot justify a failure to disclose special circumstances, which have been made a cause of condemnation by the ordinances of a foreign power, on the ground that these ordinances or the decisions under them, are in violation of the law of nations. The only question in such cases is, as to whether the facts withheld from the insurer increased the risk, and could have been known to do so by the insured; *Kohne v. The Ins. Co. of North America*, 6 Binney, 224; *Marshall v. The Union Ins. Co.*, 2 W. C. C. R. 357; *Sperry v. The Delaware Ins. Co.*

It was held in *Hazard v. The New England M. Ins. Co.*, 1 Sumner, 218, that where the application for insurance was made by a letter containing a representation, which was true according to the usage of the place where it was written, but not of that where it was received, the insurance was not binding, because the minds of the parties had not met on the same point, or assented to the same agreement. But this decision was subsequently reversed in error, on the ground that the representation was extrinsic to the contract, and that

the words of a proposition ought to be interpreted in the sense in which they are understood by the person who makes it; *Hazard v. The New England Ins. Co.*, 8 Peters, 557.

The materiality of a representation or concealment is ordinarily a question of fact and not of law, and must therefore be submitted to the jury, and not withheld from them or determined by the court; *Livingston v. The Maryland Insurance Co.*, *M'Inahan v. The Universal Ins. Co.*, *Livingston v. Delafield*, 1 Johnson, 522; *The N. Y. Firemen's Ins. Co. v. Walden*, 12 Id. 538. Questions of law may however enter into the determination of every question of fact, and where the bearing of a concealment on the risk, depends on the construction of a foreign law or ordinance, the jury should be properly instructed, and their verdict set aside, if contrary to the charge of the court; *Kohne v. The Ins. Co. of North America*, 6 Binney, 224.

The right to call in persons acquainted with the business of insurance, to give their opinion as to the materiality of a misrepresentation or concealment, was conceded without opposition, in *Marshall v. The M. Ins. Co.*, 2 W. C. C. R. 558, and *Moses v. Murgatroyd*, 1 Id. 386; but in *The Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72, where the point was much discussed, the court came to a different conclusion. The question at issue, was whether the risk had been increased by the erection of a boiler-house, adjoining a steam saw-mill covered by the insurance, and it was held that even if the opinions of witnesses conversant with the construction and management of such mills, were admissible in evidence, yet that persons who had no other knowledge of the subject than that derived from their business as insurers, could not be allowed either to say what they thought on this point, or whether they would have insured the mill at the same premium after the boiler-house was erected, as before. The only cases in which opinion is evidence, were said to be those where the nature of the question at issue is such, that the jury are incompetent to draw their own conclusions from the facts, without the aid of persons whose skill or knowledge is superior to their own; *Norman v. Wells*, 17 Wend. 136; *Fish v. Dodge*, 4 Denio, 311. The general principle thus laid down is well settled, and there is no sufficient reason for excepting the contract of insurance from its operation. Witnesses may state their belief or impression as to the value or usual market price of a class of things, when the value of a particular thing belonging to that class is in question, because such testimony is the best which the nature of the case admits of, and is moreover a matter of fact rather than of opinion; *Brill v. Hagler*, 23 Wend. 354. The same reasons apply where artizans are called in to state the results of their experience in their art, as where a mason is asked how much time must elapse before the walls of a new house are sufficiently dry to be fit for habitation; *Smith v. Gregerty*, 4 Barbour, 614. But persons conversant with a particular business, cannot be asked their opinion of the extent of the injury occasioned by its interruption, or by the withdrawal of the personal care and superintendence of the plaintiff, during an illness occasioned by the accident for which he brings suit; *Lincoln v. The Saratoga and Schenectady Rail Road*, 23 Wend. 425; *Giles v. Toole*, 4 Barbour, 261. Although therefore the master of a vessel or the owner of a factory, may be entitled to express an opinion, whether a particular mode of constructing one or equipping the other, increases the danger of loss at sea, or by fire; yet this can hardly be

said of the president or officers of an insurance company, who may be well acquainted with the details of their own business, but can not be presumed to have such a special knowledge of the different risks which they insure, as make their conclusions a proper foundation for those of the jury.

II.

[*287]

*RICE v. SHUTE.

EASTER—1 GEO. 3 B. R.

[REPORTED, BURR. 2611.]

In an action *ex contractu*, the non-joinder of a co-contractor as defendant can be taken advantage of by plea in abatement only.

THIS was an action brought against one partner only, on a partnership account.

At the trial (which was before Mr. Justice Bathurst,) the defendant gave evidence that there was another partner, named Cole, who was not joined in the action, as a defendant; which he ought to have been, as the plaintiff knew the fact to be so.

Whereupon the plaintiff was nonsuited.

Mr. Serjeant Burland moved, upon the 5th of this instant, May, 1770, on behalf of the plaintiff, to set aside this nonsuit, and to have a new trial. It appeared upon the Judge's report that the plaintiff could not but know of the partnership: for that all the letters shewed, and it was even stated upon the very account itself, "that Cole and Shute were partners." So that the plaintiff was not surprised by the defendant's producing this evidence of a partnership: on the contrary, he had brought his action in this manner against the present defendant alone, with a deliberate design to take some advantage of him.

The Serjeant's objection was, that this matter could not be given in evidence, but ought to have been pleaded in abatement.

The court gave him a rule to shew why the nonsuit should not be set aside, and a new trial had.

[*288] *Mr. Serjeant Davy now, on this 14th of May, shewed cause.

He said, it would be very mischievous, if a person having a demand upon a partnership should be left at liberty to cull out one particular partner, and bring an action against him alone, leaving out the rest of the partners.

In the case of *Boson v. Sandford*, 2 Salk. 440, the court held "that all the part-owners of the ship must be joined;" and they gave judgment for the defendant, because all the owners were not joined.

This may undoubtedly be pleaded in abatement: but it is not necessary that in all cases whatsoever it must be pleaded in abatement. In some cases, and under certain circumstances, and particularly where it is within the plaintiff's own knowledge "that there are more partners," it may be given in evidence, without pleading it in abatement.

Here the plaintiff knew that Cole was partner with the defendant. He was not surprised by this evidence: he acted with his eyes open, and with a deliberate design to take an unfair advantage.

If the defendant had pleaded in abatement, he must have shewn who his partners were: and then the plaintiff, being thus informed who they were, must have brought a new action against them all. But in the present case the plaintiff already knew, of his own previous knowledge, "who were the partners:" and, therefore, he was as much obliged to bring his action originally against them all, as he would have been obliged to bring a new action against them all, if he had come at that knowledge only by the defendant's plea in abatement. As soon as he knows who the partners are, he is obliged to bring his action against them all, however he may come at this knowledge. He cannot, after having obtained this knowledge, select one, and omit the rest. Its being pleadable in abatement shews that he cannot omit any one, if in fact there are more than one. And if he does it before he brings his action, it is more expeditious and more reasonable, that he should join them all at first.

And though it may have been heretofore holden, "that it could not be given in evidence;" yet that was only an *opinion at Nisi Prius: [*289] there never has been any such determination of this court, or any where else in your lordship's time. And if it has been ever holden "that it was sufficient to make the acting partners defendants," the rule has been since established, "that all must be joined, if known."

He, therefore, prayed that the nonsuit might be recorded.

Serjeant Burland was proceeding to support his rule; but was stopped by Lord Mansfield, as not being necessary.

Lord Mansfield—

To be sure, a distinction is to be found in the books, between *torts* and *assumpsits*—"that in torts, all the trespassers need not be made parties: but in actions upon contract every partner must be made a defendant." Many nonsuits, much vexation, and great hinderance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shews that convenience, as well as justice, lies the other way. All contracts with partners are joint and several: every partner is liable to pay the whole. In what proportion the others should contribute is a matter merely among themselves. A creditor knows with whom he dealt: but he does not know the secret partner. He may be nonsuited twenty times before he learns them all; or driven to a suit in equity, for a discovery, "who they are." It is cruel to turn a creditor round, and make him pay the whole costs of a nonsuit, in favour of a defendant who is certainly liable to pay his whole demand; and

who is not injured by another partner's not being made defendant; because, what he pays, he must have credit for, in his account with the partnership. Upon this point, I very early consulted the three other Judges of this Court, Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot. They were all of opinion, "that the defendant ought to plead it in abatement;" he then must say "who the partners are." If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie [290] by, and put the plaintiff to the delay and expense of a trial, and *then set up a plea not founded in the merits of the cause, but on the form of proceeding. The old cases make no distinction between the plaintiff's knowing of a partnership or not. Here, indeed, the plaintiff knew of it: but the present defendant was the person with whom he transacted. He must be allowed this, in his account with the other partners. No injustice is done to the defendant, by allowing the plaintiff to recover: but great injustice is done to the plaintiff, by allowing the nonsuit to stand; and, what is still worse, a mode of litigation allowed which is highly inconvenient.

Mr. Justice *Ashton* concurred.

He said, that as his lordship had gone through the whole, he would not repeat what had been already mentioned: but he observed, that there was no necessity for admitting it to be given in evidence; nor any inconvenience in pleading it in abatement; and the not pleading it in abatement seemed to be a waiver of the objection.

The case in which Mr. Justice Yates tried the cause was a contract about wood: but it was never decided here by the court.

He took notice, that, upon a joint bond, the action cannot be brought against one of the obligors only. This was the point of a case in Michaelmas Term, 1750, 24 G. 2, in this court; which was argued by the now Lord Lifford; the name of it was *Horner v. Moor*.† [† I have note of this case. "Non est factum" was pleaded: and the jury found it to be the deed of both. Mr. Sergeant Hewitt moved in arrest of judgment, *upon the face of the declaration*. He acknowledged, that it could not have been moved in arrest of judgment, if it had not appeared upon the face of the declaration: *but it there appeared, that both had sealed the obligation, and both were living. He owned, that if it had not appeared upon the face of the declaration, it must have been averred.* Mr. Ford, who was for the plaintiff, gave it up; and the judgment was arrested.]

Mr. Justice *Willes* and Mr. Justice *Blackstone* being both of the same opinion,

The whole court were unanimous that the nonsuit ought to be set aside, and a new trial had.

Rule made absolute.

*[N. B. There was a case solemnly argued and determined in the Common Pleas upon this point, in Easter Term, 1774, 14 G. 3, and they held, upon the authority even of cases in the year-books, "that it should be pleaded in abatement." The name of it was *Abbot v. Smith*. After argument, it stood for the opinion of the court: and Lord Chief Justice De Grey afterwards delivered their opinion. He observed, that this was not a

novel doctrine or invention; in proof of which he cited Trin. 9 E. 4, 24, b., 10 E. 4, 5, a., et post; 36 H. 6, 38; and Book, Brief, 37. And he took notice, that this case, just now reported (of Rice v. Shute,) went on the general principle that the court then went upon in the case of Abbot v. Smith.*

I was favoured with an account of this case of Abbot v. Smith, by a very learned Judge of the court in which it was determined.]

ACCORDINGLY it has ever since been held that the non-joinder of a joint-contractor, as defendant in an action ex contractu, must, if advantage is to be taken of it at all, be pleaded in abatement. {S P. Zeile and Becker v. Executors of Campbell, 2 Johnson's Cases, 382; Seymour v. Minturn, 17 Johnson, 169; Williams v. Allen, 7 Cowen, 316; Gay v. Cary, 9 id. 44; Witmer et al. v. Schlatter et al., 15 Sergeant & Rawle, 150; S. C. 2 Rawle, 359; Moore's Executors v. Russell, 2 Bibb, 442; Robinson v. Robinson, 1 Fairfield, 240; Winslow v. Merrill, 2 id. 127; White v. Cushing, 30 Maine, 267; Mershon et al. v. Hobensack, 2 Zabriskie, 373, 380; Barnett & Woolfolk v. Watson & Urquhart, 1 Washington, 372; &c. The opinion of Judge WASHINGTON, in Jordan v. Wilkins, 3 Washington, C. C. 110, that where the declaration is general, and there is no bill of particulars, so that the defendant has no notice that he is sued on a joint contract, non-joinder is ground of non-suit, is expressly overruled by Chief Justice MARSHALL in Barry v. Foyles, 1 Peters, 311; and is again overruled in Grubb v. Foltz, 4 Watts & Sergeant, 549. If the executor of one of two obligors be sued, the fact that the other obligor survives or survived the testator, cannot be given in evidence under the general issue, or the plea of payment or of covenants performed, &c.; but if the objection appear on the record it is fatal to the action, and if it appear not in the declaration, it should be put on the record by plea in abatement, or rather by special plea in bar. Geddis and another v. Hawk, Executor of Hawk, 10 Sergeant & Rawle, 33; Horton and Wife v. Cooke, 3 Watts, 40.} The authorities on this subject are cited, and

the subject itself elaborately discussed, in the notes to Cabell v. Vaughan, 1 Wms. Saund. 291, where it is remarked that the observation of Mr. J. Aston, respecting joint bonds, is too large, and that he must be understood to have meant that the action cannot be maintained against one co-obligor *if the other plead in abatement*, except indeed in such a case as that of Moore v. Horner, as explained by the reporter, where the fact that two persons, both of whom executed the bond, are still living appears on the face of the record. {If the declaration does not show that others were jointly bound, but on *oyer*, the deed contains the names of others as co-obligors, you cannot demur, because from the instrument itself as set forth on *oyer*, it does not appear that the others sealed: you must therefore by plea in abatement aver that the others sealed, and in such case must add that they are still alive, for every plea in abatement is taken strictly against him who pleads it; see Dauchy v. Smith & Olmsted, Kirby, 106; McArthur v. Ladd, 5 Hammond's Ohio, 514; Morgan v. Crim, 1 Monroe, 129; Allen v. Lockett, 3 J. J. Marshall, 161; but where the fact that another was jointly bound and liable, whether by deed, simple contract, or matter of record, appears on the face of the declaration, the better opinion is, *against* the view of Mr. Sergeant Williams, that the other is presumed to be still living, and that the declaration may be demurred upon, or judgment arrested, or reversed on error, *unless* the plaintiff aver in his declaration that the other is dead. In Gilman v. Rives, 10 Peters, 298, it was decided that in suits on recognizances, and judgments, and other matters of record,

* See 2 Bl. 947, where this case is reported.

where one is sued, and the writ or declaration shows that another was jointly bound, it is fatal on demurrer or arrest of judgment, if the plaintiff does not aver that the other is dead; though a distinction is suggested between records and deeds. In Virginia, it has repeatedly been decided, that in suits on bonds, where the declaration shows that another was jointly bound and does not aver that he is dead, it is bad on demurrer or writ of error; *Leftwich and others v. Berkley*, 1 *Hening & Munford*, 61; *Saunders v. Wood*, 1 *Munford*, 406; *Newell v. Wood*, id. 555; *Newman v. Graham*, 3 id. 187: and see *Winslow et al. v. Commonwealth*, 2 *Hening & Munford*, 459, of which the syllabus is wrong. And in the case of promissory notes, it was decided by C. J. MELLE, in the case of *Harwood et al. v. Roberts*, 5 *Greenleaf*, 441, that when the declaration shows that more were parties than are sued, the plaintiff must allege that the others are dead, or judgment will be reversed: and in case of simple contracts generally, the dictum of Chief Justice MARSHALL in *Barry v. Foyles*, 1 *Peters*, 311, 317, is, that "if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained." There are, however, several decisions and opinions to the contrary. In *Mackall v. Roberts*, 3 *Monroe*, 130, in an action on a joint note against one of the makers, the court below on demurrer gave judgment for the defendant; and on writ of error, this was reversed, the court saying that in cases where all the persons are not joined as defendants, who ought to have been joined, the law is well settled that no advantage can be taken of the non-joinder, but by plea in abatement; and the same practice is approved in *Harrow v. Dugan*, 6 *Dana*, 341, 342, and *Tharp v. Farquar*, 6 *B. Monroe*, 3; and more expressly decided in *Commonwealth for M'Creery v. Davis*, 9 *B. Monroe*, 123. In *Nealley v. Moulton*, 12 *New Hampshire*, 485, the argument of the court is, that in no case, not even where the fact that there is a joint-contractor living appears on the face of the pleadings, can the non-joinder be taken advantage of, otherwise than by plea in abatement. In *Lillard v. The Planter's Bank*, 3 *Howard's Mississippi*, 78, it is admitted that if it appear in the declaration that another party jointly contracted and is

still living, the defendant may demur; but it is said that if it does not appear there that he is still living, there must be a plea in abatement; and the dictum in *Geddis and another v. Hawk*, 10 *Sergeant & Rawle*, 33, 38, is to the same effect. In *Burgess v. Abbott*, 1 *Hill's N. Y.* 476, which was debt against one, on a judgment of a court of another state against two, where it did not appear expressly that the other was living, on general demurrer, it was decided in the Supreme Court by COWEN, J. "not without some hesitation," that objection could not be taken by demurrer unless it appeared in the pleadings that the other was alive; and he thought there could be no difference between scire facias on a record, and debt on a record; and the judgment in favour of the plaintiff in this case was affirmed in the court of errors; one Senator holding that the objection could be taken advantage of, only by plea in abatement, and the chancellor holding that though the objection might be taken on special demurrer, it could not on general demurrer, unless it appeared affirmatively that the other was alive, or unless in case of scire facias on a record; *Burgess v. Abbott*, 6 id. 135. In *The State of Indiana v. Woram*, id. 33, it was decided by the Supreme Court that the non-joinder of a defendant corporation could not be taken advantage of on general demurrer, where it did not appear affirmatively that the corporation was still in existence. In *Converse v. Symms*, 10 *Massachusetts*, 377, it is decided that judgment will not be arrested when the non-joinder is disclosed by *plea in bar*. In *Cocks v. Brewer*, 11 *Meeson & Welsby*, 51, where it was decided in debt on judgment, that non-joinder is not a ground of *variance*, there is a dictum of Lord ABINGER, C. B. that the objection could be taken advantage of only, if at all, by plea in abatement, but it was admitted that in scire facias on a judgment the omission of a defendant, without the cause being stated, as that he is dead or the like, is demurrable, because the sci. fa. is a quasi continuation of a matter of record. In *Morrison v. Trenchard*, 4 *M. & Gr.* 709, there is an *obiter dictum* of Tindal, C. J., that if the promise appear in the declaration to be joint, and the suit be against one, it would be ground only for plea in abatement, and not for special demurrer; but the remark was extra-judicial as the de-

claration in that case showed that the promise was joint and several. In *Needham et al. v. Heath*, 17 Vermont, 224, 225, which was an action of debt upon a recognizance, where the plaintiff having set out the recognizance in the declaration, which showed that there was another cognizor, without its appearing whether or not he was alive; the declaration was adjudged to be bad on general demurrer. And Bennett, J., delivering judgment, in that case, said, "The law is well settled, that, if one obligor be sued alone upon a joint-bond, and it appear from the declaration that the other obligor is living, the declaration is ill upon demurrer. It would seem, however, that, in such case, unless it appears from the declaration, or the subsequent pleadings of the plaintiff, that the other obligor is still living, the objection cannot be reached by a demurrer, a motion in arrest, or a writ of error. It is proper matter to be pleaded in abatement. But the doctrine which has been applied to joint obligations, does not seem fully to have been extended to cases of joint recognizances, judgments, and other matters of record. In these cases, it has been held, that, if it appear from the declaration, or other pleadings of the plaintiff, that there is another joint debtor, who is not sued, the objection may be taken advantage of by a demurrer, or upon a motion in arrest of judgment, although it is not averred that he is still living." But in a later case, in the same court, this supposed distinction was discredited. It was held that in *scire facias* on a recognizance, the non-joinder of parties could not be taken advantage of upon trial, on a plea of *nul tiel record*. And Redfield, J., giving judgment, said, "The rule and the reason for it, seem to us to be the same, whether the declaration be upon a contract of record, or upon any other contract; as, for example, a bill, note, or bond. And in all these cases, it is well settled that the omission of a joint contractor can only be taken advantage of by plea in abatement, unless such omission appear upon the record, that is, the record of the very suit upon trial; and in that case it may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error. And in the present case, if the defendants had cravedoyer of the record declared upon, and, after setting it out, had demurred, the defect complained of, ap-

pearing of record, must have been fatal. It is said, in some of the books, that it must appear of record, that the joint contractor omitted is *still living*, in order to take advantage of the non-joinder by demurrer, &c. : but this, I apprehend, is to be presumed, for at least seven years, unless the contrary appear." *McGregor v. Balch et al.*, id. 563, 567. These opinions are so discordant and uncertain, that they cannot be considered as overthrowing a principle so clearly founded in reason, as that where a joint liability appears on the declaration in a suit against one, the non-joinder is fatal on general demurrer, or in arrest of judgment.} There are some cases in which the non-joinder of a joint contractor cannot be taken advantage of in any way whatever. Thus, though it seems to be assumed, in the principal case, that the non-joinder of a secret partner might be ground of a plea in abatement; and was indeed, afterwards, so decided in *Dubois v. Ludert*, 8 Taunt. 9; 1 Marsh. 246; yet that case was soon disregarded in practice and at last solemnly overruled, *Mullet v. Hook*, 1 M. & Mal. 88; *De Mautort v. Saunders*, 1 B. & Adol. 398; and, therefore if issue be joined upon a plea in abatement of non-joinder, the jury are directed to consider *with whom had the plaintiff reason to believe that he contracted*. [*Bonfield v. Smith*, 12 M. & W. 405, where the judge left it to the jury to say *if the defendant gave the plaintiff's reason to believe that he alone constituted the firm*.] {See also *Peck v. Cowing*, 1 Denio, 222; and *Alexander v. McGinn*, 3 Watts, 220.}

Statute 9 G. 4, c. 14, commonly called Lord Tenterden's Act, and which requires a writing signed to take a debt out of the statute of limitations, further enacts that the written acknowledgment of one joint contractor shall not charge another, and directs that if non-joinder of a joint-contractor be pleaded in abatement, and it appear that by reason of the St. 21 Jac. 1, cap. 16, or of that act, no action could be maintained against the person whose non-joinder is pleaded, the issue shall be found against the party pleading such plea. By stat. 3 & 4 W. 4, c. 42, s. 9, the bankruptcy and certificate, or the discharge under an insolvent act of a co-contractor, may be replied to a plea of abatement of his non-joinder. And that act throws considerable impediment in the way of such pleas, by enact-

ing, in sec. 8, that no such plea shall be allowed, unless the co-defendant, whose non-joinder is pleaded, be therein stated to be resident within the jurisdiction of the court, and unless the place of his residence be stated with convenient certainty in an affidavit, verifying such plea. The effect of this will be to put an end [*292] to a very considerable *inconvenience; for it was held that where there were two defendants in one action, one of whom resided out of the jurisdiction of the court, and so could not be served with process, it was necessary that he should be outlawed before declaring against the other. Now, however, as the non-joinder of the defendant residing out of the jurisdiction cannot be pleaded in abatement, the plaintiff's course will be to omit him altogether, and sue the one residing within the jurisdiction. [And if one of several co-contractors reside out of the jurisdiction, there can be no plea in abatement for non-joinder of those who are within the jurisdiction, *Joll v. Lord Curzon*, 4 C. B. [*292a] 249. The affidavit is to state the *domicile, or home of the party, and not the spot where he actually is at the time, *Lamb v. Smythe*, 15 M. & W. 433; see *Wheatley v. Golney*, 9 Dowl. 1019. Where it contained a false statement of residence, the plea was set aside, *Newton v. Stewart*, 4 D. & L. 89.] The same statute further enacts, at sec. 10, that whenever such a plea is pleaded, and the plaintiff, without proceeding to trial on an issue thereon, commences a new action, joining the party named in the plea as a joint-contractor, if it turn out that all the original defendants are liable, but that some person or persons named in the plea in abatement are not *liable as a contracting party or parties*, the plaintiff is to succeed against those who are liable; and though the party who is not liable is to recover his costs against the plaintiff, the plaintiff is to be allowed them as costs in the cause against the party who pleaded the plea in abatement. [As to the course of proceeding at the trial under this section, see *Beale v. Moulds*, 1 Car. & K. 1.] By 1 W. 4, c. 69, sec. 5, any one or more of mail-contractors, stage-coach proprietors, or common carriers, may be sued in his, her, or their name or names only, and no action or suit for damages, for loss or injury to any parcel, package, or person, shall abate for non-joinder of any co-contractor or co-proprietor.

[One consequence of the doctrine established in *Rice v. Shute* is that if one joint contractor sued alone, and not pleading in abatement, happens to have a defence grounded on the joint nature of the debt, such, for instance, as a set-off, he must and may plead, averring the debt to have been joint, *Stackwood v. Dunn*, 3 Q. B. 823. Another is, that a judgment, (though unsatisfied) against one of two joint, (not joint and several) debtors, is a bar to an action against the other, *King v. Hoare*, 13 M. & W. 494. There is a distinction between *scire facias* and other forms of action in this respect: *scire facias* being a proceeding to have execution of a record must follow its terms and include all the defendants, or account for their omission; but debt on a record stands on the same ground as debt on contract; and the omission of one of the original defendants is not a variance at the trial of an issue upon nul tiel record in such an action, *Cocks v. Brewer*, 11 M. & W. 51. A statutory *scire facias*, founded on a judgment against the public officer of a joint stock company, stands upon quite a different footing, and is not open even to a plea in abatement for non-joinder of other members than the one proceeded against, *Fowler v. Rickerby*, 2 Man. & Gr. 760, 3 Sc. N. R. 138, S. C.]

{In actions, *ex delicto*, no objection can be taken on account of non-joinder of defendants, for in torts, each is answerable for the act of all. *Livingston v. Bishop*, 1 Johnson, 290; *Rose v. Oliver* and others, 2 id. 365. Actions called quasi *ex contractu*, that is, where the form of the action is in tort, but the liability springs from a joint contract or interest, are like actions *ex contractu*; and non-joinder of a defendant is matter in abatement: *Allen v. Sewall* and others, 2 Wendell, 327; *Low v. Mumford & Mumford*, 14 Johnson, 426; see *Patton, Kennedy & Foster v. Magrath & Brooks*, Rice, So. Car., 163; but this principle must be considered as greatly shaken, if not wholly overruled, by the case of *Bank of Orange v. Brown* and five others, 3 Wendell, 158; where, in case of common carriers, it is decided, that either case or *assumpsit* lies, and which ever action is chosen, must be governed by its own rules as to joinder; and this appears to be the sounder opinion. Actions quasi *ex delicto*, when the form of the action is in contract, but the ground of it *ex delicto*, as debt for a penalty, are like actions *ex delicto*, and non-joinder of de

fendants is no objection; *Boutelle*, q. t., &c., v. *Nourse*, 4 *Massachusetts*, 431; *Burnham v. Webster*, 5 id. 266; *Frost et al. v. Rowse et al.* 2 *Greenleaf*, 130.}

The non-joinder of a person who ought to be *co-plaintiff*, is an action *ex contractu*, generally speaking, fatal, and will be ground of nonsuit, or if it appears [*292*b*] on the *record will constitute error; 1 *Wms. Saund.* 291, f. g. *Halsall v. Griffith*, 2 C. & Mee. 679. [*Slingsby's case*, 5 Rep. 18 b.; *Lane v. Drinkwater*, 3 Dowl. 223; *Foley v. Adenbrooke*, 4 Q. B. 197; *Hopkinson v. Lee*, 6 Q. B. 964; *Harold v. Whitaker*, Q. B. 29 May, 1846, 15 L. J. 345. *Sorsbie v. Park*, 12 M. & W. 146; *Bradburne v. Botfield*, 14 M. & W. 559.] {*S. P. Wilson v. Wallace*, *Executrix of Wallace*, 8 *Sergeant & Rawle*, 53; *Dob & Dob v. Halsey*, 16 *Johnson*, 34: because one plaintiff is not entitled to the whole, and he knew who his partner was; *Jordan v. Wilkins*, 3 *Washington*, C. C. 110, 114: but see *Porter and others v. Cresson and others*, 10 *Sergeant & Rawle*, 257, in which it was held that in a suit by C. W. & Co. on a single bill to C. W. & Co., it could not be objected under the pleas of non est factum and payment, that the company consisted of four, of whom some were not named, for the court will intend C. W. & Co. to be the name of the four.} In actions *ex delicto* it is otherwise; *Sedgworth v. Overend*, 7 T. R. 279, *Addison v. Overend*, 6 T. R. 766; [*Wallis v. Harison*, 5 M. & W. 142; *Phillips v. Claggett*, 10 M. & W. 102, 2 Dowl. N. S. 258, S. C.; *Broadbent v. Ledward*, 11 Ad. & Ell. 210, a case of *detinue*;] and even in actions *ex contractu*, the non-joinder of a co-executor as plaintiff is not fatal, unless taken advantage of by plea in abatement, 1 *Wms. Saund.* 291 g. 3 T. R. 558; 1 *Chitt. R.* 71. [See *Doe d. Starr v. Wheeler*, 15 M. & W. 633.] And the courts have hit upon a mode of obviating the ill consequences resulting from the joinder of too few or too many plaintiffs, or of too many defendants; for on a proper case being made out, they have allowed the party making the mistake to amend by omitting or inserting a name or names as the case required. *Baker v. Neave*, 3 *Tyrwh. R.* 233; 1 *Chitt. P. Ed.* 5, p. 14, n.; *Lakin v. Wat-*

son, 4 *Tyrwh.* 839. But the Court of Queen's Bench has since refused to act on the authority of these decisions. *Roberts v. Bate*, 6 Ad. & Ell. 778. [And in the Court of Exchequer, where the power of amendment has been more extensively exercised, although the name of a plaintiff may be added, *Brown v. Fullerton*, 14 M. & W. 556; it seems that the name of a fresh defendant cannot, without his consent, *Goodchild v. Leadham*, 1 Exch. 706. Nor it seems will such an amendment be allowed in any case, except to save a debt from the operation of the statute of limitations; an object the legitimacy of which has been doubted by *Pollock, C. B.*, *Christie v. Bell*, 16 M. & W. 669, and which seems in some degree anomalous; see *Plowden v. Thorpe*, 7 Cl. & Fin. 137; *Thorpe v. Plowden*, 14 M. & W. 526, the effect of the amendment being in fact to make a new writ not tested of the day it issued. See *Campbell v. Smart*, 5 C. B. 196. {In this country, an amendment adding a new plaintiff is not allowed, *Wilson v. Wallace*, 8 *Sergeant & Rawle*, 53; nor changing the Christian name of a plaintiff, *Horback v. Knox*, 8 *Watts & Sergeant*, 30; nor adding a defendant, *Winslow v. Merrill et al.*, 2 *Fairfield*, 127; nor striking out a defendant, *Redington v. Farrar et al.*, 5 *Greenleaf*, 379: but an amendment striking out a married woman improperly made defendant in covenant, was allowed in *Massachusetts*; *Colcord et al. v. Swan and ux.*, 7 *Massachusetts*, 291; *Parsons v. Plaisted and others*, 13 id. 189. In *New Hampshire*, by statute of July 4, 1834, an amendment may be made discharging one of the defendants; *Perley v. Brown*, 12 *New Hampshire*, 494.}

The whole of the subject of non-joinder has been elaborately discussed in the notes to *Cabell v. Vaughan*, 1 *Wms. Saund.* 291.

{In actions, *ex contractu*, misjoinder of either plaintiffs or defendants is ground of non-suit, or if it appear on the record, of error. *Executors of Livingston v. Tremper and others*, 11 *Johnson*, 101; *Elmendorph v. Tappen and others*, 5 id. 176; *Robertson v. Smith*, 18 id. 459; *Savage & Bird v. Pierpont*, 1 id. 118; *Heron v. Hoffner and others*, 3 *Rawle*, 393.} H. B. W.

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*KEECH v. HALL.

MICH.—19 GEO. 3.

[REPORTED, DOUGL. 21.]

A mortgagee may recover in ejectment, without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee.

EJECTMENT tried at Guildhall before *Buller*, Justice, and verdict for the plaintiff. After a motion for a new trial or leave to enter up judgment of nonsuit, and cause shown, the court took time to consider: and now Lord *Mansfield* stated the case, and gave the opinion of the court as follows:

Lord *Mansfield*—This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made *after the date of the mortgage*, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was *no notice to quit*: so that, though the written lease should be bad, if the lessee is to be considered as tenant from *year to year*, the plaintiff must fail in this action. The question, therefore, for the court to decide is, whether by the agreement understood between mortgagors and mortgagees, which is that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrong-doer. No case has been *cited where this question has been [*294] agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belcher v. Collins*;) but *there the mortgagee was privy to the lease*, and afterwards by a knavish trick wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor, and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a court of equity goes upon a mistake. It emphatically belongs to a court of law, in opposition to a court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration a court of equity must follow, not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee, to prevent him from considering the lessee as a wrong-doer. It is rightly

admitted that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action; (a) but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will* in the *strictest sense*, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because *all is liable to the debt*; on payment of which the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage. If, by implication, the mortgagor had such a power, it must go to a great extent; to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief that there is no mortgage; for it is the nature of the transaction that the mortgagor shall continue in possession. Whoever wants to be secure, when he takes a lease, should inquire after and examine the title-deeds. In practice, *indeed (especially in the case of great estates,) that is not often done, because the tenant relies on the honour of his landlord; [*295] but, whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise, in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment. (b)

The *Solicitor General* for the defendant.—*Dunning* and *Cowper* for the plaintiff.

The rule discharged.

THE point decided in this case has been since frequently confirmed. See *sey. 8 B. & C. 767; Thunder v. Belcher, 3 East, 449; Smartle v. Williams, 3 Doe v. Giles, 5 Bing. 421; Doe v. Mai-* Lev. 387, 1 Salk. 245. In *Doe dem.*

(a) Vide *Cowp.* 473.

(b) When the question was argued at the bar, Lord Mansfield said he entirely approved of what had been done by Nares, Justice upon the Oxford circuit, and afterwards confirmed by this court, in the case of *White v. Hawkins*, viz. not to suffer a lessee under a lease *prior* to the mortgage to avail himself of such lease on an ejectment by the mortgagee, if he has had notice before the action that the mortgagee did not intend to turn him out of possession. *This doctrine is, however, long since overruled.* See *Roe v. Reade, 8 T. R. 118; Doe v. Staple, 2 T. R. 684.*

Rogers v. Cadawallader, 2 B. & Adol. 473, the wife of the lessor of the plaintiff had become mortgagee of the premises in question by a deed, dated the 7th of May, 1828. Interest was payable on the 25th of December every year; and had been paid up to the 25th of December, 1830; the demise was on the 1st of July, 1830, and the defendant, who had been let into possession after the mortgage by the mortgagor, contended that the action was not maintainable, because it was not competent to a mortgagee to treat the mortgagor, or his tenants, as trespassers, at any time during which their lawful possession had been recognised by him; and that, by receiving the interest of the mortgage-money, on the 25th of December, 1830, he had acknowledged that up to that time the defendant was in lawful possession of the premises; but the court gave judgment for the plaintiff, on the ground that the receipt of interest was no recognition of the defendant as a person in lawful possession of the premises. However, in *Doe dem. Whittaker v. Hales*, 7 Bing. 322, Austin, having mortgaged the premises to the lessor of the plaintiff, let them to the defendant. The mortgagee directed his attorney to apply to Austin for the interest; and the attorney, in April, 1830, applied to the defendant for rent to pay the [*296] interest, *threatened to distrain if it were not paid, and received it three or four times. The learned Judge at the trial, and the court in *Banco* afterwards, held that these facts amounted to a recognition that the defendant was lawfully in possession in April, 1830, and consequently that he could not be treated as having been a trespasser on December 25, 1829, the day on which the demise was laid. [See *Doe d. Bowman v. Lewis*, 13 M. & W. 241. Lord Tenterden, delivering judgment in *Doe v. Cadwallader*, took some pains to distinguish that case from *Doe dem. Whittaker v. Hales*: "there," says his lordship, "the defendant, in order to show that he was not a trespasser, on the 25th of December, 1829, proved that in April, 1830, he was in possession of the premises; and that an agent of the lessor of the plaintiff called on him, demanded payment of interest on a mortgage to the lessor of the plaintiff, and received money *co nomine*, as interest, the defendant being required to pay it instead of rent to the mortga-

gor." Lord Chief Justice Tindal, after stating these facts, observes, "this, therefore, was a demand made by the agent of the mortgagee, and with full knowledge of all the circumstances of the parties, namely, that the defendant was tenant to the mortgagor, and not to the lessor of the plaintiff, and if a party employs an agent, who has full knowledge of the circumstances, it must be presumed that the principal has the same knowledge, so that the lessor of the plaintiff, having recognised and availed himself of the possession of the defendant, so late as April, 1830, cannot treat him as a trespasser in 1829. This case is very distinguishable from the present: the evidence in this case was only that the mortgagee had received *interest on the money advanced by him for a period covering the 1st of July, 1830, the day of the demise mentioned in the declaration. By so receiving the interest he did not recognise the defendant as a person in lawful possession of the premises, nor did he avail himself of that possession to obtain payment of the interest."

Upon the whole, the question whether the mortgagee have recognised the tenant of the mortgagor as *his* tenant appears to be a question more of fact than of law, and probably would be left to the consideration of the jury, provided there were any evidence fit to be submitted to them. And the decision in *Doe v. Cadwallader* seems to establish that mere receipt of interest by the mortgagee, coupled with no other fact whatever, would not be evidence fit to be left to the jury, on the question of recognition. The ruling in *Doe v. Cadwallader*, it must, however, be observed, seems to have been thought too severe by Lord Denman in *Evans v. Elliot*, 9 A. & E. 312, where his lordship remarked that he was by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued. It seems, however, from a prior part of his lordship's judgment, that the three other judges were disposed to adhere to the opinion expressed in *Doe v. Cadwallader*. When once it has been proved that the mortgagee has

recognised the tenant of the mortgagor as *his* tenant, he cannot treat him as a *tortfeasor*, nor, if he elect to treat him as a *tortfeasor*, can he maintain any demand against him in which he is charged as a tenant, for *Birch v. Wright*, 1 T. R. 378, clearly establishes that a man cannot be treated at once both as a tenant and a trespasser.

It often happens that there is an express covenant in a mortgage deed, that the mortgagor shall remain in possession of the premises until default in payment of the mortgage-money at a certain period. Up to that period he seems to hold an interest in the nature of a term of years; and, of course, during that period he has a right to the possession, and could not be legally ejected. *Wilkinson v. Hall*, 3 Bing. N. C. 533, the stipulation that he shall remain in possession operating as a redemise. When that fixed period has expired, he becomes, if the money have not been paid, tenant at sufferance to the mortgagee. "We must look," said Best, C. J., delivering judgment in such a case, "at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between [*296b] the parties, that possession of his estate is secured to him until a certain day, and that, if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession. From that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same." 5 Bing. 427.

[And, attending to the distinction between an agreement to be collected from the mortgage deed that the mortgagor shall remain in possession for a *time certain*, which operates as a redemise, and an agreement that the mortgagee may enter upon, or the mortgagor hold until, a default, the time of which is uncertain, and which agreement cannot operate as a redemise *for want of certainty* (Com. Dig. Estate, G. 12), the view taken in *Wilkinson v. Hall*, seems not to be at variance with the more recent decisions in *Doe d. Royleance v.*

Lightfoot, 8 M. & W. 561, and *Doe d. Parsley v. Day*, 2 Q. B. 147, though extended too widely in *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. As for *Wheeler v. Montefiore*, 2 Q. B. 133, explained by the court in *Doe d. Parsley v. Day*, 2 Q. B. 155, it has no bearing upon the question; because the mortgage, in that case, was for a term of years, the mortgagee had never entered, and the action was of *trespass*; which form of action cannot be maintained by a lessee for years before entry, although he may bring an ejectment because in that proceeding the entry of the feigned lessee is admitted by the consent rule. In *Doe d. Lyster v. Goldwin*, 2 Q. B. 143, a conveyance was made of the legal estate, by Lyster and his wife, (in whose right he enjoyed the property,) in order "to secure an annuity upon which money had been advanced by the Globe Insurance Office," and it was in trust, amongst other things, to permit and suffer Mrs. Lyster to receive the rents until default made for sixty days in payment of the annuity; and, no default appearing, it was held that the legal estate remained by way of redemise in Lyster. But, to cite the observation of the court in a subsequent judgment, (*Doe d. Parsley v. Day*, 2 Q. B. 155,) "it may be questionable whether sufficient attention was paid in that case to the point as to the *certainty of the time*: at all events, it was not decided upon any ground that such certainty was immaterial." And it may be further observed, upon *Doe d. Lyster v. Goldwin*, that the nature of the transaction does not appear very distinctly, and the conveyance seems not unlikely to have been simply a demise or *assignment of a term to secure [*296c] the annuity, and so to have admitted of considerations different from those which govern the case of an ordinary mortgage. (See *Jacob v. Milford*, 1 J. & W. 629; *Doe d. Butler v. Lord Kensington*, 8 Q. B. 429.) In *Doe d. Royleance v. Lightfoot*, 8 M. & W. 553, the proviso was, that if the mortgagor should well and truly pay the principal money and interest on the 25th of March then next, the mortgagee should reconvey, and there were covenants that *after default* the mortgagee might enter, and also *after default* for further assurance. The Court of Exchequer, referring to the passage in *Sheppard's Touchstone* presently to be stated in full, and observing that it was not brought to the atten-

tion of the court in *Wilkinson v. Hall*, held that the estate was in the mortgagee from the time of the *execution of the mortgage*, and that the statute of limitations began to run at that time. In *Doe d. Parsley v. Day*, 2 Q. B. 147, freeholds and leaseholds were conveyed in mortgage with a proviso that upon payment of 550*l.* and interest on the 5th of October then next the conveyance should be void, but in case of non-payment it was to be lawful for the mortgagee, after a month's notice in writing demanding payment, to enter into possession, and to make leases and sell, and there was a covenant by the mortgagee not to sell or lease until after such notice. The Court of Queen's Bench following the authority of the passage in the *Touchstone*, referred to by Parke, B., in *Doe d. Roylance v. Lightfoot*, and acceding to the doctrine of that case, came to the conclusion that, inasmuch as after the day of payment, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain; neither was there any affirmative covenant whatever that he should hold at all; "the covenant, therefore, that the mortgagee shall not *sell or lease*, or even if it be construed should not *enter*, until a month's notice, was a covenant only and no lease." The passage in *Shep. Touch.*, (8th ed.) 272, referred to in *Doe d. Roylance v. Lightfoot*, was cited at length, and commented upon in the judgment in *Doe d. Parsley v. Day*, as follows:—"If A. do but grant and covenant with B., that B. shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So, if A. promise to B. to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if A. license B. to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate upon condition, that if such a thing be or be not done at such a time, that the feoffor, &c., shall re-enter, to the end, that in this case the feoffor, &c., may have the [*296*d*] *land, and continue in possession until that time, to make a covenant that he shall hold, and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the *uncertainty of the time* whereunto care must be had do not make it void. (Mr. Pres-

ton adds, "The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case.") And therefore, if A. bargain and sell his land to B. on condition to re-enter if he pay him 100*l.*, and B. doth covenant with A. that he will not take the profits until default of payment; or that A. shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease ("for want," says Mr. Preston, "of a more formal contract, and also for want of certainty of time.") And if the mortgagee covenant with the mortgagor, that he will not take the profits of the land until the day of payment of the money; in this case, albeit the time be certain, yet this is no good lease, but a covenant only, ("since," says Mr. Preston, "the words are negative only, and not affirmative.") Precisely the same law is laid down in *Powsley v. Blackman*, Cro. Jac. 659; *Evans v. Thomas*, Cro. Jac. 172; *Jemmot v. Cooly*, 1 Lev. 170, S. C.; 1 Saund. 112, b., 1 Sid. 223, 262, 344, Sir T. Raymond, 135, 158; *Keb.* 784, 915; 2 *Keb.* 20, 181, 270, 295." It may perhaps be concluded, on this review of the authorities, that in order to make a redemption, there must be an *affirmative* covenant, that the mortgagor shall hold for a *determinate* time; and that where either of those elements is wanting, there is no redemption.

A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent; or, a power enabling the mortgagee to distrain for interest by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest, an object more completely effected by adopting the former, than the latter mode of framing the deed; because, whilst the former produces a rent, properly so called, with all its incident remedies, the latter operates merely by way of personal license from the mortgagor, and affects his interest only. The effect of either upon the subject of this note, viz., the right of the mortgagee to bring ejectment, must, in each case, depend upon the terms in which it is framed. In *Doe d. Garrod v. Olley*, 12 Ad. & Ell. 481, it was agreed, that the mortgagor, during his occupation of the premises, should pay the mortgagee a rent of 50*l.* a-year, with such power of distress as landlords have

on common demises, provided, that the reservation of rent should not prejudice the mortgagee's right to enter after default [*296e] in payment of the moneys secured or any part thereof. The mortgagee, after the principal had fallen due, distrained for half a year's rent, and upon a subsequent default in payment of rent, the principal still remaining due, he, without any notice to quit, brought an ejectment, and succeeded. Pattenon, J., in that case, expressed his opinion that it could not be meant that the 50*l.* should be a rent-charge, because the mortgagor had no estate in him, and that it seemed "as if the relation of landlord and tenant was contemplated, but with liberty for the landlord to treat the tenant as a trespasser at any time after any default." That decision was confirmed and acted on in *Doe d. Snell v. Tom*, 4 Q. B. 615. In *Doe d. Basto v. Cox*, Q. B. 15 Nov. 1847, 17 L. J. 3, the mortgagor agreed to become tenant "henceforth at the will and pleasure of the mortgagee, at the yearly rent of 25*l.* 4*s.* payable quarterly," which agreement was held to create a tenancy at will, not converted into a tenancy from year to year by occupation for two years and payment of rent. In the last named three cases, the relation of landlord and tenant appears to have at first existed; but there have been others of a like character, in which a mere personal license to distrain, or a rent-charge (afterwards merged by the acquisition of the legal estate), was given to the mortgagee. Thus in *Doe d. Wilkinson v. Goodier*, Q. B., 7th July, 1847, 16 L. J. 435, there was a power in the mortgagee to distrain for interest if in arrear twenty-one days, "in like manner as for rent reserved on a lease;" and though the mortgagee had entered and distrained after the day of the demise in ejectment, but for interest due before that day, he was considered not to have recognised the mortgagor as his tenant, and to be entitled to maintain ejectment. In *Freeman v. Edwards*, Exch. 21 June, 1848, 17 L. J. 258, the mortgage, which was of copyhold, contained a similar power to distrain for interest; the mortgagee was admitted to the copyholds; the mortgagor became bankrupt, and whilst he still remained in possession, the mortgagee distrained for interest in arrear; for which act the assignees of the mortgagor sued in trespass. The mortgagee pleaded a justifi-

cation under the deed, which plea was held bad after verdict. The arguments advanced on either side, and the view taken by the court of the operation of such a power, appear fully in the following passage from the judgment of Parke, B.; "The utmost that can be given to this deed, is to consider it as operating as a covenant that the mortgagee may seize such goods of the mortgagor as shall be on the premises at the time the distress is made, and treat them as if distrained; such a covenant would not affect any specific goods before seizure, and therefore the goods came to the assignees not subject [*296f] to any equity. Probably, the argument that the grant operated so as to create a rent-charge, is correct; and if so, the rent-charge continued until the surrender and admittance. But it is not necessary to decide that, for as soon as the grantee of the rent-charge, if it was one, became entitled to the fee-simple in possession, the rent-charge was gone, and the covenant ceased to exist as an obligation binding the land. It might, however, still exist as a personal covenant, binding the covenantor, though it would not affect third persons. The argument of the plaintiff's counsel, that the effect of the deed was exhausted by the creation of the rent may make this doubtful; and it is not necessary to decide it, for, giving the covenant this effect, it will not make this a good plea. The covenant at most is to be construed as an agreement that all goods belonging to Leedham (the mortgagor) at the time of the distress, and then upon the land, might be seized. This would affect his own goods when seized. Up to the seizure the whole is contingent, and gives no lien on specific goods. Before the distress was made, Leedham became bankrupt; at that time the whole of the goods which were his property, and then upon the land, were contingently liable to be seized, but no specific portion was liable more than the rest. There was, therefore, no lien on any portion of the goods, according to the principle of the decision in *Carvalho v. Burn*, 4 B. & Ad. 382, (1 Ad. & E. 883.) Then at the moment of the distress the goods had ceased to belong to Leedham, and became the property of the assignees, and, as goods not belonging to the covenantor, were not subject to the covenant." See also *Chapman v. Beecham*, 3 Q. B. 373].

With respect to the nature of the mortgagor's possession after the mortgage, where there is no stipulation that he should be allowed to remain in possession *for any certain time, there [*297] seems to be more difficulty. Messrs. Coote and Morley, in an elaborate note to Watkins on Conveyancing, deliver it as their opinion, that "if there be no express agreement originally as to the period of possession, and the mortgagor, being the occupant, remain in possession *with the consent* of the mortgagee, it seems that, in such a case, he ought to be considered strictly as tenant at will." This is true, if it be admitted that he has remained in possession *with the consent of the mortgagee*. But the more difficult question seems to be under what circumstances shall the mortgagee's consent be taken to exist, and shall it be implied merely from the fact of his abstaining from ousting the mortgagor immediately after the execution of the mortgage? Certainly neither the case of *Thunder dem. Weaver v. Belcher*, 3 East, 450; nor that of *Smartle v. Williams*, 1 Salk. 246; 3 Lev. 357, which are cited by Messrs. Coote and Morley, have any tendency in favour of such an implication; for, in the former, ejectment was brought against a tenant let into possession by the mortgagor after the mortgage; and, as there had been no recognition of him by the mortgagee, there was judgment against him; and so far was the court from considering that the mortgagor would, under the circumstances above supposed, have been tenant at will, had he remained himself in possession instead of letting, that Lord Ellenborough says, "A mortgagor is no more than a *tenant at sufferance*, not entitled to any notice to quit: and one tenant at sufferance cannot make another." In *Smartle v. Williams* the mortgagor certainly remained in possession, and that with the *express consent* of the mortgagee, for *Holt, C. J.*, says: "Upon executing the deed of mortgage, the mortgagor, *by the covenant to enjoy till default of payment*, is tenant at will." But in that case, the mortgagee had assigned the mortgage; and the question was, whether, by doing so, he had determined his will, and whether the mortgagor's subsequent continuance in possession divested the estate of the assignee, and turned it to a right, so as to prevent a person to whom the assignee afterwards assigned, and who brought the ejectment,

from taking any legal interest; upon which point the court held that it had no such effect, since the mortgagor was, at all events, *tenant at sufferance* after the assignment. And it is not believed that there exists any *decision* in which a mortgagor remaining in possession, after an absolute conveyance away of his estate, by way of mortgage, without any consent on the part of the mortgagee, express or to be implied otherwise than from his silence, has been considered in any other light than as *tenant at sufferance*, to the definition of whom he seems strictly to answer, being a person who *comes in by right, and holds over without right*: see *Co. Litt. 57*, and *Lord Hale's MSS.*, note 5, where the following case is put, which seems analogous:—"If tenant for years surrenders, and still continues possession, he is tenant at sufferance or disseisor at election."

This subject has been treated at some length, because the reader will find it often said that a mortgagor in possession is *tenant at will quodammodo*; an idea which Lord Mansfield especially seems to have countenanced, for in the principal case he says, "when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises *at will*, in the strictest sense: and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt:" and in *Moss v. Gallimore*, which will be printed in this collection, he calls the mortgagor "*tenant at will quodammodo*." Whereas Lord Ellenborough in *Thunder v. Belcher*, denominated him "*tenant at sufferance*;" and it is submitted that it would be more convenient to range his possession under some one of the ancient and well-known descriptions of tenancy, than to invent the new and anomalous class of *tenants at will quodammodo*, for the only purpose of including it. See *Litt. sec. 381*.

Upon the whole it is concluded, 1st. That, if there be in the mortgage-deed an agreement that the mortgagor shall continue in possession till default of payment on a certain day, he is in the mean while termor of the intervening term. 2ndly. That, if default be *made [*298] on that day, he becomes tenant at sufferance. 3rdly. That, when there is no such agreement, he is tenant at sufferance immediately upon the execution of the mortgage, unless the mortgagee

expressly or impliedly consented to his remaining in possession. 4thly. That such consent renders him tenant at will. 5thly. That if in any of the last three cases he let in tenants, they may be treated by the mortgagee, if he think proper, as tort feisors. 6thly. That, if the mortgagee recognise their possession, they become *his* tenants. Lastly, that the mere receipt of interest from the mortgagor does not amount to such a recognition. These two last propositions must, however, now be taken subject to the doubts expressed in *Evans v. Elliot*.

Notwithstanding some earlier decisions, which look the other way, it is now well settled throughout this country, that the mortgagor is invested with the incidents both of legal and equitable ownership, as it regards all persons save the mortgagee and those claiming under him; *Wilkins v. French*, 2 Appleton, 211; *Ellison v. Daniels*, 11 New Hampshire, 274; *Southerin v. Mendum*, 5 id. 420; *Wellington v. Gale*, 7 Mass. 138; *Goodwin v. Richardson*, 11 id. 469; *Eaton v. Whilden*, 3 Pick. 484; *Hooper v. Wilson*, 12 Vermont, 695; *Smith v. Taylor*, 9 Alabama, 133. Thus, the wife of the mortgagor is entitled to dower; *Hitecock v. Harrington*, 6 Johnson, 295; *Coles v. Coles*, 15 id. 319; *Bolton v. Ballard*, 13 Mass. 2227; *Snow v. Stevens*, 13 id. 279; *Cass v. Martin*, 6 New Hampshire, 25; *Bullard v. Bowers*, 10 id. 500; and the mortgagor himself to a settlement in the township where the land is situated; *Groton v. Roxborough*, 6 Mass. 53. The outstanding legal title of the mortgagee, cannot be set up by a third person, as a bar to an ejectment or writ of entry, brought by the mortgagor; *Doe v. McLoskey*, 2 Alabama, 708; *Smith v. Taylor*, 9 id. 63; *Blaney v. Bearce*, 2 Greenleaf, 132; *Ellison v. Daniels*, 11 New Hampshire, 274; *Willington v. Gale*, 7 Pick. 159. And where land is conveyed after the execution of a mortgage, all covenants capable of running with land will pass to a subsequent assignee from the grantee, in the same manner as if the grant were of a legal estate, and not of a mere equity of redemption; *White v. Whitney*, 3 Metcalf, 83. The interest of the mortgagor can be seised and sold under any of the forms of process in use in this country, for the levy and sale of land, while that of the mortgagee is held to be liable to an attachment, but not to a direct execution; *Dougherty v. Linthicum*, 8 Dana, 194; *Davis v. Anderson*, 1 Kelly, 176; *Blanchard v. Colman*, 16 Mass. 345; *Snow v. Stevens*, 15 id. 279; *Glass v. Ellison*, 9 id. 69; *Watkins v. Gregory*, 6 Blackford, 113; *Jackson v. Willard*, 4 Johnson, 41; *The Farmers' Bank v. The Commercial Bank*, 10 Ohio, 71; although in some of the states this rests on the ground of an equitable or statutory jurisdiction, so far as it regards the estate of the mortgagor; *Van Ness v. Hyatt*, 13 Peters, 194; *Mordecai v. Parker*, 3 Devereux, 425; *Thornhill v. Gilmore*, 4 Smedes & Marshall, 153; *McIsaacs v. Hobbs*, 8 Dana, 268.

But while such is universally the law as between the mortgagor and third persons, a different rule prevails in many parts of this country, with regard to the mortgagee, who is held to have all the rights of ordinary grantees in fee, subject to a condition which has not been performed. It has accordingly been decided, that the mortgagee may enter on the mortgagor, or bring an action against him for the recovery of the land, as soon as the mortgage

is executed, without waiting until the expiration of the period fixed for the performance of the condition; *Blaney v. Bearce*, 2 Greenleaf, 132; *Smith v. Goodwin*, id. 173; *Brown v. Cramer*, 1 New Hampshire, 169; *Pettingill v. Evans*, id. 54. And as this right is regarded as a necessary incident to the estate conveyed by the mortgage, it cannot be restrained by a parol agreement, that the mortgagor shall be allowed to remain in possession until forfeiture, because such an agreement is inconsistent, both with the terms of the deed and the provisions of the statute of frauds; *Colman v. Packard*, 16 Mass. 39. Nor can the right of the mortgagor to possession, be defeated by the tender, or even by the payment of the debt after the time fixed for its payment, for the condition not having been performed at the day, is gone at law, and the only redress of the mortgagor is in equity; *Parson v. Willes*, 17 Mass. 419; *Doton v. Russel*, 17 Conn. 146; *Maynard v. Hunt*, 5 Pick. 233; *Howe v. Lewis*, 14 id. 39. And as the freehold vests in the mortgagee on the execution of the mortgage, he is entitled to enter at once on the land, and may maintain trespass against the mortgagor or his tenants, immediately afterwards; *The Northampton Paper Mills v. Ames*, 8 Metcalf, 1. But he cannot maintain trespass *quare clausum fregit*, or for mesne profits against the mortgagor or third persons, before actual entry, unless the mortgage is by feoffment, and not merely under the statute of uses, because he has neither an actual nor constructive possession of the land, until entry; *Mayo v. Fletcher*, 14 Pick. 525; *Hatch v. Dwight*, 17 Mass. 289; *Com. Dig. Trespass*, B. 3; *Estes v. Cook*, 22 Pick. 295; *French v. Fuller*, 23 id. 304; *Emerson v. Thompson*, 2 id. 473; *Polk v. Henderson*, 9 Yerger, 310. But he may recover in trespass *de bonis asportatis* or *trover*, for trees, minerals, or other things severed and removed from the mortgaged premises without his assent; *Smith v. Goodwin*, 2 Greenleaf, 173; *Stowell v. Pike*, ib. 385; *Gore v. Jenness*, 19 Maine, 53; *Frothingham v. McKusick*, 24 id. 403; *Smith v. Moore*, 11 New Hampshire, 53; *Saunders v. Reid*, 12 id. 458; for upon such severance they become mere chattels personal, and the general right of property passed by the mortgage, will be clothed by the law with a constructive possession, sufficient for the support either of trespass or trover; *Higgon v. Mortimer*, 6 Carr. & P. 116; *Farrant v. Thompson*, 2 D. & R. 3. And as the interest of the mortgagee is regarded under this course of decision as an estate, though restricted to the purposes of a security, it may be conveyed by the mortgagee to third persons, by any of the assurances appropriate to the conveyance of land. *Given v. Doe*, 7 Blackford, 210; *Gould v. Newman*, 6 Mass. 239; *Hunt v. Hunt*, 14 Pick. 374, and on the other hand, a parol assignment of the debt will not carry with it any right in the land, nor entitle the assignee to enforce the mortgage at law, whatever may be the effect in equity. *Parsons v. Welles*, 17 Mass. 418; *Warden v. Adams*, 15 Id. 233; *Vase v. Handy*, 2 Greenleaf, 322; *Dockray v. Noble*, 8 Id. 278; *Prescott v. Ellingwood*, 23 Maine, 345; *Smith v. Kelly*, 27 Id. 237; *Doe v. Demon*, 5 Halstead, 156. A mortgage is considered as a conditional conveyance of an estate in land; *Aiken v. Skilburn*, 27 Maine, 252; and the registry of a subsequent assignment by the mortgagee, as within the recording acts and notice of the assignment to creditors and purchasers. *Clark v. Jenkins*, 5 Pick. 280; *Pierce v. Odlin*, 27 Maine, 341.

In many of the states, however, a different view is taken, and the mort-

gagor is treated as the owner, not only as against third persons, but as against the mortgagee. *Evertson v. Sutton*, 5 Wend. 295. The interest of the mortgagee is held to be a mere incident to the debt, and limited to the object of securing its payment. It has consequently been decided on the one hand, that a mortgage is not an interest in land within the terms of the statute of frauds, and will pass by a parol assignment of the debt for which it is given; *Green v. Hart*, 1 Johnson, 580; *Clearwater v. Rose*, 1 Blackford, 137; and on the other, that the assignment of a mortgage is invalid, unless it is accompanied by an actual or constructive assignment of the debt. *Bell v. Morse*, 6 New Hampshire, 205. And a conveyance by the mortgagee, intended to pass his interest as an estate and not as a security, has been held to be wholly inoperative, *Wilson v. Troup*, 2 Cowen, 145; *Jackson v. Myers*, 11 Wend. 533; and not to entitle the grantor to maintain ejectment against the mortgagor; *Jackson v. Bronson*, 19 Johnson, 325. The court held that "the mortgage was a mere incident to the bond or personal security given for the debt, and that the assignment of the interest of the mortgagee in the land, without an assignment of the debt was a nullity at law, as well as in equity." And in this case, and in *Coles v. Coles*, 15 Johnson, 320, it was said that the mortgagee has a mere chattel interest, and that the mortgagor is the tenant of the freehold. Thus, where the mortgagor brought trespass for an entry on the land and cutting down the timber, it was held that the defendant could not justify under a license from the mortgagee, and that an issue joined on a traverse of the freehold of the latter, must be found for the plaintiff. *Runyan v. Mersereau*, 17 Johnson, 334. So far was this reasoning pushed, that a payment, or even a tender of the debt after the day, was held to be as effectual a bar to the recovery of the land, as if made at the time fixed by the condition of the mortgage. *Arnott v. Post*, 6 Hill, 65; *Jackson v. Craft*, 18 Johnson, 110; *Edwards v. The Fireman's Fire Ins. Co.*, 21 Wend. 467. It follows under this course of decision, that as the assignment of a mortgage, is the assignment of a chose in action and not of an estate, it is not within the registry acts, and derives no additional validity from being recorded. *Craft v. Webster*, 4 Rawle, 255. And as the interest of the mortgagee is thus limited to a lien, he cannot maintain trespass de bonis asportatis or trover, for the recovery of timber cut down by the mortgagor or third persons; although he may recover in case, on averring the insolvency of the mortgagor, and the loss of the debt by the deterioration of the security. *Cooper v. Davis*, 15 Conn. 556; *Lane v. Hitchcock*, 14 Johnson, 213; *Gardner v. Heart*, 3 Denio, 232. "The mortgagor, as such," said BEARDSLEY, J. in the latter case, "has no title to the land mortgaged; he has neither *jus in re*, nor *ad rem*, but a mere security for his debt; the title to the land remains in the mortgagor, notwithstanding the mortgage. It is a familiar principle of law, said MASON, J. in *Calkins v. Calkins*, 3 Barbour's S. C. R., 30, that a mortgage upon land is a mere security for the debt, and that the interest of the mortgagee is a mere chattel interest. (*Wilson & others v. Troupe & others*, 2 Cowen's Rep. 195. *Jackson v. Bronson*, 19 John. Rep. 325. *Runyan v. Mersereau*, 11 Id. 534. *Edwards v. Farmer's Fire Ins. & Loan Co.*, 21 Wend. 467. *Fleet v. Youngs*, 11 Id. 525. *Farmer's Fire Ins. & Loan Co. v. Edwards*, 26 Id. 554. *Waring v. Smith*, 2 Barb. Ch. Rep. 135.) In this

last case the chancellor says: "Before the adoption of the revised statutes, it was settled by the courts of this state that the mortgagor was to be considered the real owner of the fee of the lands mortgaged, except for the mere purpose of protecting the mortgagor as the holder of a security thereon for the payment of his debt. And the revised statutes have restricted the legal right of the mortgagee still further, by depriving him of the power to bring a suit to recover the possession of the mortgaged premises before a foreclosure. The only right he now has in the land itself, is to take possession thereof with the assent of the mortgagor, after the debt has become forfeited and payable, and to retain such possession until the debt is paid. The mortgage, then, is here nothing but a chose in action, or a mere lien or security upon the mortgaged premises as an incident to the debt itself." And the whole doctrine, as held in New York, and in many other parts of this country, *Davis v. Anderson*, 1 Kelly, 176, was summed up in the *State v. Lawson*, 1 English, 269, in the declaration that the equity of redemption of the mortgagor, had now become the real as well as the beneficial estate in the land, tantamount to the legal fee, and attended by all the incidents of other estates of inheritance. This course of decision is a plain departure from the doctrines of the common law as enforced in England, and in some respects even from the principles of equity. In *Merritt v. Lambert*, 7 Paige, 344, and *Post v. Arnott*, 2 Denio, 344, the chancellor first, and the members of the court of errors, subsequently, pointed out the obvious mistake committed in *Jackson v. Craft*, and *Edwards v. The Farmers Ins. Co.*, in deciding that a tender after the day, was an answer to an ejectment brought on the mortgage in a court of law, while, in point of fact, the condition not having been performed at the time, was legally void, and could not be enforced either by a tender or payment. A tender at the day is a performance of the condition, and entitles the mortgagor to immediate entry, whether it be refused or accepted by the mortgagee; but a tender after the day is neither performance nor payment, and merely lays a ground for the intervention of equity, to compel the mortgagee to receive it, and reconvey the land to the mortgagor. *Maynard v. Hunt*, 5 Pick. 243; *Smith v. Kelly*, 27 Maine, 247. The law was so held in *Charter v. Stevens*, 3 Denio, 33, with regard to mortgages of personal property, and although laid down in that case, as applicable only to personalty, is beyond all doubt, equally so in the case of realty. Even payment after the day is insufficient to defeat the estate of the mortgagee, or entitle the mortgagor to maintain an action of trespass at law. *Howe v. Lewis*, 14 Pick. The decision in *Jackson v. Craft*, is, therefore, indefensible both at common law and in equity, and illustrates the danger of a partial and limited introduction of the theory of one system, into the practice of another. The innovation made in this country on the doctrines of the common law with respect to mortgages, has been productive of much confusion and uncertainty, without being attended by any corresponding advantage, and has often resulted in denying the use of common law remedies, to enforce undoubted common law rights, and for purposes sanctioned by the principles of equity.

Although the interest of the mortgagee under the mortgage, has been reduced from the dignity of an estate to that of a mere lien or security, throughout the greater part of the Union, there has as yet, been no disposition on the part of the courts, and but little on that of the legislature, to

deny his right to the possession of the land, charged as it must always be with the equitable duty of applying the rents and profits to the payment of the debt, and giving an account of their application. It is, accordingly, held in general, that the mortgagee may recover in ejectment against the mortgagor, and those claiming under him by lease or conveyance, subsequent to the mortgage, (supra); 72. *Van Dayne v. Thayer*, 14 Wend. 236; *Begley v. Wallace*, 16 S. & R. 245; *Knaub v. Essick*, 2 Watts, 282; *Hughes v. Edwards*, 9 Wheaton, 495; *Randall v. Phillips*, 3 Mason, 380; *Dexter v. Phillips*, 1 Sumner, 116; *Blaney v. Bearee*, 2 Greenleaf, 132; *Bower v. Crane*, 1 New Hampshire, 169; *Ersine v. Townsend*, 2 Mass. 495; *Reed v. Davis*, 4 Pick. 216; *Henshaw v. Willis*, 9 Humphreys, 568; *Chapman v. Armistead*, 4 Munford, 382; although in New York and Indiana, the law has been changed by statute, and the right of the mortgagee to possession abrogated. *Jackson v. Myers*, 11 Wend. 537; *Steward v. Hutchins*, 13 id. 495; *Jones v. Thomas*, 8 Blackford, 428. But while the existence of this right has been generally admitted, many distinctions have been taken as to its exact nature, and the mode in which it must be exercised.

Unless there is something to distinguish the legal position of a mortgagor, who continues in possession after the execution of the mortgage, from that of other persons who hold over without right, after a previous right has terminated, he must be regarded simply as a tenant by the sufferance of the mortgagee, and as such, liable to be ejected at any moment by the latter without previous warning. It has, accordingly, been decided that the mortgagee may enter upon the mortgagor, or recover in ejectment against him, without giving any previous notice of his intention or demanding possession of the mortgaged premises. *Brown v. Cram*, 1 New Hampshire, 169; *Pettingill v. Evans*, 5 id. 54; *Newall v. Davis*, 3 Mass. 152; *Colman v. Packard*, 16 id. 39; *Reed v. Davis*, 4 Pick. 216; *Blaney v. Bearee*, 2 Greenleaf, 132; *The Fitchburg Man. Corporation v. Milven*, 15 id. 270; *Mayo v. Fletcher*, 14 Pick. 525; *Stone v. Patterson*, 19 Pick. 476; *Welch v. Adams*, 1 Metcalf, 494; *The Northampton Paper Mills v. Ames*, 8 id. 1; *Shute v. Greaves*, 7 Blackford, 1; *Hobart v. Sandford*, 13 New Hampshire, 226. The mortgagor and those claiming under him, cannot be made liable as trespassers by the mortgagee before entry, because, until then, their possession though without right, is not wrongful. But an entry on the land, accompanied by a notice to the tenants of the mortgagor to withdraw, will invest the mortgagee with a constructive possession, and enable him to bring an action of trespass, for their subsequent continuance in possession. *The Northampton Paper Mills v. Ames*; *Jones v. Thomas*, 8 Blackford, 428; *Stone v. Patterson*, 12 Pick. 476, (supra). The mortgagee's estate is, notwithstanding, so far anomalous, even in those parts of this country, where there has been the least departure from the common law, that his recovery in trespass, *quare clausum fregit*, or for mesne profits against the mortgagor or third persons, is limited to the period subsequent to entry, instead of extending back by relation, as in ordinary cases, to the time when the right, under which the entry is made, first accrued. *Parsons v. Wills*, 17 Mass. 419; *Howe v. Lewes*, 14 Pick. 329; *Wilder v. Houghton*, 1 id. 87; *Field v. Swan*, 10 Metcalf, 112.

In New York, however, the courts regarded the position of a mortgagee, after the execution of the mortgage, as analogous to that of a tenant at will,

and held that he was consequently entitled to six months notice, before ejectionment brought by the mortgagor. *Jackson v. Loughhead*, 2 Johnson, 75; *Dickinson v. Jackson*, 6 Cowen, 149. But it was also decided that, as an assignment by a tenant at will determines the will, and entitles the reversioner to an immediate recovery, the same rule would apply in the case of an assignment by a mortgagor, and that an ejectionment might be brought against the assignee without previous notice. *Jackson v. Fuller*, 4 Johnson, 215; *Jackson v. Hopkins*, 18 id. 188; *Jackson v. Stackhouse*, 1 Cowen, 126.

The possession of a mortgagor, after the execution of the mortgage, has, notwithstanding, been treated as a tenancy at will, in many of the cases, where he has been held liable to an ejectionment without previous notice. *Morey v. McGuire*, 4 Vermont, 327; *Lull v. Matthews*, 19 id. 322. This, however, involves no inconsistency, for although what would once have been a tenancy at will, is now construed by the courts into a tenancy from year to year, which cannot be determined without notice, yet there is no reason why a true tenancy at will determinable at pleasure should not exist when such is the express or implied intention of the parties. *Hargrave's Coke Lit.* 55 a, note 3. A better criterion of the nature of the mortgagor's interest, may be found in the right to the emblements, which is one of the best defined incidents of a tenancy at will. It was held in *Jones v. Thomas*, 8 Blackford, 178, that the mortgagor cannot take the emblements, even when he is expelled without warning by the mortgagee. And a dictum to the same effect may be found in *Mayo v. Fletcher*. He cannot, therefore, be regarded as a tenant at will, consistently with these decisions. It was, however, decided in *Cassidy v. Rhodes*, 12 Ohio, 88, that the tenants of the mortgagor were entitled to the emblements, when ejected unexpectedly by the mortgagee, whatever might be the rule as to the mortgagor himself. There can be little doubt that the decisions in New York, which put the possession of a mortgagor on the footing of a tenancy at will, are erroneous, and that the view taken in Massachusetts, is the better law, for although the mortgagor holds the premises by the sufferance of the mortgagee, yet he does not hold of him; and as the peculiar relation of tenure is not created, the mortgagor cannot properly be described as a tenant at will. *Mayo v. Fletcher*; *Tucker v. Keeler*, 4 Vermont, 161; *Morey v. McGuire*, id. 137; *Pettingill v. Evans*, 5 New Hampshire, 327. The law was so held in *Winslow v. The Merchants Ins. Co.*, 4 Metcalf, 306, and again in *Butler v. Paige*, 7 id. 40, when it was decided, that a mortgagor in possession, does not stand in the relation of a tenant to the mortgagee, and is not entitled to remove fixtures erected on the mortgaged premises, subsequently to the execution of the mortgage, and for the benefit of his trade.

It is, however, well settled under the decision in *Mayo v. Fletcher*, and that in *Wilkinson v. Hall*, (*supra*), that a provision in the mortgage or in any cotemporaneous agreement, authorizing the mortgagor to remain in possession until the time fixed for the performance of the condition, or for any other determinate period, will operate as a demise, and create a true tenancy between the parties. *Wheeler v. Montefiore*, 2 Q. B. 133; *Doe v. Goldwin*, ib. 143; *Smith v. Taylor*, 98 Alabama, 133. But in order to give the character of a lease to a proviso or stipulation, that the mortgagor shall remain in possession, the time during which it is to operate, must

be certain in itself, or susceptible of being reduced to certainty, for otherwise, whatever may be its effect in equity, it will be nothing more than a covenant at law and cannot be set up as a bar to an action of ejectment brought by the mortgagee. *Doe v. Day*, 2 Q. B. 147.

The right to recover the mortgaged premises in ejectment will pass to an assignee from the mortgagee; *Jackson v. Minkler*, 10 Johnson, 480; *Jackson v. Bowen*, 7 Cowen, 21; *Chapman v. Armistead*, 4 Munford, 82; and may, of course, be exercised against parties claiming under the mortgagor whether by absolute conveyance, *Jackson v. Fuller*, 4 Johnson, 215; *Jackson v. Hopkins*, 18 id. 188; *Jackson v. Stackhouse*, 1 Cowen, 126; *Erskine v. Townsend*, 2 Mass. 493; or merely as tenants for life or years. *Gould v. Newman*, 6 Mass. 329; *The Northampton Paper Mills v. Ames*, 8 Metcalf, 1; *Henshaw v. Welles*, 9 Humphreys, 568.

An ejectment may also be brought by the heir of the mortgagee who will, however, hold the land when recovered in trust, first for the executors of the ancestor and subject to their interest in the debt, for the benefit of the mortgagor. *Van Dyne v. Thayre*, 14 Wend. 236. And in Pennsylvania, where an equitable title is sufficient to support an ejectment, the executors of the mortgagee, are allowed to recover the land by an action in their own names instead of proceeding in that of the heir. *Simpson v. Ammons*, 1 Binney, 177; *Smith v. Shuler*, 12 S. & R. 243. A similar practice prevails in Massachusetts, although less consistent with the usual course of procedure in that state. *Howe v. Lewis*, 14 Pick. 329.

H.

*WIGGLESWORTH v. DALLISON. [*300]

TRINITY—19 GEO. 3.

[REPORTED DOUGL. 201.](a)

A custom that the tenant, whether by parol or deed, shall have the way-going crop, after the expiration of his term, is good, if not repugnant to the lease by which he holds.

THIS was an action of trespass for mowing, carrying away, and converting to the defendant's own use, the corn of the plaintiff, growing in a field called Hibaldstow Leys, in the parish of Hibaldstow, in the county of Lincoln. The defendant Dallison pleaded *liberum tenementum*, and the other

(a) [And where entitled by custom to the way-going crop, he keeping the fences in repair, the possession remains in the tenant. See *Griffiths v. Pulseton*, 13 M. & W. 359.]

defendant justified as his servant. The plaintiff replied, that true it was that the locus in quo was the close, soil, and freehold of Dallison; but, after stating that one Isabella Dallison, deceased, being tenant for life, and Dallison, the reversioner in fee, made a lease on the 2nd of March, 1753, by which the said Isabella demised, and the said Dallison confirmed, the said close to the plaintiff, his executors, administrators and assigns, for twenty-one years, to be computed from the 1st of May, 1755, and that the plaintiff, by virtue thereof, entered and continued in possession, till the end of the said term of twenty-one years,—he pleaded a custom, in the following words, viz. “That, within the parish of Hibaldstow, there now is, and, from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, there used and approved of, that is to say, that every tenant and farmer of any lands within the same parish, for any term of years which hath expired on the first day of May, in any year, hath been used and accustomed, and of right ought, to have, take, and enjoy, to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and taken away, his way-going crop, that is to say, all the corn growing upon the said lands which hath before the expiration of such term been sown by such tenant upon any part of such lands, not exceeding a reasonable quantity thereof in proportion to the residue of such lands, according to the course and usage of husbandry in the same parish, and which hath been left standing and growing upon such lands at the expiration of such term of years.” He then stated that, in the year 1775, he sowed with corn part of the said close, being a reasonable part in proportion to the residue thereof, according to the course and usage of husbandry in the said parish, and that the corn produced and raised by such sowing of the corn so sown as aforesaid, being the corn in the declaration mentioned, at the end of the term, and at the time of the trespass committed, was standing and growing in the said close, the said time not exceeding a reasonable time for the same to stand, in order to ripen and become fit to be reaped, and that he was during all that time lawfully possessed of the said corn, as his absolute property, by virtue of the custom. The defendant, in his rejoinder, denied the existence of any such custom, and concluded to the country. The cause was tried before Eyre, Baron, at the last assizes for Lincolnshire, when the jury found the custom in the words of the replication.

Baldwin moved, in arrest of judgment, that such a custom was repugnant to the terms of the deed, and therefore, though it might be good in respect to parole leases, could not have a legal existence in the case of leases by deed. He relied on *Trumper v. Carwardine*, before Yates, Justice(b) the circumstances of which case were these:

“The plaintiff had been lessee under the corporation of Hereford for a term of twenty-one years, which expired on the 4th of December, 1767. In the lease there was no covenant that the tenant should have his off-going crop. In the seed-time, before the expiration of the term, he sowed the allow with wheat. The succeeding tenant obstructed him in cutting the wheat when it became ripe, and cut and housed it himself, for his own use. Upon this the plaintiff brought an action on the case, and declared on a

(b) At the summer assizes for Herefordshire, 1769.

custom in *Herefordshire for tenants who quit their farms at Christ-mas or Candlemas to reap the corn sown the preceding autumn. [*301] Yates, Justice, held that the custom could not legally extend to lessees by deed, though it might prevail, by implication, in the case of parole agreements. That, in the case of a lease by deed, both parties are bound by the express agreements contained in it, as that the term shall expire at such a day, &c.; and, therefore, all implication is taken away. That, if such a custom could be set up, the Statute of Frauds would be thereby superseded in Herefordshire.(c) Accordingly the plaintiff did not recover on the custom, although on another count in trover, in the same declaration, he had a verdict."

A rule to show cause was granted.

The case was argued on Tuesday, the 8th of June, by Hill, Serjeant, Chambre and Dayrell, for the plaintiff, and Cust, Baldwin, Balguy, and Gough for the defendants; when three objections were made on the part of the defendants, viz.: 1. That the custom was unreasonable. 2. That it was uncertain. 3. That, as had been contended on moving for the rule, it was repugnant to the deed under which the plaintiff had held.

For the plaintiff it was argued, 1. That it was not an unreasonable custom, because, without an express agreement, or such a custom as this, there could be no crop the last year of a term, for the tenant would not sow if he could not reap, and the landlord would not have a right to enter till the expiration of the term. That it was for the advantage of the public as much as customs for turning a plough or drying nets, on another person's land, which had been held to be good.(d) That it bore a great analogy to the right of emblements, and was founded on the same principle, namely, the encouragement of agriculture. It was not prejudicial to any one; not to the landlord, because without it his land must be unemployed and unproductive for a whole season; nor to the succeeding tenant, because he would have his turn at the end of his term. 2. That it was sufficiently certain, by the reference to the residue of the lands not sown, and to the course and usage of husbandry in the parish. This is as much certainty as the nature of the subject will admit of; for, if it had been that so many acres might be sown and reaped, that would have been *incompatible with [*302] those variations in the proportion of ploughed land, which arise, at different times, from circumstances in the course of cultivation and husbandry. Reasonable is an epithet which sufficiently qualifies the extent of customs, and is generally used in pleading them; as with regard to customary fines paid to the lord of a manor, estovers prescribed for by a party to be taken for the use of his house, &c. In the case of Bennington v. Taylor, reported in Lutwyche,(e) where the defendant, in an action of trespass, had pleaded a right to distrain for twelve pence for stallage, due by prescription, for the land near every stall in a fair, and, on a motion in arrest of judgment, it was objected, that the prescription was uncertain, and therefore void, the quantity of land not being ascertained, the court held it to be

(c) Qu. This argument seems more applicable to parole leases, because, if a parole lease for three years could be extended in some degree for half a year longer by such a custom, it might be said this would be repugnant to the Statute of Frauds.

(d) Vide Davis 32, b.

(e) C. B. E. or T. 12 W. 3; 2 Lutw. 1517, 1519.

certain enough, because the quantity was to be ascertained by the common usage of the fair. In all such cases, whether the quantity or amount is in truth reasonable or not, is for the jury to decide. 3. That the circumstance of the plaintiff's lease in this case having been by deed, made no difference. There was no agreement contained in the deed, that the defendant would depart from the custom, although the parties must have known of it when the lease was executed. He did not claim under any parole contract express or implied; and, therefore, the argument of repugnance did not apply; and the *Nisi Prius* case which had been cited, went upon mistaken reasoning. Hill, Serjeant, admitted, that he knew of no instance in the Reports, of a similar custom to this, in the case of freehold property; but he said that there were several with regard to copyholds that went much farther; and he cited *Eastcourt v. Weeks*,^(f) where a custom, that the executors and administrators of every customary tenant for life, if he should die between Christmas and Lady-day, should hold over till the Michaelmas following, is stated on the pleadings;^(g) and no objection taken to it on the argument of the case.

For the defendant were cited, *Grantham v. Hawley*;^(h) *White v. Sayer*,⁽ⁱ⁾ in which last case a custom for a lord of a manor "to have common of pasture in all the lands of his tenants for life or years," which had been pleaded in justification of a trespass in the land of a tenant for years, was held to be void and against law, for that such a privilege is contrary to the lease, being part of the thing demised, *and different from a prescription [*303] to have a heriot from every lessee for life, because that is only collateral.^(j) A case relied on by Houghton, Justice, in *White v. Sayer*,^(k) in which he said the court had decided that a custom for lessees for years to have half a year after the end of their term, to remove their utensils, was void, as being against law; *Starpup v. Dodderidge*,^(l) where the court refused to grant a prohibition, on the suggestion of a *modus* "to pay, upon request, at the rate of two shillings for every pound of the improved yearly rent or value of the land," because the yearly rent or value were variable and uncertain; *Nailor, qui tam, v. Scott*,^(m) where a custom having been found by a jury, "that every housekeeper in the parish of Wakefield having a child born there, should, at the time when the mother was churched, or at the usual time after her delivery when she should be churched, pay tenpence to the vicar," the court, on a motion in arrest of judgment, determined that the custom was void, being, 1. uncertain, because the usual time for women to be churched was not alleged;⁽ⁿ⁾ 2. unreasonable, because it obliged the husband to pay if the woman was not churched at all, or if she

(f) T. 10 W. 3; 1 Lutw. §99, 801.

(g) It is found by the special verdict, the action being ejectment.

(h) T. 13 Jac. 1 Hob. 132. That case, if at all applicable, seems to me to make for the plaintiff. It is curious in one respect, viz., that the question was brought on in an action of debt on a common bond conditioned for the payment of 20*l.* to the plaintiff if a certain crop of corn did of right belong to him; or, in other words, if the question of law was in his favour.

(i) B. R. M. 19 Jac. 1 Palm. 211.

(j) Cites 21 H. 7, 14.

(k) B. R. M. 19 Jac. 1 Palm. 211.

(l) E. 4 Ann. 2 Ld. Raym. 1158; 2 Salk. 657; 1 Mod. 60.

(m) E. 2 G. 2; 2 Ld. Raym. 1558.

(n) In that case the custom, as suggested, did not refer to the usage of the parish.

removed from the parish, or died before the time of churching: *Carleton v. Brightwell*,^(o) where the defendant, on a bill for tithes, set up a modus that "the inhabitants of such a tenement, with the lands usually enjoyed therewith, should pay such a sum for tithe corn:" and it was held by the Master of the Rolls to be void for uncertainty; *Harrison v. Sharp*,^(p) where a modus that, "when any of the inclosed pastures in a certain vill were ploughed and sown with corn or grain of any kind, or laid for meadow, and mown and made into hay, tithes in kind were paid to the rector, but when eaten and depastured, then the occupier paid to the vicar one shilling in the pound of the yearly rent or value thereof, and no more, upon some day after Michaelmas yearly," was held void, on the authority of *Starpup v. Dodderidge*; *Wilkes v. Broadbent*,^(q) where the Court of Common Pleas, and afterwards, on error brought, the Court of King's Bench, held a custom found by verdict, "for the lord of a manor, or the tenants of his collieries who had sunk pits, to throw the earth and coals on the land near such pits, such land being customary tenement and part of the manor, there to continue, and to lay and continue *wood there for the necessary use of the pits, and to take coals so laid, away in carts, and to burn and [*304] make into cinders coals laid there, at their pleasure," to be void, because, among other reasons, the word *near* was too vague and uncertain; *Oland v. Burdwick*,^(r) where a *feme* copyholder *durante viduitate*, having sowed the land, and then married, it was determined that the lord should have the corn, upon the principle, that, when the interest in land is determined by the act of the party, he shall not have the crop: an anonymous case in *Moore*,^(s) where it was held, that a custom, "that lessee for years should hold for half a year over his term," was bad; *Roe, lessee of Bree, v. Lees*,^(t) where, in an ejectment to recover a farm of about sixty acres, of which fifty-one were included, and nine lay in certain open fields, a special case was reserved, which stated a custom, "that when a tenant took a farm, in which there was any open field, more or less, for an uncertain term, it was considered as a holding from three years to three years;" and though the court decided against the custom on other grounds, yet, by their reasoning, it clearly appeared that they thought it void for uncertainty, because the quantity of open ground was not ascertained, and one rood might determine the tenure of 100 acres of land inclosed. Besides the above authorities,^(u) the case before Yates, Justice, was much relied on. It was admitted, that, in cases where the usual crop of the country is such, that it cannot come to maturity in one year, a right to hold over after the end of the term, in a parole demise, may be raised by implication; as where saffron is cultivated, in Cambridgeshire, liquorice, near Pontefract, or tobacco, which formerly used to be planted in Lincolnshire; but it was contended, that, in such cases, a lease by deed would preclude such implication, as the parties must be supposed to have described all the circumstances relative to the intended tenure in the written instrument. Such a custom as that set up, in the

(o) Cane. T. 1728, 2 P. W. 462.

(p) T. 1724, Bunb. 174.

(q) B. R. E. 18 G. 2, 2 Str. 1224.

(r) B. R. H. 37 El. Cro. Eliz. 460: 5 Co. 116.

(s) H 3 Ed. 6. Moore, 8 pl. 27.

(t) C. B. M. 18 G. 3. Since reported in 2 Black. 1171.

(u) 4 Co. 51 b. 1 Roll. Abr. 563, pl. 9, et Co. Litt. 55, were also cited for the general principles concerning customs and emblements.

present case, could not, it was said, be of sufficient antiquity with respect to leases by deed, as in the time of Richard I., and long afterwards, tenants had no permanent interest in their lands; or, if there could be such a custom, the plaintiff's lease could not be within it, because the custom must have [*305] applied to the first of May, old style, and *this lease was made and commenced after the alteration was introduced by 24 Geo. 2, c. 23.(v)

The court took time to consider; and this day, Lord *Mansfield* delivered their opinion as follows:

Lord *Mansfield*.—We have thought of this case, and we are all of opinion, that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who knew when their term is to cease, because it is held to be their fault or folly to have sown, when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease.(w)

The rule discharged.(x)

FEW questions are of more frequent practical occurrence than those which involve the admissibility of parol evidence of custom and usage, for the purpose of annexing incidents to, or explaining the meaning of, written contracts. In one of the last cases on the subject, the following luminous account of this head of the law was given by Parke, B., delivering the judgment of the Court of Exchequer. 1 *Mee. & Welsb.* 474.

"It has been long settled," (said his

lordship.) "that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing the whole

(v) The new style commenced the 1st of January, 1753. But if this argument were admitted in its full extent, no custom could exist where a certain day of the month made part of it, as from the errors in the former method of computation the nominal day was continually deviating, by degrees, from the natural day.

(w) Vide *Doe v. Snowden*, C. B. M. 19 Geo. 3, 2 Black. 1225, where it is said by the court, that if there is a taking from Old Lady-day (5th April) the custom of most countries would entitle the lessee to enter upon the arable at Candlemas (2nd of February,) to prepare for the Lent corn, without any special words for that purpose, i. e. in a written agreement for seven years; for the court were speaking of such an agreement.

(x) Judgment was accordingly entered for the plaintiff, upon which a writ of error was brought, in the Exchequer Chamber, and the defendant assigned for errors, "that the custom contained and set forth, &c. is a custom void in law, and is contrary to and inconsistent with the said indenture of lease in the said replication mentioned." The case was argued at Serjeants' Inn, before the Judges of C. B., and the Barons of the Exchequer, by Balguy, for the plaintiff in error, and Chambre for the defendant. The objection to the reasonableness of the custom was abandoned. In T. 21 G. (27th June, 1781,) Lord Loughborough delivered the unanimous opinion of the Court of Exchequer Chamber, that the custom was good; and the judgment was affirmed.

of the contract by which they intended to be bound, but to contract with reference to those known usages. Whether such a relaxation of the common law was wisely applied where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the [*306] *relations between landlord and tenant have so long been regulated upon the supposition that all customary obligations not altered by the contract are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience if this practice were now to be disturbed.

"The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the court should have been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

"Accordingly, in *Wigglesworth v. Dallison*, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord Mansfield said the custom did not alter or contradict the lease, but only added something to it.

"The question subsequently came under the consideration of the Court of King's Bench in *Senior v. Armitage*, reported in Mr. Holt's *Nisi Prius Cases*, p. 197. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Mr. Justice Bayley, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned Judge, that though there was a written contract between landlord and tenant, the custom of the country would still be binding, if not inconsistent with the terms of such written contract; and that, not only all common law obligations, but those imposed by custom, were in full force

where the contract did not vary them. Mr. Holt appears to have stated the case too strongly when he said that the court held the custom to be operative, "unless the agreement in express terms excluded it;" and probably he had not been quite accurate in attributing a similar opinion to the Lord Chief Baron Thompson who presided on the second trial. It would appear that the court held that the custom operated, unless it could be collected from the instrument, *either expressly or impliedly*, that the parties did not mean to be governed by it.

"On the second trial, the Lord Chief Baron Thompson held that the custom prevailed; although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy, without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

"The next reported case on this subject is *Webb v. Plummer*, 2 B. & A. 750; in which there was a lease of down lands, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the following land and carrying out the dung, but nothing for the dung itself, and paying for grass on the ground and threshing the corn. The claim was for a customary allowance for *foldage* (a mode of manuring the ground;) but the court held, as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission of *foldage*, the customary obligation to pay for the latter was excluded. No doubt could exist on that; the language in the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

"The question then is, whether from the terms of the lease now under consideration, it can be collected that the parties meant to exclude customary allowance for seed and labour."

In the case from which the above is extracted, viz., *Hutton v. Warren*, 1 Mee. & Welsb. 466. a custom by which the tenant, cultivating according to the course of good husbandry, was entitled, on quitting, to receive a reasonable al-

lowance in respect of seed and labour bestowed on *the arable land in [*307] the last year of his tenancy, and was bound to leave the manure for the landlord, if he would purchase it, was held not to be excluded by a stipulation in the lease that he would consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as should not be so spread on the land, on receiving a reasonable price for it.

From the above luminous judgment of Baron Parke it may be collected, that evidence of custom or usage will be received to annex incidents to written contracts on matters with respect to which they are silent.

1st. In contracts between landlord and tenant.

2nd. In commercial contracts.

3rd. In contracts in other transactions of life, in which known usages have been established and prevailed.

But that such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable, and this inconsistency may be evinced.

1st. By the express terms of the written instrument.

2nd. By implication therefrom.

With respect to the first class of cases in which the evidence has been received, viz., that of contracts between landlord and tenant, that is so thoroughly discussed in *Hutton v. Warren*, part of the judgment in which is above set out, and in *Wigglesworth v. Dallison*, the principal case, that it seems unnecessary to say more on that head of the subject. See *Holding v. Pigott*, 7 Bing. 465; *Roberts v. Barker*, 1 C. & M. 803; *Hughes v. Gordon*, 1 Bligh. 257; *Clinan v. Cooke*, 2 Sch. & Lef. 22; *White v. Sayer*, Palm. 211; *Furley v. Wood*, 1 Esp. 198; *Doe v. Benson*, 4 B. & A. 558.

With respect to commercial contracts, it has been long established that evidence of an *usage of trade* applicable to the contract, and which the parties making it knew, or may be reasonably presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the written instrument is silent. The words "*usage of trade*" are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct

from that general custom of merchants' which is the universal established law of the land, which is to be collected from decisions, legal principles, and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the Judges. (See *Vallejo v. Wheeler*, Loft. 631; *Eden v. E. I. Company*, 1 Wm. Black. 299, 2 Burr. 1216; see vide *Haille v. Smith*, 1 B. & P. 563, in which evidence of the general custom of merchants was received.) This distinction, indeed, between the general custom of merchants, which is part of the law of the realm, and the particular usages of certain particular businesses, was not, it seems, so clearly marked in former times as it is now; thus we find Buller, Justice, saying, 2 T. R. p. 73, that "within the last thirty years (his lordship spoke in 1787) the commercial law of this country has taken a very different turn from what it did before. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury, and produced no established principle. From that time we all know the great study has been to find some certain general principles which shall be known to all mankind; not only to rule the particular case then under consideration, but to serve as a guide for the future."

But with regard to particular commercial usages, evidence of them is admissible either to ingraft terms into the contract, as in those cases concerning the time for which the underwriters' liability in respect of the goods shall continue after the arrival of the ship, *Noble v. Kennaway*, Dougl. 510, and see the observations on this case in *Ougier v. Jennings*, 1 Camp. 503, n.; *Moon v. Guardians of Witney Union*, 3 Bing. N. C. 817; or to explain its terms, as was done in *Udhe v. Walters*, 3 Camp. 16, by showing that the Gulf of Finland, though not so treated by geographers, is considered by mercantile men part of the Baltic, and in *Hutchinson v. Bowker*, 5 Mee. & Welsb. 535, where it was proved that *good* barley and *fine* barley signified in mercantile usage different things. See further *Robertson v. Clarke*, 1 Bing. 445; *Bottomley v. Forbes*, 5 Bing. N. C. 123; *Moxon v. Atkins*, 3 Camp. 200; *Vallance v. Dewar*, 1 Camp. 403, et notas; *Cochran v. *Retburg*, 3 [*308] Esp. 121; *Birch v. Depeyster*, 1 Stark. 210, 4 Camp. 355; *Donaldson v.*

Forster, Abb. on Shipp. part 3, cap. 1; Baker v. Payne, 1 Ves. jun. 459; Raitt v. Mitchell, 4 Camp. 156; Lethulier's case, 2 Salk. 443; Charaud v. Angerstein, Peake, 43; Bold v. Rayner, 1 Mee. & Welsb. 446; Powell v. Horton, 2 Bing. N. C. 668; Bowman v. Horsey, 2 M. & Rob. 85. {"In mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex customary incidents, when such usage is not expressly or impliedly excluded by the tenor of the written instrument," per Parke, B. in Syers v. Jonas, 2 Exch. 111, 116.} [And, as to evidence of a usage to pay an agent, Hutch v. Carrington, 5 C. & P. 471; for a factor to sell in his own name, Johnston v. Osborne, 11 Ad. & Ell. 549; that "sold 18 pockets Kent hops at 100s." means in the hop trade 100s. per cwt., Spicer v. Cooper, 1 Q. B. 424; that "in turn to deliver," in a charter-party to [*308a] Algiers means at a particular spot in the port for *a particular purpose, Robertson v. Jackson, 2 C. B. 412; to explain the sense in which "the word London" was employed, Mallan v. May, 13 M. & W. 511, {and see Simpson v. Margitson, 11 Q. B. 23, 32.}

In Sutton v. Tatham, 10 Ad. & Ell. 27, it was laid down that a person employing a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, though the principal be himself ignorant of them. And in Bayliffe v. Butterworth, 1 Exch. 416, Sutton v. Tatham was expressly approved of by Parke, B., and Rolfe, B.; and Alderson, B., laid down the law generally, that "a person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place must be taken as intending that the contract may be made according to the usage of that place." And Parke, B., distinguished the cases of Gabay v. Lloyd, 3 B. & C. 793, and Bartlett v. Pentland, 10 B. & C. 760, in which the usage of Lloyd's Coffee-house was held not to be binding on persons who were not shown to have been cognizant of, or to have assented to it, on the ground that in Bayliffe v. Butterworth, the question was as to the *authority* which the broker received. {And Bayliffe v. Butterworth has since been followed in the Queen's

Bench; Pollock v. Stables, 12 Q. B. 765. See, also, Bayley v. Williams, 7 C. B. 886.} In Stewart v. Cauty, 8 M. & W. 160, a rule of the Liverpool Stock Exchange was admitted in evidence between parties not members of it, upon a question what was a reasonable time for the completion of a sale of shares made at Liverpool through the agency of brokers. See further, Stewart v. Aberdeen, 4 M. & W. 211.]

So, in a case not falling within the head of mercantile contracts, evidence has been received to show that by the custom of a particular district the words "1000 rabbits" meant 1200 rabbits. Smith v. Wilson, 3 B. & Ad. 728; and see Clayton v. Gregson, 5 A. & E. 302. {In Hinton v. Locke, 5 Hill, 437, Bronson, J., said that he should feel great difficulty in subscribing to the case of Smith v. Wilson; that it was difficult to deny that the evidence in that case was a plain contradiction of the express contract of the parties; and that no usage or custom is admissible in evidence where it contradicts the agreement of the parties. But in Macy and another v. Whaling Ins. Co. 9 Metcalf, 354, 363; Smith v. Wilson appears to be approved; and it is remarked that evidence is admissible, to show that the contract, notwithstanding the common meaning of the language used, was in fact made in reference to the usage in the trade to which the contract relates; and see also Brown v. Brown and others, 8 id. 573, 576.} [So in Reg. v. Stoke-upon-Trent, 5 Q. B. 303, an agreement in writing "to serve B. from 11 Nov. 1815, to 11 Nov. 1817," at certain wages, "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," was considered capable of explanation by a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves. See Phillips v. Innes, 4 Cl. & Fin. 234. Also, in Grant v. Maddox, 15 M. & W. 737, an agreement by the manager of a theatre to engage an actress "for three years, at a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively," was explained by the usage of the theatrical profession to mean, that the actress was to be paid only whilst the theatre was open for performance. So, again, in Evans v. Pratt, 3 Man. & Gr. 759; 4 Scott, N. R. 370, S. C., in a memorandum as to a race, the run described was

[*308b] "four miles across a country," and *evidence was admitted to show that in sporting parlance the meaning of those words is straight across over all obstructions without liberty to go through open gates.] So if A. & B. were to agree for a lease, it would be implied from custom that the lessor should prepare and the lessee pay for it. *Grissell v. Robinson*, 3 Bing. N. C. 11. [Although, in general, upon a sale of property, the vendee who is to bear the expense of the conveyance ought to prepare it, *Price v. Williams*, 1 M. & W. 6; *Poole v. Hill*, 6 M. & W. 835; *Stephens v. De Medina*, 4 Q. B. 422. See, however, *Doe d. Clarke v. Stilwell*, 8 Ad. & Ell. 645.]

But the admissibility of evidence of custom to explain the meaning of a word used in any contract whatever, is subject to this qualification, viz., that if an Act of Parliament have given a definite meaning to any particular word denoting weight, measure, or number, it must be understood to have been used with that meaning, and no evidence of custom will be admissible to attribute any other to it; per curiam in *Smith v. Wilson*; see also *Hockin v. Couke*, 4 T. R. 314; *The Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *Wing v. Erle*, Cro. Eliz. 267; *Noble v. Durell*, 3 T. R. 271. In *Doe v. Lea*, 11 East, 312, it was held, that a lease by deed of lands since the new style, to hold from the feast of *St. Michael*, must mean *New Michaelmas*, and could not be shown by parol evidence to refer to Old Michaelmas. In *Furley v. Wood*, 1 Esp. 198, Runn. Eject. 112, Lord Kenyon had under similar circumstances admitted parol evidence of the custom of the country to explain the meaning of the word *Michaelmas*; and the court, in *Doe v. Lea*, on hearing that case, asked whether the holding there was *by deed*, which it does not appear to have been; and to which it may be added, that it appears possible that it was not even in writing.

In *Doe v. Benson*, 4 B. & A. 588, evidence of the custom of the country was held admissible for the purpose of showing that a letting *by parol* from *Lady-day*, meant from *Old Lady-day*. The court referred to *Furley v. Wood*, and distinguished that case from *Doe v. Lea*, on the ground that the letting there was *by deed*, "which," said Holroyd, Justice, "is a solemn instrument; and therefore

parol evidence was inadmissible to explain the expression *Lady-day* there used, even supposing that it was equivocal." It is perhaps not easy to conceive a distinction, founded on principle, between the admissibility of evidence to explain terms used in a *deed*, and terms used in a written contract not under seal: for though, when the terms of a deed are ascertained and understood, the doctrine of estoppel gives them a more conclusive effect than those of an unsealed instrument; yet the rule [*308c] that parol evidence shall not be admitted to vary the written terms of a contract seems to apply as strongly to a contract without a seal as with one: while, on the other hand, it appears from the principal case of *Wigglesworth v. Dallison*, without going further, that in cases where parol evidence is in other respects admissible, the fact that the instrument is under seal forms no insuperable obstacle to its reception. Nor does it seem necessary, in order to prevent a contradiction between *Doe v. Lea*, and *Doe v. Benson*, and *Furley v. Wood*, to establish any such distinction between deeds and other written instruments; for in *Doe v. Benson*, the letting seems not to have been in writing, so that the objection to the admission of parol evidence, founded upon the nature of a written instrument, did not arise. In *Furley v. Wood* the letting was perhaps also by mere parol; and though the evidence was, it is true, offered to explain the notice to quit, still it may be urged, that when the holding was once settled to commence from Old Michaelmas, the notice to quit, which probably contained the words "at the expiration of your term," or something *ejusdem generis*, must be held to have had express reference to, and to be explained by it. We must not, therefore, it is submitted, too hastily infer that parol evidence of custom would be receivable to explain a word of time used in the lease in writing, but not under seal.

Doe v. Lea was acted upon by the Court of Common Pleas in *Smith v. Walton*, 8 Bing. 238, where the defendant avowed for rent payable "at Martinmas to wit, November 23d;" the plaintiff pleaded non tenuit; and a holding from *Old Martinmas* having been proved, the court *thought [*309] that the words after the videlicet must be rejected, as inconsistent with the term *Martinmas*, which

they thought themselves bound by statute to interpret November 11th; that no evidence was admissible to explain the record; and that there was, therefore, a fatal variance between it and the evidence; see *Hockin v. Cooke*, 4 T. R. 314; *The Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *Kearney v. King*, 2 B. & A. 301; *Sprowle v. Legge*, 1 B. & C. 16.

However, evidence of usage, though sometimes admissible to add to, or explain, is never so to vary, or to contradict either expressly or by implication, the terms of a written instrument, *Magee v. Atkinson*, 2 Mee. & Welsb. 442; *Adams v. Wordley*, 1 M. & Welsb. 374; [*Trueman v. Loder*, 11 A. & E. 559.] Thus, in *Yeates v. Pym*, 6 Taunt. 445, in an action on a warranty of *prime singed bacon*, evidence was offered of an usage in the bacon trade, that a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer the description of *prime bacon*. This evidence was held inadmissible, first at Nisi Prius, by Heath, Justice, and afterwards by the Court of Common Pleas. In *Blackett v. Royal Exchange Insurance Company*, 2 Tyrwh. 266, which was an action on a policy upon "*ship, &c., boat, and other furniture*," evidence was offered that it was not the usage of underwriters to pay for boats slung on the davits, on the larboard quarter: but was rejected at Nisi Prius, and the rejection confirmed by the Court of Exchequer. "The objection," said Lord Lyndhurst, delivering judgment, "to the parol evidence is, not that it was to explain any ambiguous words in the policy, or any words which might admit of doubt, or to introduce matter upon which the policy was silent, but that it was at direct variance with the words of the policy, and in plain opposition to the language it used, viz., that whereas the policy imported to be upon ship, furniture, and apparel generally, the usage is to say, that it is not upon furniture and apparel, generally, but upon part only, excluding the boat. Usage may be admissible to explain what is doubtful, but is never admissible to contradict what is plain." In *Roberts v. Barker*, 1 Cr. & Mee. 808, the question was whether a covenant in a lease, whereby the tenant bound himself not, on quitting the land, to sell or take away the manure, but to leave it to be expen-

ded by the succeeding tenant, excluded the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it. The court held that it did. "It was contended," said Lord Lyndhurst, delivering judgment, "that the stipulation to leave the manure was not inconsistent with the tenant's being paid for what was so left, and that the custom to pay for the manure might be ingrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part." [*Accord. Clarke v. Roystone*, 13 M. & W. 752]. See further, *Reading v. Menham*, 1 M. & Rob. 236.

[Evidence of previous usage between the parties to a contract may be admitted with the same effect, but subject of course to the same restrictions, as a general usage of trade, *Bourne v. Gatliffe*, 11 Cl. & Fin. 45: see *Ford v. Yates*, 2 M. & Gr. 549, 2 Scott, N. R. 645, S. C.]

Lord Eldon in *Anderson v. Pitcher*, 2 B. & P. 163, expressed an opinion, that the practice of admitting usage to explain contracts *ought not to be extended. [See also the expression of the Court in *Trueman v. Loder*, 11 A. & E. 559, and *Johnstone v. Usborne*, *Ibid.* 549]. In *Cross v. Eglin*, 2 B. & Ad. 106, evidence had been offered for the purpose of showing that the plaintiffs, who had contracted for "300 quarters (*more or less*) of *foreign rye*," could not consistently with the usage of trade, be required to receive so large an excess as 45 quarters over the 300: the question as to the admissibility of the evidence ultimately proved immaterial; but *Littledale, Justice*, said that where words were of such *general import*, he should feel much difficulty in saying that evidence ought to be received to ascertain their meaning. [See *Lewis v. Marshall*, 8 Scott, N. R. 477, 7 Man. & Gr. 729, S. C., per curiam.]

When evidence of usage is admitted, evidence may be given in reply, tending to show such usage to be unreasonable. *Bottomley v. Forbes*, 5 Bing. N. C. 123.

[It is right to observe, that though in certain cases above pointed out evidence of usage is received to explain the terms used in a contract, yet when the jury have decided on the meaning of those terms, it is not for them but for the court

to put a construction upon the entire contract or document. *Hutchinson v. Bowker*, 5 M. & W. 535, and the judgment in *Neilson v. Harford*, 8 M. & W. 806].

The usage of a particular trade, or class of persons, is competent evidence from which the intention, understanding, and agreement of parties may be implied, in those cases where there is no express contract, and where the circumstances themselves do not fix absolutely the legal rights of the parties. In *Smith and Stanley v. J. and I. Wright*, 1 Caines, 43, upon a question whether goods shipped on deck, and ejected in a storm, were entitled to average as against the ship-owners, evidence of usage against allowing it was given, and the court after showing that the allowance of average would be unreasonable, decided against the claim on the ground of the usage; and it being objected that the usage had not been shown to exist above thirty years, the court considered that as no objection, and said, "The true test of a commercial usage is, its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it." *S. P. Winsor and another v. Dillaway*, 4 Metcalf, 221. An authority, as to sell, insure, &c., may be implied from the custom of a trade or profession: *Kemp v. Coughtry*, 11 Johnson, 107; *Taylor v. Wells*, 3 Watts, 65; *Harrington and others v. M'Shane*, 2 id. 443; *Galloway v. Hughes & al.*, 1 Bailey, 553; *De Forest v. Fire Insurance Co.*, 1 Hall, 84. See also, *Hosea, Jr. v. McCrory*, 12 Alabama, 350, 353; and see *United States v. MacDaniel*, 7 Peters, 3, 15. Proof of the usage in such cases is received, not as evidence of what the law is, but as a fact or circumstance from which the intention of the parties is to be made out. *Ruan v. Gardner*, 1 Washington, C. C. 146, 149. The usage of an individual in his own business, as to the manner of performing the business, or the length and kind of credit given, *if known to the party dealing with him*, is evidence competent to show that the contract was on those terms. *Loring and al. v. Gurney*, 5 Pickering, 16; *McDowell and others, ex'ors of Woods v. Ingersoll*, 5 Sergeant & Rawle, 101. See *Knox v. Rives, Battle & Co.*, 14 Alabama, 249, 257.

In like manner, where there has been an express contract about a matter concerning which there is an established custom, this custom is reasonably to be understood as forming a part of the contract, and may be referred to, to show the intention of the parties in those particulars which are not expressed in the contract; and it is obvious that the *reason* of the rule which forbids the receipt of parol evidence of the intention of the parties for the purpose of adding to a written contract, has no application to evidence of custom. In *Williams & al. v. Gilman*, 3 Greenleaf, 276, evidence of usage among printers, that upon a contract to print a certain number of books, an agreement to print no more was implied, was held admissible. In *Van Ness v. Pacard*, 2 Peters, 138, which resembles the principal case, it was held,

that a local usage for the tenant to remove, during the term, fixtures erected by himself, gave that right under an indented lease; and the Court, per STORY, J., said, "Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country or of the district where the land lies: every person under such circumstances is supposed to be cognizant of the custom, and to contract with a tacit reference to it." In *Sewall v. Gibbs and Jenny*, 1 Hall, 602, the usage was shown to be that on sales of certain articles the usual average tare allowed was 10 per cent., but in case of fraud in the packing, the actual tare; and it was held that where notice was given on a sale by auction that the sale was with the usual tare of 10 per cent., the purchaser, upon fraud being found was yet entitled, by reason of the usage, to an allowance of the actual tare. In *Conner & Co. v. Robinson*, 2 Hill's South Carolina, 354, usage was admitted to show that sales of cotton in Charleston are to be understood as made according to the weight as ascertained by the wharfinger on its arrival, and not by the actual weight. See also, *Wilcox v. Wood*, 9 Wendell, 349; *Consequa v. Willings and Francis*, 1 Peters's C. C. 172, 225; *Thomas v. O'Hara*, and *Same v. Graves and Toomer*, 1 Mill's Constitutional, (So. Car.) 303, 308; *Bank of Utica v. Smith*, 18 Johnson, 230; *United States v. Fillebrown*, 7 Peters, 30, 50; *Clark v. Baker*, 11 Metcalf, 186; *The Bridgeport Bank v. Dyer*, 19 Connecticut, 136, 139; *Barton v. McKelway*, 2 Zabriskie, 165, 175. In *Barber v. Brace*, 3 Connecticut, 10, 13, proof of a usage to carry certain goods on deck, was held admissible: but on the same point coming up in *The Paragon*, Ware, 322, though the abstract principle of admissibility was granted, yet it was held that as it derogated from the general usage and law, full and clear proof was to be required; and it was decided in this case that the alleged usage did not exist.

In like manner, in commercial instruments and written contracts, the usage of a particular trade, profession, or place, may be used to aid in ascertaining the sense in which certain words have been used, whose signification may be doubted; or, as it is expressed in *Murray v. Hatch*, 6 Massachusetts, 465, 477, to "give a peculiar effect and meaning to the words of a contract necessarily referring to the usage proved." See *Brown v. Brown & others*, 8 Metcalf, 573, 576. In *Coit and Pierpont v. The Commercial Insurance Co.*, 7 Johnson, 385, it was decided that evidence was admissible to show that by usage and general understanding, the word "roots" in New York policies of insurance is limited to mean such roots as are perishable in their own nature; and thereby excludes sarsaparilla; and similar evidence had been received in *Baker v. Ludlow*, 2 Johnson's Cases, 289. In *Astor v. Union Insurance Co.*, 7 Cowen, 202, it was decided that the usage of traders in *furs* and *skins* was admissible to show the meaning of those words in a policy of insurance. In *Macy and another v. Whaling Ins. Co.*, 9 Metcalf, 354, 362, usage was held admissible to show that among underwriters on whale ships, and their owners, the term "outfits" in a policy of insurance, includes one quarter part of the catchings, that amount of catchings replacing and standing in lieu of outfits. In *Eyre v. The Marine Insurance Company*, 5 Watts & Sergeant, 116, it was decided that on an insurance of a vessel at sea, for twelve months, with liberty of the globe, and if at sea at the end of the time, the risk to continue at the

same rate until her arrival at her port of destination in the United States, evidence was admissible that such a voyage is known among merchants and underwriters as a trading voyage, and that by the usage of trade, the vessel may sail to any part of the globe to which she may get a freight at any time within twelve months, and that she continues to be covered by the insurance during such voyage after the twelve months; and what renders this case extraordinary, is the fact that the policy had previously received a judicial construction to a contrary effect: *S. C. 6 Wharton, 247*. In *Winthrop v. Union Insurance Co., 2 Washington C. C. 8*, it was held, that usage was admissible to show that in an insurance to a foreign port and back, with liberty to touch and trade for refreshments as usual, no part of the cargo could be sold at an intermediate port: but the evidence must be of *usage*, not of the opinions of witnesses. In *Hinton v. Locke, 5 Hill, 437*, it was decided that on a contract to pay the plaintiff twelve shillings a day for each man employed by him in the defendant's service, evidence was admissible of a universal custom where the defendant lived, to consider *ten hours'* labour as a day's work, and thereby to charge twelve and a half hours' work, as the labour of one day and a quarter. In *Avery and another v. Stewart and others, 2 Connecticut, 69*, the meaning of "wholesale factory price" was allowed to be illustrated by usage, and was referred to the jury as a question of fact; see some judicious remarks in *Roberts v. Button & Al., 14 Vermont, 195, 203*. In *Allegre v. The Insurance Company, 6 Harris & Johnson, 408*, the usage of the port of shipment was decided to be admissible to explain the words in a policy, the loss to be paid within 90 days "after proof and adjustment thereof," and to show what proof of loss and value was to be required; and in *Allegre's Adm'rs v. Maryland Insurance Co., 2 Gill & Johnson, 137*, the same sort of evidence was held admissible to show that "cargo" included live-stock as well as dead. So, in *Lawrence v. McGregor & al., 5 Hammond's Ohio, 309*, usage of the river was held admissible to explain matters that were doubtful on the face of the bill of lading. In *Gordon & Walker v. Little, 8 Sergeant & Rawle, 533*, the majority of the court, GIBSON, J. dissenting, were of opinion that evidence of usage was admissible to explain the meaning of "inevitable dangers of the river" in a bill of lading, and also to show that river-boatmen are not, in point of fact, common-carriers, but assume a different responsibility; as to the latter point see also *Dean v. Swoop, 2 Binney, 72*. In *Sleight v. Rhineland & al., 1 Johnson, 192*, it was held by the Supreme Court that evidence of the commercial meaning of "sea-letter" in a policy was inadmissible, because the legal meaning was clear; and the judgment was reversed by the Court of Errors, *2 id. 531*, but, apparently, *not* on the ground that the evidence was improperly excluded. And it is a certain and settled principle, that where the meaning is certain and not doubtful, usage cannot be received to contradict or vary it; *Macomber v. Parker, 13 Pickering, 176*. *Keener v. Bank of the United States, 2 Barr, 237*. And the disposition to abide by the legal meaning of written instruments, and to prevent doubtful usages from controlling fixed and express agreements, is becoming stronger and more general in the courts. In *The Schooner Reeside, 2 Sumner, 568*, it was decided that where the bill of lading undertook to deliver in good order, "the danger of the seas only excepted," evidence of a usage in that region that the ship-owners are made by this clause responsible only for damage arising from their own negligence,

was contradictory, and inadmissible, and an earnest wish to put an end to these local and particular usages is expressed by STORY, J. In *Turney v. Wilson*, 7 Yerger, 340, the same point is decided; see dicta in *McArthur and Hubbert v. Sears*, 21 Wendell, 190, 194, approving of these decisions. It is true, that in *Sampson and Lindsay v. Gazzam*, 6 Porter, 124, in a case of river-navigation, usage and general understanding were decided to be admissible to put the same construction on those words: but this latter case professes to be decided chiefly on the authority of *Gordon and Walker v. Little*, and so far forth proceeds upon a mistake; for in the *Pennsylvania* case, of the three judges present, one, GIBSON, J., thought that no explanatory evidence should be received, and another, DUNCAN, J., expressly said that usage could not be received to contradict the written words so much as to render the boat-owners liable only for their own negligence, if charged on their special contract, though he thought it admissible on the general count on the custom, to show that by the custom of the state, the legal liability of that kind of carrier was less than in England. See *Knox v. Rives, Battle & Co.*, 14 Alabama, 249, 259. In *Aymar and Amar v. Astor*, 6 Cowen, 266, a majority of the court, viz. WOODWORTH and SUTHERLAND, Js., against C. J. SAVAGE, decided that evidence of mercantile usage and understanding at New Orleans and New York was inadmissible to show that injury by rats was included under the exception of "perils of the sea." In *R. & J. Rankin v. The American Insurance Company of New York*, 1 Hall, 619, it was decided, on the ground that usage cannot contradict an express agreement or fixed rule of law, that where, by the policy, the insurers bound themselves to pay for all damage arising from perils of the sea, evidence of usage in that port and others, that the insurer is not liable unless a survey by particular officers be first made on board, and the surveyors find that the goods were properly stowed, and that the damage arose from perils of the sea, is inadmissible; for this is varying the obligation, and introducing a condition precedent into the contract. In *Lewis & al. v. Thatcher & al.*, 15 Massachusetts, 431, it is said by C. J. PARKER, that where there are words in a policy which, by legal construction are a warranty of neutrality, usage to show that those words mean only that the vessel is documented as neutral, would be inadmissible; and in *Homer v. Dorr*, 10 id. 26, a similar principle is decided. In *Barksdale v. Brown and Tunis*, 1 Nott & McCord, 517, usage of factors in that quarter to allow purchasers a week or a fortnight on cash sales, was decided to be incompetent to contradict the express orders of the principal to sell for cash; but CHIEVES, J. dissented, holding the usage good. In *Allen v. Dykers and Alstyne*, 3 Hill's New York, 593, it was decided that evidence of an usage, general or particular, among brokers, though known to the agent of the party who made a special contract, was inadmissible when it contradicted "the fair and legal import of the written contract:" and in the late case of *Hinton v. Locke*, 5 Hill, 437, it was said that usage is never admissible when it contradicts the agreement of the parties. In *Gross, Myers & Moore v. Criss*, 3 Grattan, 262, also, it was considered, that where the meaning of the terms used in a letter of instructions is plain and unequivocal, it is not proper to admit evidence of a local usage or understanding to give a different meaning to the terms of the letter.

In those cases, where, though there has been no full and expressed con-

tract, the law implies a particular contract or liability from certain acts or writings, *because* by general usage such acts or writings are understood as *intended* to indicate such contracts, or create such liabilities, a different contract or liability will be implied, if a different usage be proved; as, for example, in case of the contract of endorsement. It will be remembered that parol evidence of the intention of the parties is admissible to rebut or control a contract implied in this manner from written matter; *Susquehanna B. & B. Co. v. Evans*, 4 Washington C. C. 480, 481; 7 *Sergeant & Rawle*, 114; and evidence of usage is therefore quite unobjectionable. Accordingly, it has repeatedly been decided, in relation to the contract of indorsement, that an established usage of particular banks, as to the time of demanding payment and giving notice, differing from the time fixed by the general law merchant, with which banks the parties deal, is evidence of intention and consent that the contract of the indorser shall be modified according to this usage, and that, therefore, the indorser is bound by such demand and notice as the usage prescribes. *Jones v. Fales*, 4 Massachusetts, 245; *Lincoln and Kennebeck Bank v. Page*, 9 id. 155; *Blanchard v. Hilliard*, 11 id. 85; *Pierce v. Butler*, 14 id. 303; *D. & M. Bank v. N. E. Bank*, 1 Cushing, 178, 188; *The Bank of Columbia v. Fitzhugh*, 1 Harris & Gill, 239; *Renner v. Bank of Columbia*, 9 Wheaton, 582; *Mills v. Bank of the United States*, 11 id. 431; *Bank of Washington v. Triplett and Neale*, 1 Peters, 25, decided by C. J. MARSHALL; and see *Cookendorfer v. Preston*, 4 Howard's S. Ct. 317, 326; *Kilgore v. Buckley*, 14 Connecticut, 363, 388; and the same principle has been applied to the *manner* of making the demand and giving notice; *Whitwell & al. v. Johnson*, 17 Massachusetts, 499; *City Bank v. Cutter & al.* 3 Pickering, 414; *Chicopee Bank v. Eager*, 9 Metcalf, 583. In *Halsey v. Brown and others*, 3 Day, 346, in an action against the owners of a vessel for the recovery of money undertaken to be carried in the ship, for which the master had given a bill of lading, it was admitted that by the general commercial law, the owners were liable upon the contracts of the master, but was held that evidence of a custom in Connecticut and New York that contracts to carry *money* are private and personal to the master, was admissible. In *Allen v. Merchant's Bank of New York*, 22 Wendell, 215, it was held by a majority of the Court of Errors, that a bank receiving a note for collection, which requires the intervention of agent-banks in another state, is liable for their negligence, but that general custom and usage at the place (which must be proved not by the opinions of merchants, but by their evidence as to facts,) might modify and lessen this liability; but is obvious from the opinions delivered in this case, that the usage was deemed admissible, not to alter the legal liability flowing from a contract for the collection of the note, but to show that in point of fact the contract of the bank was not for the collection of the note, but (as was held in *The Mechanics' Bank v. Earp*, 4 Rawle, 385,) for the transmission of the note, or some such modified undertaking; not to put a different meaning upon a contract, but to show that a different contract had been made from that which the law would ordinarily imply from the general understanding and practice of business: see also *Van Santvoord v. St. John*, 6 Hill, 158.—These, it will be observed, are cases of contracts; in which the actual intention of the parties always controls; and the general presumption which the law had made as to the intention from general usage, is re-

butted by that evidence of actual intention which the specific usage affords : no principle of law is oppugned by the usage. And it is well-settled that usage is never admissible to oppose or alter a general principle or rule of law, and upon a fixed state of facts, to make the legal rights or liabilities of the parties other than they are by the common law. *Frith v. Barker*, 2 Johnson, 327 ; *Brown v. Jackson*, 2 Washington C. C. 24 ; *U. S. v. Buchanan*, 8 Howard's S. Ct. 83, 102 ; *West, Oliver & Co. v. Ball & Crommelen*, 12 Alabama, 340, 347 ; *Dewees v. Lockhart*, 1 Texas, 535, 537 ; *Rapp v. Palmer*, 3 Watts, 178. In *Middleton v. Heyward*, 2 Nott & M'Cord, 9, such effect it was thought might be given to an usage, but upon a new trial of the same case, 3 M'Cord, 121, the usage could not be made out. See, however, *Singleton v. Hilliard & Brooks*, 1 Strobhart, 203, 216. In *Snowden and another v. Warder*, 3 Rawle, 101, it was held that evidence was admissible of an usage in Philadelphia, that the vendor, upon a sale of cotton, shall answer for latent defects, though there be neither fraud nor warranty ; but C. J. GIBSON dissented ; and the case is directly contrary to *Thompson v. Ashton*, 14 Johnson, 316 : and is probably not law. And a usage will not be recognized in a court of law unless it be reasonable, and adapted not only to increase trade, but to promote just dealing between the parties ; *Macy and another v. Whaling Ins. Co.* 9 Metcalf, 354, 363 ; *Bowen and others v. Stoddard*, 10 id. 375, 381. In *Bryant & al. v. Commonwealth Insurance Co.*, 6 Pickering, 131, 145, it was decided that an usage for a master of a stranded vessel to sell without necessity, is void ; and in *Prescott v. Hubell*, 1 M'Cord, 94, evidence of a custom that the note of a third person, given by a sea captain, to be in satisfaction when paid, is an absolute discharge, was decided to be inadmissible. That usage cannot stand against statute, see *McDowell and others, ex'ors of Woods v. Ingersoll*, 5 Sergeant & Rawle, 101 ; as, in case of usury ; *Dunham v. Dey* ; *Same v. Gould*, 13 Johnson, 40, 16 id. 367. See, however, *Governor for Liggatt v. Withers*, 5 Grattan, 24, 27. For other cases where usage has been rejected as unreasonable, or contrary to the common law, see *Newbold v. Wright and Shelton*, 4 Rawle, 195 ; *Jordan and Whitesides v. Meredith*, 3 Yeates, 318 ; *Mussey v. Eagle Bank*, 9 Metcalf, 306, 314 ; *Henry, Ex'or v. Risk & al.*, 1 Dallas, 265 ; *Stoever v. Lessee of Whitman*, 5 Binney, 416, where C. J. TILGHMAN says, "Miserable will be our condition, if property is to depend, not on the contract of the parties, expounded by established principles of law, but on what is called the custom of particular places, so that we may have different law in every town and village of the commonwealth." But in *Gibson v. Culver and Brown*, 17 Wendell, 305, proof of usage establishing, in case of common carriers, a different mode of delivery from that required by the common law, was decided to be admissible ; and see dictum to the same effect in *Cope v. Cordova*, 1 Rawle, 203, 211. In *Bolton v. Colder and Wilson*, 1 Watts, 360, where a custom, that, where one carriage passes another going the same way, the leading one must incline to the right, was rejected, the court, per C. J. GIBSON, said, "Nothing should be more pertinaciously resisted, than these attempts to transfer the functions of the judge to the witness's stand, by evidence of customs in derogation of the general law, that would involve the responsibilities of the parties in rules, whose existence, perhaps, they had no reason to suspect before they came to be applied to their rights. If the existence

of a law be so obscure, as to be known to the constitutional expounders of it, only through the evidence of witnesses, it is no extravagant assumption, to take for granted, that the party to be affected was ignorant at the time when the knowledge of it would have been most material to him; and to try a man's actions by a rule with which he had not an opportunity to become acquainted beforehand, is the very worst species of tyranny." See the remark of BRONSON, J., in *Cole v. Goodwin*, 19 Wendell, 252, 256. "No usage or custom," says the same judge in *Hinton v. Locke*, 5 Hill, 437, "can be set up for the purpose of controlling the rules of law." In *Strong v. Bliss*, 6 Metcalf, 393, evidence of a custom among merchants, going or sending to purchase goods, to pay for the article purchased, without taking a delivery or seeing it, and that it is considered a purchase when paid for, was decided to be inadmissible; as it was not of the usage of any particular place, or trade, or class of dealers, or course of dealing, but of a general usage to control the rules of law.

A custom or usage, to be admissible and valid, must be certain, reasonable, and sufficiently ancient, to afford a presumption that it is generally known; *U. S. v. Buchanan*, 8 Howard's S. Ct. 83, 102. It must be general and uniform, but need not be universally acquiesced in; *Desha, Smith & Co. v. Holland*, 12 Alabama, 513; 519; *Barton v. McKelway*, 2 Zabriskie, 165, 175; See *Maitland v. Insurance Co.* 3 Richardson, 331, 333.

The usage of a class or trade is good evidence to ground an argument of negligence in one belonging to it; *Sampson and another v. Hand and another*, 6 Wharton, 311, 324; or to repel fraud or negligence; *Maxwell v. Eason*, 1 Stewart & Porter, 514; *Cook v. Champlain Transportation Company*, 1 Denio, 92, 102; *Bradford v. Drew*, 5 Metcalf, 188; *Chenoweth & Co. v. Dickinson and Shrewsbury*, 8 B. Monroe, 156; and this is probably the true ground of *Barber v. Brace*, 3 Connecticut, 9.

The custom, recognized in *Wigglesworth v. Dallison*, has long been established as part of the common law of Pennsylvania:—a tenant for a term certain is, unless there be an exception in the lease, entitled to the way-going crop, that is, the grain, hay and straw, sown the season before that in which the lease expires, and coming to maturity after the expiration of the lease. *Iddings v. Nagle*, 2 Watts & Sergeant, 22; *Craig v. Dale*, 1 id. 509; *Forsyth v. Price*, 8 Watts, 282; *Demi v. Bossler*, 1 Penrose and Watts, 224; dictum in *Biggs and others v. Brown*, 2 Sergeant & Rawle, 14, 16; *Stultz v. Dickey*, 5 Binney, 285; *Diffedoffer and others v. Jones*, id. 289, and 2 id. 487. In *Van Dorens v. Everitt*, 2 Southard, 460, the same custom is said by C. J. KIRKPATRICK, to be well established in New Jersey. And in Delaware it exists as to wheat, but not oats. *Templeman v. Biddle*, 1 Harrington, 522. In Virginia, however, it has been decided, that a local custom that an off-going tenant shall have the way-going crop, after the determination of a written lease for a term certain, was inadmissible, as it is in derogation of the common law, and is not immemorial; *Harris v. Carson*, 7 Leigh, 632, 639.

As to the admissibility of usages in general, the later cases show that the dislike to them, which seems always to have characterized the ablest judges in this country, is now becoming general. "I am among those judges," says STORY, J., in *Donnell et al. v. Columbia Insurance Co.*, 2 Sumner,

367, 377, "who think usages among merchants should be very sparingly adopted, as rules of court, by courts of justice, as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles."

H. B. W.

MOSS v. GALLIMORE AND ANOTHER.

MICHAELMAS.—20 Geo. 3.

[REPORTED DOUGL. 279.]

A mortgagee, after giving notice of the mortgage to a tenant in possession, under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice.

In a notice for the sale of a distress, it need not be mentioned when the rent fell due.†

In an action of trespass, which was tried before *Nares*, Justice, at the last assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the court, on a case reserved. The case stated as follows: One Harrison being seized in fee, on the 1st of January 1772, demised certain premises to the plaintiff, for twenty years, at the rent of 40*l.*, payable yearly on the 12th of May; and in May, 1772, he mortgaged the same premises, in fee, to the defendant Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor all but 28*l.*, which was due on and before the month of November 1778, when the mortgagor became a bankrupt, being at the time indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3rd of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignee of Harrison had demanded it before, viz. on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, *he said, he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff [*311]

† A man is not bound by his notice of distress, *Crowther v. Rambottom*, 7 T. R. 654, per Lord Kenyon. [A notice of distress must be in writing, *Wilson v. Nightingale*, 8 Q. B. 1034.]

not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c., by virtue of an authority, &c., for the sum of 28*l.*, being rent and arrears of rent, due to the said Esther Gallimore, at Michaelmas last past, for, &c., and unless you pay the said rent, &c." He accordingly sold cattle and goods to the amount of 22*l.* 2*s.* The question stated for the opinion of the court was, whether, under all the circumstances, the distress could be justified?

Wood for the plaintiff. *Bower* for the defendants.

Wood.—The plaintiff's case rests upon two grounds: 1st, The defendant, Gallimore, not being, at the time when the rent distrained for became due, in the actual seisin of the premises, nor in the receipt of the rents and profits, she had no right to distrain. 2nd. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due, and payable, in May.—1. Before the statute of 4 Anne, c. 16, (a) a conveyance by the reversioner was void without the attornment of the tenant, (b) which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence, that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor (according to a late case) (c) is tenant at will to a mortgagee, and has a right to the rents and profits due before his will is determined. Nothing, in this case, can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as Gallimore, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. [*312] It does not appear, from the case, that *the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the statute of William and Mary; (d) but it is thereby required that notice shall be given thereof, "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal. It is true, this irregularity, since the statute of 11 Geo. 2, (e) does not make the defendants trespassers ab initio, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity.†

Lord Mansfield observed, that the plaintiff was precluded by the case

(a) Sect. 9.

(b) Co. Litt. 309, a. b.

(c) *Keech v. Hall*, M. 19 Geo. 3, ante, p. 293.

(d) 2 W. & M. Sess. 1, c. 5, s. 2.

(e) Cap. 19, s. 19.

† See on this point, ante, p. 66.

from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable: and Buller, Justice, said, that it was not necessary, by the statute of William and Mary, to set forth, in the notice, at what time the rent became due.

Bower.—If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses; *Long v. Hemming*.^(a) Now, however, any doubts there might have been on this subject are entirely removed by the statute of Queen Anne, the words of which are very explicit, viz.:^(b) “that all grants or conveyances of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made.” The proviso in the same statute^(c) which says, that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shews, that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to *the mortgagee. That may be true in some respects, but it is more correct to consider him [^{*313}] as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to, at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage.^(d) The interest it is said, is not stated to have been demanded; but the case states, that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said, the tenant could not decide between the mortgagor (or, which is the same thing, his assignees) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The court told him it was unnecessary for him to say any thing on the other point.

Lord Mansfield.—I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. *Of late years the courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his posses-*

^(a) 1 Anders. 256. Vide S. C. Cro. El. 209.

^(b) 4 Anne, cap. 16, s. 9.

^(c) Sec. 10.

^(d) *White v. Hawkins*, M. 19 Geo. 3, ante, p. 295.

sion, but only requires the rent to be paid to him, and not the mortgagor.† This, however, is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and, like other relative acts, they were to be taken together. Thus, livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment; but there is a provision, that the tenant shall not be prejudiced for any act [*314] done by him as holding under the *grantor, till he has had notice of the deed. Therefore, the payment of rent before such notice is good. With this protection, he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and, here, the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of executions it is uniformly held, that if you act after notice, you do it at your peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant in the present case cannot be damaged, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

Ashurst, Justice.—The statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. 'Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. *The demise itself would amount to a determination of the will.* There being in this case a tenant in possession, the [*315] mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at *any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

Buller, Justice.—There is in this case a plea of the general issue, which is given by statute,(a) but if the justification appeared upon the record in

† But this is at present never permitted. See ante, p. 295.

(a) 11 Geo. 2, c. 19, s. 21.

a special plea, the distress must be held to be legal. Before the act of Queen Anne, in a special justification, attornment must have been pleaded; but since that statute it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the court did not consider the mortgagor as tenant at will to all purposes. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance, namely, that a mortgagor would not be entitled to emblements. *Expressions used in particular cases are to be understood with relation to the subject-matter then before the court.*

The postea to be delivered to the defendants.

Moss v. Gallimore is the leading case upon a point which seems so clear in principle that, were it not for its very general importance, it would be perhaps a matter of some surprise that any case should have been requisite to establish it. The mortgagor having conveyed his estate to the mortgagee, the tenants of the former become of course the tenants of the latter, the necessity for their attornment being done away with by the statute of Anne, which, though it provides that they shall not be prejudiced by the abolition of attornment, and consequently renders valid any payments they may have made to the mortgagor without notice of the mortgage, nevertheless places the mortgagee in the situation of the mortgagor, immediately upon the execution of the mortgage-deed, subject only to that proviso in favour of the tenants; and enables him, by giving notice to them of the conveyance, to place himself to every intent in the same situation towards them as the mortgagor previously occupied. [*Rawson v. Eicke*, 7 A. & E. 451; *Burrowes v. Gradin*, 1 Dowl. & L. 213.] Such being the situation of the tenant with respect to the mortgagee, it would of course be unfair that he should not be proportionably exonerated from his liabilities to the mortgagor; therefore, where a lessor, after the execution of the lease, mortgaged the premises, it was held that he could not afterwards maintain ejectment for a forfeiture. *Doe dem. Marriott v. Edwards*, 5 B. & Adol. 1065.

Such being the situation of a tenant who comes in under the mortgagor before the mortgage; let us now examine a subject which seems to involve more difficulty, namely, that of a tenant who

has entered under the mortgagor *subsequently* to the mortgage; for it was once alleged, that though a tenant who had entered previous to the mortgage became the tenant of the mortgagee after the mortgage, and might, if any proceedings were afterwards instituted against him by the mortgagor, show that, although that person was once his landlord, he had now conveyed away his estate in the premises; (according to the ordinary rule of law, that a tenant, though he cannot dispute the title of the landlord under whom he entered, may confess and avoid it by *showing [*316] that it has now determined; see *Doe dem. Marriott v. Edwards* above cited;) still that a tenant who had entered since the mortgage was differently situated, for that he was estopped from disputing the title of the mortgagor, and could not confess and avoid it, inasmuch as it had never really existed during the period of his possession; and this idea derived a good deal of countenance from the decision of the Court of Common Pleas, in *Alchorne v. Gomme*, 2 Bing. 54. However, the subject was afterwards fully discussed in *Pope v. Biggs*, 9 B. & C. 245. In that case Garbet, being the owner of six houses, mortgaged them to various persons; and, after the mortgage, let to several persons. Biggs, the defendant, was tenant of one of the houses, and received the rents of the others as agent for Garbet, who became bankrupt; and thereupon the mortgagees gave notice to the tenants of the houses that the interest was in arrear, and required them to pay the amount of the interest, in part of rent, and similar sums out of future rents, until further notice. At this time there was rent in arrear,

and other rents subsequently became due: these were received by the defendant, and applied by him to the interest due on the mortgage, with the exception of a sum which would not be sufficient to meet the next half-year's interest. To recover these moneys, an action was brought against the defendant Biggs, by the assignees of Garbet; but the court held that they were not entitled to recover. "I have no doubt," said Bayley, J., "that, in point of law, a tenant who comes into possession under a demise, from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents, and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. *But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents.*" "The mortgagor," said Parke, J., "may be considered as acting in the nature of a bailiff or agent for the mortgagee." His receipt of rent will, therefore, be good until the mortgagee interferes, and he may recover on the contracts he has himself entered into in his own name with the tenants. But where the mortgagee determines the implied authority by a notice to the tenants to pay their rents to him, the mortgagor can no longer receive or recover any unpaid rent, whether already due or no." And in *Waddilove v. Barnett*, 4 Dowl. 348, the law on this point was considered so completely settled, that, as remarked by Tindal, C. J., it was not even attempted to argue that the tenant was estopped from showing that the mortgagor's right has been determined by a notice.

The view taken by Parke, J., in *Pope v. Biggs*, in which the mortgagor is treated as the mortgagee's agent, if he think fit to adopt him as such, seemed to be in accordance with a decision of the Court of Common Pleas in a case not arising, it is true, between mortgagor and mortgagee, but between trustee and cestui que trust. *Vallance v. Savage*, 7 Bing. 595, was an action on the case by John Vallance for an injury to his reversion by obstructing a highway leading to a dwelling-house which the declaration alleged to be in the occupation of Sarah Pell, *as tenant to the plaintiff*. The evidence was, that John Vallance,

the plaintiff, was a trustee; that one James Vallance was his cestui que trust, and had let the premises in question to Sarah Pell, from whom he received the rent. It was objected that Sarah Pell was not tenant to the plaintiff, but to James Vallance; and, consequently, that the plaintiff had not the reversionary interest set forth in the declaration. But the court held that the plaintiff had a right to adopt, and had adopted, Sarah Pell as his tenant. "In the present case," said Tindal, C. J., "inasmuch as the plaintiff has brought an action, and has alleged that Pell was a tenant to him, that is a sufficient adoption of her as tenant, and there is no failure in the proof of the allegation on record. *Even in the case of mortgagor and mortgagee, whose interests are adverse, acts of the mortgagor assented to by the mortgagee are considered as acts of the mortgagee.* By the stronger reason, *then, [*317] the act of the cestui que trust, whose interest is under the trustee, must, if known, and not repudiated, be considered the act of the trustee." See *Meggison v. Harper*, 4 Tyrwh. 100. [*Burrows v. Gradin*, 1 Dowl. & L. 213, *Wightman, J.*] The doctrine thus promulgated in *Pope v. Biggs* was, however, shaken by *Partington v. Woodcock*, 5 N. & M. 672, and 6 Ad. & Ell. 690, where *Patteson, J.*, adverting to the expressions of Bayley, J., above cited, says, "I never could understand how the notice of the mortgagee could make the lessee tenant to him at the reserved rent." Very strong expressions to the same effect were also used in *Rogers v. Humphreys*, 4 A. & E. 313. And at length in *Evans v. Elliot*, 9 Ad. & Ell. 342, it was expressly decided by the Court of Queen's Bench, *that the mortgagee cannot by the mere fact of giving the mortgagor's tenant a notice cause him to hold of himself the mortgagee, and that even a subsequent attornment by the tenant to the mortgagee will not have the effect of setting up his title as landlord by relation.* The result of this decision and of that of the Court of C. P. in *Brown v. Storey*, 1 Scott, N. C. 91; 1 M. & G. 117, seems to be that, in order to create a tenancy between the mortgagee and the tenant let into possession by the mortgagor, there must be some evidence whence it may be inferred that such relation has been raised by mutual agreement, and that in such case the terms of the tenancy are to be ascer-

tained (as in an ordinary case) from the same evidence which proves its existence. But that it does not lie in the power of the mortgagee by a mere notice to cause the tenant in possession to hold under him on the same terms on which he held under the mortgagor—or [*317a] indeed *upon any terms at all without his own consent. And that where the tenant does consent to hold under the mortgagee, a new tenancy is created, not a continuation of the old one between him and the mortgagor. In *Brown v. Storey*, indeed, the Court of Common Pleas expressed an opinion that, if the mortgagor's tenant, after receiving notice from the mortgagee to pay rent to him, continued in possession, it might fairly be inferred that he assented to continue as tenant to the mortgagee *upon the old terms*.

[It would seem that the cases on this subject might be reconciled to ordinary principles without straining after any peculiar rule applicable to the case of mortgagor and mortgagee, by observing that a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may in case of an eviction by the mortgagee either actual or constructive, (for instance, an attornment to him under threat of eviction, see *Doe d. Higginbotham v. Barton*, 11 A. & E. 314; *Mayor of Poole v. Whitt*, 15 M. & W. 571.) dispute the mortgagor's title to either the land or the rent, (which is no more than any tenant may do upon an eviction by title paramount;) and further, that he may, although there have been no eviction, defend an action for rent by proof of payment under constraint of as much in discharge of the mortgagee's claim, *Johnson v. Jones*, 9 Ad. & El. 809, (which right is analogous to that of an ordinary tenant in respect of payments on account of rent-charges, and other claims issuing out of the land, of which examples are cited in the note to *Lampleigh v. Braithwaite*, ante;) so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid the rent to the mortgagee, nor been evicted by him either actually or constructively before the day of payment, cannot defend an action by the mortgagor for the rent. *Wheeler v. Branscombe*, 5 Q. B. 373.

In *Burrowes v. Gradin*, 1 Dowl. & L. 213, (which may be considered a middle case,) *Wightman, J.*, held, that an agreement between the mortgagor, and a

tenant from year to year whose tenancy commenced before the mortgage, for payment of an additional annual sum as rent, in consideration of improvements made by the mortgagor, had not the effect of so changing the situation of the parties, that the tenant could be considered as no longer holding of the mortgagee; and further, that the mortgagee might adopt the dealing of the mortgagor as his agent, and (after notice of the mortgage) recover not merely the amount of rent originally payable, but the additional sum also, which, in consequence of the improvement of the land, the tenant agreed to pay; a remarkable decision, so far as relates to the additional sum agreed to be paid, because it appears from *Donellan v. Read*, 3 B. & Ad. 899; *and *Lambert v. Norris*, 2 M. & W. [*317b] 334, that that sum was not rent properly so called, but a sum in gross, for which an assignee of the reversion could not sue, nor could an assignee of the term be sued. The reasoning of *Wightman, J.*, though expressly limited to the peculiar circumstances of the case, and especially founded on that of the tenancy having existed at the time of the mortgage, tends in some degree to confirm the conclusions drawn from *Pope v. Biggs*.]

As the mortgagor ceases to be entitled to the rents upon the mortgagee's giving the tenant notice, it follows that the mortgagor cannot afterwards maintain any action for use and occupation against him, either for rent which accrued due after notice, or for rent which accrued due before the notice but was unpaid at the time when the notice was given. But there is a difference between the modes in which the tenant must plead in the former and in the latter case. In the former case he should plead *non assumpsit*, and will be allowed to give the mortgage and notice in evidence, for "when the mortgagee gave notice that the future rent was to be paid to him, it follows that the defendant ceased to occupy by the permission of the mortgagor, but by the permission of the mortgagee;" and, of course, such a defence amounts to a denial of the contract alleged in the declaration, which avers the defendant to have used and occupied the land by the permission of the plaintiff, the mortgagor. But in the latter case, viz., where the rent became due *before* notice, but was unpaid at the time of

notice, the tenant must plead his defence specially, for "the mortgagor had a right of action against the defendant up to the time when the notice was given, and before the mortgagee required the rent to be paid to him;" so that the tenant, by setting up this defence, confesses that the right of action, stated in the declaration, once existed, but avoids it by matter *ex post facto*, viz., by the subsequent notice from the mortgagee. *Waddelove v. Barnett*, 4 Dowl. P. C. 347; 2 Bing. N. C. 538.

I will conclude this note by taking notice of a case which sometimes occurs; viz., that of a lease purporting to be by mortgagor and mortgagee jointly: such an instrument operates as a lease by the mortgagee, with a confirmation by the mortgagor, until the estate of the former has been determined by paying off the mortgage-money, and then it becomes the lease of the mortgagor, and the confirmation of the mortgagee; and it follows that, if ejectment be brought against the tenant during the mortgagee's estate, the demise must be laid in the name of the mortgagee; if afterwards, in that of the mortgagor; but a joint demise laid in the declaration [*317c] would *be improper. *Doe dem.*

Barney v. Adams, 2 Tyrwh.

289. See *Doe dem. Barker v. Goldsmith*, *ibid.* 710. When a mortgagor and mortgagee join in a lease, and the covenants to pay rent and repair are with the mortgagor and his assigns only, the mortgagee cannot sue on those covenants, because collateral to his interest in the land, *Webb v. Russell*, 3 T. R. 393, though the mortgagor might sue on them as covenants in gross, *Stokes v. Russell*, 3 T. R. 678; 1 H. Bl. 562. Where the mortgagor and mortgagee join in a lease, containing an express covenant by the mortgagor for quiet enjoyment, no covenant from both can be implied. *Smith v. Pilkington*, 1 Tyrwh. 313. [In *Harold v. Whitaker*, Q. B. 29 May, 1846, 15 L. J. 345, in a lease by the mortgagor and mortgagee which recited the mortgage, the *reddendum* was to the mortgagee, his executors, &c., during the continuance of the mortgage, and after payment and satisfaction thereof, to the mortgagor or his executors, &c., and the lessee covenanted to and with the mortgagee, and also to and with the mortgagor to pay the rent "on the several days and times, and in manner as the same was reserved and made payable." The covenant was holden to be several.]

WHEN a lease has been made prior to a mortgage, the latter amounts under the common law, to an immediate grant of the reversion. No doubt, therefore, can be entertained, that upon the attornment of the tenant, or without such attornment, where the conveyance is under the statute of uses, or the statute of Anne, dispensing with attornment is in force, the mortgagee will be entitled to all the remedies for the recovery of the rent, which belong to other assignees of reversions. This doctrine, which is well settled on principle, has been generally recognized in the United States. *Burden v. Thayer*, 3 Metcalf, 79; 4 Kent. Com. 165. *Coker v. Pearsall*, 6 Alabama, 342; *Smith v. Taylor*, 9 Id. 633. And where the right of the mortgagee is restrained by statute, until the forfeiture of the condition, he may exercise it immediately afterwards, and proceed to compel immediate payment of the rent from the tenant; *Babcock v. Kennedy*, 1 Vermont, 457. When, however, the lease is subsequent to the mortgage, as no reversion vests in the mortgagee, and no privity of estate or contract is created between him and the lessee, he cannot proceed either by distress or action for the recovery of the rent. *Mayo v. Shattuck*, 14 Pick. 533. *Watts v. Coffin*, 11 Johnson, 495. *McKircher v. Hawley*, 16 Id. 290. But although the mortgagee cannot recover the rent as such under these circumstances, he may, notwithstanding, recover possession

of the mortgaged premises by entry or ejectment; *Keech v. Hall*, (supra,) *The Northampton Paper Mills v. Ames*, 8 Metcalf, 1; *Jones v. Thomas*, 8 Blackford, 428; and thus either compel the tenant to withdraw altogether, or to remain on the terms of paying the rent to him and not to the mortgagor. So far, the mortgagee stands on the same footing with a grantee claiming under an absolute conveyance. It has, notwithstanding been held, that until a demand is made by the mortgagee, the existence of the mortgage does not entitle him to the rent, or justify a refusal to pay it to the mortgagor, and that payments made to the one before such demand, will be a good answer to an action brought by the other. *Weidner v. Foster*, 2 Penna. R. 23; *Myers v. White*, 1 Rawle, 355; *The Mass. L. Ins. Co. v. Wilson*, 10 Metcalf; *Coker v. Pearsall*; *Burden v. Thayer*; *Smith v. Taylor*. This is well settled when the suit is brought by the mortgagee as assignee of the reversion, on a lease paramount to the mortgage, and there can be little doubt that it applies when the suit is brought in trespass for mesne profits after a recovery in ejectment, on a mortgage paramount to the lease. *The Fitchburgh Cotton Corp. v. Melven*, 15 Mass. 268; *Wilder v. Houghton*, 1 Pick. 87; *Field v. Swan*, 10 Metcalf, 112. It has been said that this rule is founded, at least so far as it regards leases anterior to the mortgage, on the statute 4 Anne, c. 16, which although authorizing grantees to exercise the rights of a landlord, without obtaining the attornment of the tenant, protects the latter for all acts done before notice of the grant, (supra.) But this explanation does not apply when the suit is for mesne profits, and seems insufficient when it is for rent. A payment of rent to a grantor, after notice of an absolute conveyance, is invalid, while in the case of a mortgage, there must be an actual demand of the rent by the mortgagee, or a prohibition to pay it to the mortgagor. A better explanation, therefore, seems to be, that the peculiar relation subsisting between the mortgagor and mortgagee, raises a presumption which does not exist in the case of ordinary conveyances, that the former is to receive the rent and profits of the land, notwithstanding his departure with the legal title, and that the tenants are consequently justified in making payments to him until this presumption is rebutted by an entry or demand on the part of the latter. *Carvis v. McClary*, 5 New Hampshire, 530; *Jones v. Thomas*, 8 Blackford, 428. And the decisions in Massachusetts go still further, and to the point that the mortgagee is absolutely without right until entry or notice, and consequently cannot recover the rents from the tenant, whether they have or have not been paid by the latter to the mortgagor. *Wilder v. Houghton*; *Field v. Swan*; *Hatch v. Dwight*, 17 Mass. 289. A different view was taken in *Henshaw v. Welles*, 9 Humphreys, 568, where it was held that the right of the mortgagee accrues as soon as the mortgage is executed, and that although payments made in good faith by the tenant to the mortgagor, before demand by the mortgagee may be valid, yet that he is not justified in paying in advance, and cannot rely on such a payment, as a defence to a subsequent suit by the mortgagee. It was further held, that although the remedy of the mortgagee against a tenant claiming under a lease subsequent to the mortgage, is by a suit for mesne profits and not for rent, yet that this distinction does not apply in equity, and that the tenant will be compelled to pay the rent reserved in his lease, to the receiver appointed by the court at the suit of the mortgagee, whether the lease be subject or paramount to the mortgage.

When the lease is anterior to the mortgage, payments to the mortgagee stand on the same footing with those made to other grantees of the reversion, and constitute a good defence to any subsequent action brought by the mortgagor. But there is more difficulty in adjusting the respective rights of the parties, when the mortgage is paramount to the lease. Under these circumstances the mortgage does not operate as a grant of the reversion, and a payment to the mortgagee, is not in itself a defence to a suit by the mortgagor. It was accordingly held in *Souders v. Van Sickle*, 3 Halstead, 313, that a tenant cannot set up payments to a prior mortgagee claiming paramount to the lease, as a bar to an action brought by the landlord. The position of the tenant is sufficiently difficult under this decision, for if he does not pay the rent to the mortgagee, he may be evicted by the latter in an ejectment, and if he does, he still remains open to another demand by the mortgagor. There are, however, other principles of law, which though overlooked in *Souders v. Van Sickle*, are sufficient to extricate him from this dilemma. An entry under a paramount title, such as that given by a prior mortgage, followed by an actual expulsion of the tenant is an eviction, and consequently a bar to any action brought for subsequent rent. The legal effect of such an entry and ouster, is not varied by a re-demise to the tenant who has been evicted. And it would seem to follow, that the tenant may agree to hold of the mortgagee as soon as a demand is made by the latter, without going through the formality of giving up the possession of the premises merely in order to resume it, and may rely on this constructive change of possession, as an extinguishment of the rent due to the mortgagor. *Doe v. Barton*, 11 A. & E. 307. Thus it has been held in some instances, that the purchase of an outstanding title to avoid an eviction may be pleaded as an eviction. *Loomis v. Bidell*, 11 New Hampshire, 84. If, said Pollock, C. B. in *The Mayor of Poole v. Whitt*, 15 M. & W. 571, "a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you, that according to good sense, is capable of being well pleaded as an expulsion.'" The mortgagee, said Lord Denman in *Doe v. Barton*, might have ejected the tenants and afterwards redemised to them, and it seems absurd to require him to go through the form of an ejectment in order to put them into the very position in which they now stand."

It was held accordingly, in *Jones v. Clarke*, 20 Johnson, 121, and *Magill v. Hinsdale*, 6 Conn. 469, that a tenant might resist an action brought by the mortgagor, by showing payment of the rent to a mortgagee, in order to avoid an eviction under the mortgage. And it has been decided in Massachusetts, that a demand of the rent made by a mortgagee, on a tenant claiming under a subsequent lease and supported by an entry or a threat of entry under the mortgage, justifies a payment to him, and may be pleaded as an eviction to any subsequent action brought by the landlord. *Smith v. Shepard*, 15 Pick. 147, or given in evidence under non assumpsit, if the suit be brought in use and occupation. *Welch v. Adams*, 1 Metcalf, 494. An eviction, however, can only be good as a defence, when the suit is brought for rent which has fallen due subsequently, and not when it is for rent due at the time of the eviction. When therefore, the mortgagee makes his right to obtain a judgment in ejectment, and for the

mesne profits, the means of compelling a payment to himself of the arrears of rent due to the mortgagor, other principles must be invoked for the protection of the tenants. Under these circumstances, the case comes within the doctrine, that where a debt due to one man is compulsorily paid to another claiming under a right or power given by the former, the payment will enure, not only as a set-off or cause of action, but as a satisfaction or extinguishment of the debt. Thus in *Sapsford v. Fletcher*, 4 Term, 513, a payment of rent by a sub-lessee in order to avoid a distress by the superior landlord, was held to take effect as a payment to the lessor, and to be a good defence to an action by the latter. The same principle was applied in *Taylor v. Zamira*, 6 Taunton, 524, although the payment was of a rent-charge which bound the estate demised to the tenant, but was not personally binding either on him or on the lessor. It would, therefore appear, that as the mortgagee has a right to recover the demised premises as mesne profits, although not as rent, which grows out of the act of the mortgagor, and may be enforced against the tenants, it must necessarily follow that a payment in discharge of this right, will operate as a payment to the mortgagor himself, and consequently be a bar to any demand on his part.

This doctrine is illustrated by the cases of *Pope v. Garbet*, 9 B. & C. 245, and *Waddilove v. Barnet*, 2 Bing. N. C. 538. In the first of these cases, which was decided before the new rules, payments by a tenant to a mortgagee claiming under a mortgage paramount to the lease, were held to be, against the mortgagor, a good defence under a plea of non-assumpsit, whether the rent so paid, fell due before or after the notice or demand by the mortgagee. But in *Waddilove v. Barnet*, where the pleadings were the same, but subsequent to the new rules, although the tenant was allowed to prove payments to the mortgagee, under notice, as a defence to the rent which fell due subsequently, he was not permitted to prove similar payments of the rent due at the time when the notice was given, because while the former showed that the use and occupation of the premises had been by the permission of the mortgagee and not of the plaintiff, and were therefore admissible under the general issue, the latter could only be good in confession and avoidance, and should have been specially pleaded.

The principles above stated, will apply under proper pleadings, for the protection of a tenant who has been compelled to pay the rent to avoid a suit on a paramount mortgage, whatever may be the form of action brought by the landlord. Whether the question arise in debt, covenant, or on a distress, the demand of possession by the mortgagee, and the agreement to hold under him on the part of the tenant, will support a plea of eviction, and thus constitute a bar to any claim for subsequent rent. And all compulsory payments to the mortgagee, may be given in evidence in any of these forms of action, under the principle laid down in *Taylor v. Zamira* and *Sapsford v. Fletcher*, as payments to the mortgagor, whether the rent on account of which they were made, accrued before or after the notice given by the mortgagee. And when the suit is brought in assumpsit for use and occupation, the evidence will be admissible under non assumpsit, both for the purpose of disproving the averments of the declaration as to the subsequent rent, and for that of showing a satisfaction of that already due, unless where there is some special rule as in England, requiring all matter in confession and avoidance to be pleaded specially.

It is proper to observe, that where, as in New York, the mortgagee has been deprived of the right to take possession of the mortgaged premises, to compel the tenants to pay the rent to him instead of the mortgagor, such payments will not be a defence to an action brought by the latter. And it is equally evident, that as a mortgagee is not entitled in Massachusetts to the profits of the land before demand or entry, the tenants will only be justified in paying him the rent which falls due, after he has taken actual or constructive possession of the premises, (*supra*.)

It seems to have been thought in *Waddilove v. Barnet*, and *Pope v. Garbett*, that payment of the rent by the tenant, under a notice from the mortgagee, may invest the latter with the rights of a reversioner, and entitles him to enforce the stipulations in the lease, even when it is subsequent in date to the mortgage. It is, however, evident, that if such payments create any tenure, it must be a tenure perfectly distinct in its origin, and which has nothing to do with the demise by the mortgagor, unless in so far as that may be made the measure of the new agreement, by the express or implied understanding of the contracting parties.

H.

[*319] *WHITCOMB v. WHITING.

EASTER—21 GEO. 3.

[REPORTED DOUGL. 652.]

The acknowledgment of one out of several drawers of a joint and several promissory note takes it out of the Statute of Limitations as against the others, and may be given in evidence in a separate action against any of the others.

DECLARATION, in the common form, on a promissory note executed by the defendant. *Pleas*; the general issue, and *non assumpsit infra sex annos*: *Replication*; *assumpsit infra sex annos*. The cause was tried before Hotham, Baron, at the last assizes for Hampshire. The plaintiff produced a joint and several note executed by the defendant, and three others; and, having proved payment, by one of the others, of interest on the note, and part of the principal, within six years, and the Judge thinking that was sufficient to take the case out of the statute, as against the defendant, a verdict was found for the plaintiff.

On Friday, the 4th of May, a rule was granted to show cause why there should not be a new trial, on the motion of Lawrence, who cited *Bland v. Haslerig*;(a) and this day, in support of the application, he contended that

(a) C. B. H. 1 & 2 W. & M. 2 Ventr. 150.

the plaintiff, by suing the defendant separately, had treated this note exactly as if it had been signed only by the defendant; and, therefore, whatever might have been the case in a joint action, in this case the acts of the other parties were clearly not evidence against him. The acknowledgment of a party himself does not amount to a new promise, but is only evidence of a promise. This was determined in the case of *Heylin v. Hastings*,^(b) reported in *Salkeld*,^(c) and 12 Modern;^(d) and, in **Hemings v. Robinson*,^(e) it was decided, that the confession of nobody but a defendant [*319] himself is evidence against him. That last case was an action by an indorsee of a note, against a drawer, and the plaintiff proved the acknowledgment of a mesne indorser that the indorsement on the back of the note was in his handwriting; but the court was of opinion, that this was not evidence against the drawer, but that the indorsement must be proved. It would certainly open a door to fraud and collusion, if this sort of evidence were, in any case, to be admitted. A plaintiff might get a joint drawer to make an acknowledgment, or to pay part, in order to recover the whole, although it had been already paid.

Lord Mansfield.—The question, here, is only, whether the action is barred by the Statute of Limitations. When cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.

Willes, Justice.—The defendant has had the advantage of the partial payment, and, therefore, must be bound by it.

Ashurst, and Buller, Justices, of the same opinion.

The rule discharged^(f).

THIS case is confirmed by *Perham v. Raynal*, 2 Bing. 306, where it was held, that the fact of one of the defendants being but a surety was immaterial, *Wyatt v. Hodson*, 8 Bing. 309; *Rew v. Pettet*, 1 Adol. & Ell. 196; *Pease v. Hirst*, 10 B. & C. 122; *Burleigh v. Stott*, 8 B. & C. 36; [*Channell v. Ditchburn*, 5 M. & W. 494, where the statute had run

against the debt at the time when the payment was made; *Goddard v. Ingram*, 3 Q. B. 839, where the jury, under the direction of *Gurney, B.*, found for the defendants, on the ground that the payment relied upon, and which had been made after the statute had run, was made by the co-contractor, not bona fide, but in fraud of the defendants, and "in

(b) B. R. H. 10 Will. 3.

(c) 1 Salk. 29:

(d) 223.

(e) C. B. M. 6 Geo. 2. *Barnes*, 4 to ed. 436.

(f) The case of *Haslerig v. Bland*, cited p. 318, n. (a), was a joint action against four; the plea, the Statute of Limitations; and a verdict, that one of the defendants did assume within six years, and that the others did not; and it was held by *Pollexfen, C. J.*, *Powel*, and *Rokeby*, (against *Ventris*), that the plaintiff could not have judgment against the defendant, who was found to have promised within the six years.—That case may be explained on the manner of the finding; for as the plea was joint, and the replication must have alleged a joint undertaking, the verdict did not find what the plaintiff had bound himself to prove. But according to the principle in the case of *Whitcomb v. Whiting*, the jury ought to have considered the promise of one as the promise of all, and therefore should have found a general verdict against all.

the jaws of bankruptcy;" and in answer to a question of the learned Baron, the jury further stated that they considered the payments to have been made by the co-contractors in collusion with the creditor; yet, the Court of Queen's Bench declaring that they could not forbear acting upon numerous authorities, set aside the verdict, and ordered a new trial; a very strong case, because the payment was made under circumstances from which there could hardly be implied a promise even by the person who made the payment, to pay the balance sued for; and *Jackson v. Fairbank*, 2 H. Bl. 340; in which last case, one of two joint makers of a promissory note having become bankrupt, the payee of the note proved under the commission, and received dividends; and it was held, that the receipt of the last dividend being within six years before the commencement of the action, took the case out of the Statute of Limitations, as to both makers. But where one of two joint drawers of a bill of exchange became bankrupt, and the holder of the bill proved, not upon the bill, but for goods sold, exhibiting the bill as a security, it was held that receipt of dividends on that proof would not take the case out of the statute, as against the other drawer, *Brandram v. Wharton*, 1 B. & A. 463. [In that case the dividend was paid upon the debt proved, and its payment could not, without straining the facts, be treated as a payment on account of the bill; but in general, where there are several securities for a debt, a general payment on account revives them all; thus where a promissory note was made by a surety as security for part of the amount of a mortgage, payment of interest on the mortgage was held enough to take the note out of the operation of the statute. *Dowling v. Ford*, 11 M. & W. 329.] A joint and several note is not taken out of the statute, as against the executor of one of the makers, by a payment made by the other after the death of the deceased maker; for the [*320] joint contract is determined by the death of one of the joint contractors, *Atkins v. Tredgold*, 2 B. & C. 23; [see *Ault v. Goodrich*, 4 Russ. 430; *Way v. Bassett*, 5 Hare, 55;] nor will a payment by the executor of the deceased, under such circumstances, take the case out of the statute as against his survivor, *Slater v. Lawson*, 1 B. & Adol. 396. But it was ruled in *Burleigh v. Stott*,

that if one of two joint and several makers make a part-payment before the death of the other, that part-payment will take the case out of the statute *against the administrator of [the other after his death; for [*320a] though it was urged that, the note being joint and several, it must be considered as if there were three notes, one joint and two several, and that the payment only operated as an admission so far as the joint promise was concerned, and no further, and, consequently, not against the administrator, who was sued on the several liability of his intestate; yet Lord Tenterden and the rest of the court thought that a part-payment by one is an admission by both that the note is unsatisfied, and that it operates as a promise by both to pay according to the nature of the instrument, and, consequently, as a promise by defendant's intestate to pay this his several promissory note. [In *Griffin v. Ashley*, 2 Car. & Kir. 139, A., one of three makers of a joint and several promissory note, died, leaving as his executor one of the survivors, B., who paid interest on the note; and that payment was relied upon in answer to a plea of the statute of limitations in an action against the other surviving co-contractor, C.; on whose part evidence was opened to prove that the payment had been made by B. in the character of executor to A., and so, as C. insisted, did not take the case out of the statute as against him; upon which, according to the report, *Cresswell, J.*, before whom the cause was tried, "without hearing the evidence, directed the jury to find a verdict for the plaintiff." That ruling is questioned in a note, 2 Car. & Kir. 140; but it seems not improbable that the learned judge considered the evidence opened by the defendant's counsel, the particulars of which are not stated in the report, *insufficient*; not *irrelevant*, to prove that the payment was made by B. in his character of executor only; the onus of establishing which fact, according to *Way v. Bassett*, 5 Hare, 57, lay on the defendant. In that case Sir James Wigram, V. C., held that acts done by one of several surviving partners who was executor of the deceased partner, being acts which the surviving partners were in that character bound to do, could not *prima facie* be considered as done in the character of executor; and accordingly, that payments made by the surviving partners,

on account of a debt of the original firm, had not the effect of taking that debt out of the statute, as against the real or personal estate of the deceased partner. It is a moot question whether a payment made by one executor in his representative character, but without any express authority from the other executors, revives the debt so as to bind them in their representative character. It seems to have been the opinion of the judges of the Court of Queen's Bench in *Atkins v. Tredgold*, 2 B. & C. 23; 3 D. & R. 200 S. C.; and *McCulloch v. Dawes*, 9 D. & R. 40; that the payment by one in his character of [*320b] executor, may *have that effect. The ruling of Lord Tenterden in *Tulloch v. Dunn*, 1 R. & M. 416, is, however, an authority to the contrary. In *Scholey v. Walton*, 12 M. & W. 510, the question was incidentally discussed, but there being no evidence to show in what character the payment was made, it became unnecessary to decide it. The inclination of Lord Abinger's mind appears to have been, that a payment by one executor would bind the other; but Parke, B., expressed a strong opinion in favour of the ruling of Lord Tenterden in *Tulloch v. Dunn*, of which case he said, "I own that decision of Lord Tenterden which has been cited, appears to me to be a correct decision, that one executor cannot be bound by the express promise of another, *even if he binds himself in his character of an executor*;" and again, "it appears to me that that case is founded in justice and good sense, and ought to be followed." In *Scholey v. Walton*, the transaction relied upon to take the case out of the statute was an allowance in account by one of the executors against his own debt, of interest upon the debt of the testator which was the subject of the action; and the account was marked "settled," and was signed by the executor; but as was pointed out by Lord Abinger, he did not add the word "executor," or "as executor," to his signature, nor was he dealing with the testator's goods at the time; "therefore," said his lordship, "in order to show that he was acting in an executive character, the plaintiff should have given some evidence to show that this was a settlement of account by him with the consent of the other executors, or with a view to reduce the amount of a claim upon the estate. That would be evidence to go to the jury of the payment being

made by him in that character; but as it stands, the document itself says nothing of the kind, and the evidence does not supply the ambiguity."]

St. 9 G. 4, cap. 14, enacts that where there shall be two or more joint contractors or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments (*subintell.* statutes of limitation), or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made or signed by any other or others of them; provided always that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also that in actions to be commenced against two or more such joint-contractors or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors or executors or administrators, shall, nevertheless, be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants, against whom he shall recover, and for the other defendant or defendants against the plaintiffs. And by sect. 2, it is further enacted, that, if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

Since this enactment, one joint contractor cannot prevent the other from taking advantage of the statute of limitations by any species of acknowledgment excepting a part payment of principal or interest. But as the statute expressly saves the effect of such a payment, the principal case of *Whitcomb v. Whiting* is still law, and has been recognised as such in *Wyatt v. Hodson*, 8 Bing. 313, ubi per Park, Justice: "1

have always considered *Whitecomb v. Whiting* a governing case, notwithstanding some observations which have been thrown out against it; but the case has been recognised in *Burleigh v. Stott*, and confirmed in *Perham v. Raynal*, where an acknowledgment by one of several joint contractors on a promissory note was held to be binding on the others. That was, like the present, the case of a surety, and therefore, expressly in point. Then the recent statute having distinguished between the effect of a promise by one of many joint contractors, and the payment of interest by such a person, the law in respect of such a payment remains where it was under the previous decisions." *Rew v. Pettet*, 1 Ad. & Ell. 196, is another case to the same effect. The reason which induced the legislature to make this distinction in favour of payment is said by Tindal, Chief Justice, in *Wyatt v. Hodgson*, to have been, because the payment of principal or interest stands "on a different footing from the making of promises, which are often rash and ill-interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment."

With respect to the mode of proving such a payment—it has been held that if goods be given and accepted in part payment *within six years, [*321a] that takes the case out of the statute. *Hooper v. Stephens*, 4 A. & E. 71; *Hart v. Nash*, 2 C. M. & R., 337. [But, an open account between two tradesmen, each charging the other with goods, though containing items within six years, has not, without an appropriation of the charges on one side in liquidation of those on the other, the effect of avoiding the bar; for the exception in 9 G. 4 is in favour of payments only. *Cottam v. Partridge*, 4 M. & Gr. 271; 4 Scott, N. R. 819, S. C.; *Clark v. Alexander*, 8 Scott, N. R. 147. Where, however, there is such an appropriation by going through the account and striking a balance, with an agreement express or implied that the balance only shall be paid, such a transaction is equivalent to a payment of the lesser debt and a repayment of the amount in liquidation of so much of the greater debt; and so it operates to save the balance of the larger debt from the effect

of the statute, *Ashby v. James*, 11 M. & W. 542, per Alderson, B.; *Scholey v. Watton*, 12 M. & W. 510, per Parke, B. A payment on account of the creditor in part liquidation of the debt has of course the same effect as a payment to himself. *Hart v. Stephens*, 6 Q. B. 937; *Worthington v. Grimsditch*, 7 Q. B. 479; see *Clarke v. Hooper*, 10 Bing. 480.] St. 9 G. 4, cap. 14, enacts, "that no indorsement or memorandum of any payment made upon any bill of exchange, promissory note, or other writing, by, or in behalf of, the person to whom such payment is made, shall be deemed sufficient proof of payment to take the case out of the operation of the statutes of limitation;" and, that part payment may have that effect, it must be observed, that there are two requisites besides proof of the naked fact of payment. 1st. it must appear that the payment was made on account of a larger debt; 2ndly, that that debt is the one sued for; *Tippetts v. Heane*, 4 Tyrwh. 775. See the judgment of Parke, B. there, and see *Holme v. Green*, 1 Stark. 488. In *Evans v. Davis*, 4 A. & E. 840; [*Worthington v. Grimsditch*, supra, and *Burn v. Boulton*, 2 C. B. 476,] the evidence was held sufficient for that purpose. [In *Waugh v. Cope*, 6 M. & W. 829, the evidence was held insufficient.] See further, *Mills v. Fowkes*, 5 Bing. N. C. 455; *Moore v. Strong*, 1 Bing. N. C. 442. [The 1st requisite above mentioned involves this also, that the payment be made under circumstances which do not rebut the implication of a promise to pay the balance; because it is only as giving rise to such an implication, and not by any specific effect of its own, that a payment operates. *Wainman v. Kinman*, 1 Exch. 118, yet see *Goddard v. Ingram*, 3 Q. B. 839; for which reason the payment must also be before action brought, *Bateman v. Pindar*, 3 Q. B. 574, *overruling *Yea v. Fouraker*, 2 Burr. 1099. The 2nd [*321b] requisite mentioned above has led to a discussion, whether, where there are two clear and undisputed debts, either can be taken out of the statute by evidence of a part-payment not specifically appropriated by the debtor; upon which question the Court of Common Pleas are said to have incidentally expressed an opinion in the negative, *Burn v. Boulton*, 2 C. B. 476; but, with submission, it seems to be a proper question for the jury, whether the payment was made

generally on account of whatever might be due from the debtor at the time, and if so both the debts would be saved.] In *Mills v. Fowkes*, it was held that though a creditor has a right to appropriate a payment made generally to an item barred by the statute of limitations, still such payment is not a payment on account so as to take the remainder of the demand out of the statute. [Accord. *Waller v. Lacy*, 1 Sc. N. R. 186, 1 M. & Gr. 54, S. C.] In *Willis v. Newham*, 3 Y. & J. 518, the Court of Exchequer held, that a verbal acknowledgment of part-payment of a debt was not sufficient proof thereof within this statute; the import of which they construed to be, that in no case should a mere verbal acknowledgment take a case out of the statute of limitations, whether that acknowledgment were of the existence of the debt, or of the fact of payment. Vide *Trentham v. Deverill*, 3 Bing. N. C. 397. The authority of *Willis v. Newham* has been questioned, [though it was acted upon in *Bayley v. Ashton*, 12 Ad. & El. 493, 4 Per. & D. 204, S. C.; *Maghee v. O'Neil*, 7 M. & W. 531; *Eastwood v. Savile*, 9 M. & W. 615; *Clark v. Alexander*, 8 Scott, N. R. 147, and probably as suggested in more than one of the cases above cited, its doctrine may not stand the test of a writ of error;] and at all events, it is quite clear, [that written and signed evidence of appropriation may be confirmed by parol, *Bevan v. Gething*, 3 Q. B. 740, and] that if the payment be proved as a fact, the appropriation of that payment to the debt which it is sought to take out of the statute of limitations may be proved by an admission, *Waters v. Tompkins*, 2 C. M. & R. 726. That action was brought to recover the amount of five notes, one for 100*l.*, two for 50*l.*, and two for 20*l.* each; the evidence upon an issue joined on plea of *actio non accrevit infra sex annos* was, that within six years the maker, the defendant, on application to him, said, his wife would have called on the holder and paid money on account of the interest on 200*l.*, but for their child's illness; about a fortnight after which, the wife called, and paid 15 shillings, without saying on what account; on another occasion the defendant sent word to the testator that his wife was in

[*321c] *Wales, or would have called with the interest; and that the wife on other occasions made payments

to the testator, who said, at the time, he should be glad if the interest were more regularly paid. This evidence was held to warrant the jury in finding a verdict for the plaintiff. See, too, *Bevan v. Gething*, 3 Q. B. 740, where, however, *Coleridge, J.* expressed a doubt as to the correctness in principle of *Waters v. Tompkins*.] Nor need the writing which is relied on for the purpose of taking a debt out of the operation of the statute specify its amount; that may be proved by parol; *Bird v. Gammon*, 3 Bing. N. C. 888. [*Waller v. Lacy*, 1 M. & Gr. 54, 1 Sc. N. R. 186, S. C.; *Dickenson v. Hatfield*, 1 Moo. & R. 141; *Chealey v. Dalby*, 4 You. & Coll. 228.]

When a bill is given on account of part of a debt, and is paid by the drawee, the statute is not avoided by such payment though it may be by the delivery of the bill; *Irving v. Veitch*, 3 M. & W. 90. [Whether the promise implied from part payment to the holder of a negotiable instrument is itself negotiable, quære. See *Cripps v. Davis*, 12 M. & W. 159.]

An attempt, which proved, however, unsuccessful, was lately made to oust the defendant of his opportunity of pleading the statute of limitations, by averring a payment of interest within six years, in the declaration, instead of giving it in evidence under the replication. The declaration, which was on a promissory note for 127*l.* 10*s.* 8*d.*, payable on demand, *with interest*, after commencing in the ordinary way, proceeded to state that the defendant "disregarded his promise, and did not pay the amount of the note and interest, or any part thereof, *except interest on the said note, at the rate of 5*l.* per cent., from the day of the date of said note up to a certain day within six years next before the commencement of this suit, to wit, the 26th April, 1830; which interest was, within six years next before the commencement of this suit, to wit, on the last-mentioned day, paid by the defendant to S. Davies,*" as whose executrix the plaintiff sued. Plea, *Actio non accrevit infra sex annos*. Demurrer and joinder. It was contended for the plaintiff, that the payment of interest on the note within six years took the entire demand out of the operation of the statute of limitations, and that such payment being averred in the declaration and not traversed, the plea was bad, since it was

founded on a statute which the declaration showed to be inapplicable. The court, however, held the plea good, upon the ground that the payment of interest within six years did not necessarily, as a proposition of law, take the debt out of the operation of the statute, but was only evidence whence the jury might infer the continuing existence of the cause of action. "The question is," said the Lord Chief Justice, "whether the first plea, as pleaded to this count, is an answer to the whole. What is the whole? A cause of action within six years. Interest, however, [*322] as separate from the principal, is not, of itself, a cause of action, though the payment of it is one mode of evidence to show that, *prima facie*, a cause of action subsists. That is the legal effect of the payment. The statute 9 G. 4, c. 14, s. 1, has this *proviso*. 'Provided always that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.' Since that statute, as before, payment of interest *may* afford an inference that the principal is still due. But how are we to know whether it is so or not, unless we knew the circumstances under which the interest has been paid? I think, therefore, that the declaration discloses only evidence of a cause of action and not any actual cause of action that has not been barred by the plea, and consequently that our judgment must be for the defendant." *Hollis v. Palmer*, 2 Bing. N. C. 713.

Having touched on St. 9 G. 4, c. 14. it may not be amiss to advert to a case of great importance lately decided on it, although not immediately bearing upon the point in the principal case, *Whitcomb v. Whiting*. The enactment of the first section of the statute is, as will be recollected, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, "unless such acknowledgment or promise shall be made or contained in some writing, *to be signed by the party chargeable thereby*." In consequence of these last words, it has been solemnly decided that an acknowledgment, signed by an agent in behalf of the debtor, is not sufficient; *Hyde v. Johnson*, 2 Bing. N. C. 777; 3 Scott, 289 S. C. It does not, however, appear from that case, that the agent,

who was the party's own wife, was authorised *in writing*; so that, perhaps some doubt may still exist whether, if a case were to occur, in which an agent authorised *by writing* were to sign a written acknowledgment, this last would not be looked upon as sufficiently connected with the document signed by the principal to satisfy the words of the statute. It must, however, be observed, that the expressions used by the Chief Justice, in *Hyde v. Johnson*, are extremely comprehensive, and seem to militate against such a distinction. "Looking," says his Lordship, "at the words of the statute, it is confined in terms to a writing signed by the party chargeable thereby; and as the effect of that statute is, for the first time, to introduce a legislative exception into the statute 21 Jac. 1, c. 16; and thereby, *pro tanto*, to repeal it, we do not feel ourselves justified in extending such exception beyond the plain and unambiguous meaning of the words employed therein. The legislature has, in many cases, given equal efficacy to written instruments when signed by the parties, and when signed by their agents; but in all those cases express words have been employed for that purpose. The Statute of Frauds, in its third section, requires, for the purposes of that section, a note in writing to be signed by the party, 'or their agents thereto lawfully authorised *by writing*;' in the fourth section a memorandum or note in writing is required, 'signed by the party to be charged therewith, or some other person thereto by him lawfully authorised;' in the fifth section, a devise of lands is required to be made in writing, to be signed by the party so devising, 'or by some other person in his presence, and by his express directions;' in the seventh section, a declaration of trusts of any lands shall be in writing, 'signed by the party;' and lastly, the seventeenth section requires, upon the sale of goods, that there shall be some note or memorandum in writing of the bargain, 'signed by the parties to the contract, or their agents thereunto lawfully authorised.' It appears, therefore, that the legislature well knew how to express the distinction not only between a signature by the party, and a signature by his agent; but also to describe the different modes in which agents for different purposes are to be appointed. The same observation arises upon referring to the more

recent statutes, 3 & 4 W. 4, c. 27, s. 42, and c. 42, s. 5. When, therefore, we find in the statute now under consideration, that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be legislating, not interpreting, if we extended *its operations to writings signed, not by the party chargeable thereby, but by his agent."

If the question just supposed were to be mooted, a good deal would depend upon the wording of the agent's written authority. Supposing, by that authority, A. were to direct the agent "to investigate the account between himself and B, and to acknowledge the balance, if any should appear to be due;" it possibly might be urged that the acknowledgment, when made and signed by the agent, would, if it referred in terms to the authority, be incorporated by reference thereinto, in the same way that the instrument by which a power is executed becomes, in contemplation of law, part of the deed by which the power was created. Supposing that, in the case just put, the written acknowledgment by the agent were to be held sufficiently connected with the signature of the principal to satisfy the exigency of the statute, might it not be urged with some plausibility, that, as *omne majus continet in se minus*, less effect could not be given to the signature of an agent acting under a general authority? It may be observed, too, that the policy of the act would by no means militate against such arguments, for the object of the statute was to prevent a claim from being made out after the lapse of a number of years by mere parol testimony; an object which is by no means defeated by allowing it to be made out by any number of *written* documents, no matter by whom signed, provided there be written evidence to show that they all emanate from the party to be charged, and are clothed with his assent. Thus, under the Statute of Frauds, the policy of which is similar to that of 9 G. 4, c.

14, the contract may be contained by any number of writings, provided they can be connected in sense, without the interposition of parol evidence. *Cobbold v. Caston*, 1 Bing. 399; *Jackson v. Lowe*, *Ibid.* 9; *Phillimore v. Barry*, 1 Camp. 513; *Saunderson v. Jackson*, 2 B. & P. 238. Suppose A. were in writing to acknowledge a debt due from B. to C., and B. were afterwards, by writing signed, expressly to approve of that acknowledgment; would not such an approval be sufficient to take the debt out of the operation of the statute? may it not be contended that the maxim *omnis ratihabitio retrotrahitur et mandato equiparatur* is convertible, and that, if such a subsequent approval by B. would suffice, a previous authority, similarly signed, would suffice also? [In the more recent case of *Clark v. Alexander*, 8 Sc. N. R. 147; *Hyde v. Johnson*, was recognised and acted upon, and it was made a question, which however the state of facts rendered it unnecessary to decide,—whether a written acknowledgment made and signed by one of several partners, stands upon a different footing from a written acknowledgment made and signed by one of several ordinary joint contractors, which is provided for by the act 9 Geo. 4, c. 14,—a question too which, when it comes to be solemnly discussed, there may not be found much difficulty in answering in the negative.]

There is in the 9 G. 4, c. 14, a proviso, that "no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within any Stamp Act." The effect of this appears to be to render the stamp unnecessary where the agreement is put in merely for the purpose of avoiding the statute of limitations, the debt having been proved aliunde. But if it were put in as the only evidence of a debt though more than six years old, *seem* that it would require a stamp, *Morris v. Dixon*, 4 Ad. & Ell. 845. The proviso has been held to be inapplicable to the case of an unstamped promissory Note, *Jones v. Ryder*, 4 M. & W. 32.

IN order to understand how far a payment or acknowledgment by one of several co-contractors, should be allowed to take a cause of action arising under the joint contract, out of the statute of limitations as against the rest,

it is necessary to inquire into the general principles, on which evidence of subsequent facts or admissions, is received to prevent the operation of that statute as a bar to a recovery.

It is now held universally, both in the United States and in England, that in order to take a case out of the statute of limitations, there must be evidence from whence the law can imply a new promise, although such promise may be, and when the declaration pursues the original facts, must be, supported by the old consideration. Thus it has been repeatedly and expressly decided in New York, that to prevent the operation of the statute as a bar, there must have been within six years, either an express promise, or the acknowledgment of a *subsisting debt*, from which a promise of payment may be enforced. With whatever clearness the debt be acknowledged, if the debtor express an intention not to pay, there can be no recovery; and the same result will follow a contingent or conditional promise of payment, unless the condition or contingency be shown to have occurred, or to have been performed. *Allen v. Webster*, 15 Wendell, 284; *Stafford v. Richardson*, Ib. 302; *Gaylord v. Van Loan*, Ib. 308; *Hancock v. Bliss*, 7 Id. 187; *Stafford v. Bryan*, 3 Id. 532; *Purdy v. Austin*, Ib. 187; *Sands v. Gelston*, 15 Johnson, 511; *Danforth v. Culver*, 11 Id. 146. The law is held the same way in Massachusetts. *Bangs v. Hall*, 2 Pick. 368; *Barley v. Crane*, 21 Id. 323; *Barnard v. Bartholomew*, 22 Id. 291; *Munford v. Freeman*, 7 Metcalf, 432. "If," said SHAW, C. J., in *Sigourney v. Drury*, 14 Pick. 390, "more than six years have elapsed since the making of the original promise, or since the cause of action thereon accrued, it must appear that the defendant has made a new promise to pay, within six years. Such promise may be express or implied, and a jury will be authorised and bound to infer such promise, from a clear unconditional and unqualified admission of the existence of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar." This language necessarily implies, that the most unqualified admission of the existence of a debt, will be insufficient to sustain a recovery, if accompanied by expressions showing an intention not to pay it, or to rely on the statute for protection. The same rule prevails in the Supreme Court of the United States, where it has been repeatedly determined, that evidence of the confessions of the defendant that the debt still subsists, will not render him liable, when more than six years have elapsed since the cause of action accrued unless they are unqualified by any expressions, inconsistent with an intent of payment. This doctrine was held by MARSHALL, C. J., in *Wetzell v. Bussard*, 11 Wheaton, 315, and still more strongly laid down in the subsequent case of *Moore v. Bank of Columbia*, 6 Peters, 92. It was there said, that to take a case out of the statute, "where there is no express promise, there must be an unqualified and direct admission of a subsisting debt which the party is willing to pay;" and that if there are "accompanying circumstances which repel the intention to pay," the plaintiff cannot recover.

The same law has been repeatedly and unequivocally declared by the Supreme Court of Pennsylvania. A new promise is held necessary, and on the maxim "*expressum facit cessare tacitum*," the fullest acknowledgment of a debt is not permitted to raise a legal promise of payment, when accompanied with expressions, inconsistent with the existence of such a promise

Fries v. Boisselett, 9 Sergeant & Rawle, 128; Church v. Feterow, 2 Penn. 305; Hogan v. Bear, 5 Watts, 111; Berghaus v. Calhoun, 6 Watts, 220; Allison v. James, 9 Watts, 381; Hay v. Kramer, 2 W. & S. 138; Gylkinson v. Larue, 6 Id. 217.

Where only one debt exists, the acknowledgment will be presumed to refer to it; Woodbridge v. Allen, 12 Met. 407; but where there are two, it must be shown to relate to that on which the suit is brought, although it need not specify its amount; Davis v. Steiner, 2 Harris, 275; Clarke v. Butcher, 9 Cowen, 674. And when one part of the demand is barred by the statute, and the other not, it must appear to refer to the former rather than the latter; Morgan's adm'rs v. Walton, 4 Barr, 321. It must be present and immediate in its nature, and not merely an expression of hope, or expectation for the future. Thus, a promise to make an arrangement to pay a debt, will not rebut a plea of the statute, because it shows that the defendant, instead of being willing to meet the debt as it stands, contemplates paying it in some other form or manner not yet determined on. The Kensington Bank v. Patton, 2 Harris, 479; Oakes v. Mitchell, 15 Maine, 360. And the admission must not only be unqualified in itself, but there must be nothing in the attendant acts or declarations of the defendant to qualify it, or rebut the inference of willingness to pay, to which an unqualified admission naturally and primarily gives rise. Thus, the statement of a debt in a petition, for the discharge of an insolvent has been held not to take it out of the statute, because the circumstances under which the statement is made, are inconsistent with a present purpose of payment; Christy v. Flemington, 10 Barr, 129; although such an acknowledgment may be used to shew the existence of the debt, and other evidence given to prove the defendant's willingness to pay it; Woodbridge v. Allen. And when one item is admitted, at a meeting held for the purpose of stating and settling an account, which is not stated or settled, the admission will be qualified by the purpose for which it is made, and will not be evidence of a new promise, in a suit brought for that particular item. Nixon v. Brownfield, 2 Harris, 319.

The law is the same way in most of the other states of the Union, and there can be no recovery in cases barred by the statute, without such an acknowledgment of the obligation of the defendant, as to constitute a new cause of action, when the suit is brought in debt, or raises a new promise by implication, when it is in assumpsit. Cromwell v. Buckman, 7 Blackford, 537; Robbins v. Farley, 2 Strobhart, 348; Dickinson v. Conway, 5 Georgia, 486; McLellan v. Albee, 17 Maine, 184; Pray v. Garcelon, id. 145; Porter v. Hill, 4 Greenleaf, 41; Perley v. Little, 3 Greenleaf, 97; Cross v. Conner, 14 Vermont, 398; Phelps v. Stewart, 12 Vermont, 263; Exeter Bank v. Sullivan, 6 New Hampshire, 132; Tillet v. Lindsay, 6 Marshall, 337; Executor of Head v. Executor of Manners, 5 Marshall, 209; Harrison v. Handley, 1 Bibb, 443; Gray v. Lawridge, 2 Bibb, 285. In Vermont, however, the courts still adhere to the interpretation which was given to the statute in many of the older cases, and hold that the effect of an admission of the debt, cannot be restrained by any qualification attached to it by the debtor; Cummings v. Gassett, 19 Vermont, 308; Williams v. Phinney, 16 Id. 207.

The necessity for a new promise, or of evidence whence a new promise

may be implied, for the purpose of avoiding the plea of the statute of limitations, is as well settled in England as in this country: and although it is admitted, that a distinct and unambiguous acknowledgment of the debt will suffice; *Gardner v. McMahon*, 3 Q. B. 561; *Walter v. Lacy*, 1 M. & G. 54; *Dodson v. Mackey*, 8 A. & E. 225; yet it has been determined that there can be no recovery, if the acknowledgement be accompanied with any qualification, tending to rebut the implication of a promise of payment, which would otherwise arise. *Routledge v. Ramsay*, 8 A. & E. 221; *Spong v. Wright*, 9 M. & W. 629; *Hart v. Prendergast*, 14 Id. 741; *Cripps v. Davis*, 12 Id. 159; *Morrell v. Frith*, 3 Id. 402. The operation and extent of the rule in that country, will best appear from the language held by Lord DENMAN in deciding the case of *Bateman v. Pinder*, 3 Q. B. 574; where an attempt was made on the authority of *Yea v. Fouraker*, 2 Burr. 1099, to sustain a traverse of a plea of the statute, by evidence of a payment by the defendant since action brought. "This case, when we consider it," said his Lordship, "is very clear. *Yea v. Fouraker* is acknowledged as an authority in *Thornton v. Illingworth*; but the judges distinguish it from that case. *Yea v. Fouraker* was rightly decided, if, as BAYLEY and HOLROYD, Js., lay it down in the subsequent case, the statute of limitations takes effect upon the ground that after a certain time, it shall be presumed, that the debt has been discharged. For, if that be so, an acknowledgment made at any time, will rebut that presumption. But in *Tanner v. Smart*, 6 B. & C. 602, the earlier cases were revised, and the doctrine as to presumption of payment repudiated; and it was held, that to prevent the operation of the statute, a distinct promise was necessary. That promise must be before action brought."

It is a necessary consequence of this doctrine, that there can be no recovery on a replication to a plea of the statute, unless the replication itself, and the evidence given under it, accord with the averments made in the declaration. For no rule is better established than that, unless the subsequent pleadings and proof, agree with the allegations made in the first instance, the action must fail, on the ground either of departure or variance. Hence, whenever the original cause of action is special, and the new promise general, or when the new promise is special, and the original cause of action general, the statutory disability can only be overcome by resorting to a declaration, framed to meet the case, and setting forth the liability of the defendant in its ultimate, and not in its original aspect. Thus, a subsequent promise for the payment of money, cannot be given in evidence when issue is joined on a plea of the statute, to a declaration on an agreement to build a house, or deliver merchandize; and a promise for the delivery of merchandize is inadmissible, when the cause of action declared on is a debt; *Reeves v. Hearne*, 1 M. & W. 323; *Earle v. Oliver*, 2 Exchequer, 71; *Short v. McCarty*, 3 B. & Ald. 626; *Whitehead v. Howard*, 2 Brod. & Bing. 372; *Wetzell v. Bussard*, 11 Wheaton, 315. If the plaintiff can recover at all under such circumstances, it can only be by setting forth the antecedent transaction as the consideration, and the subsequent promise as founded upon it. This is strikingly illustrated by the case of *Lechmere v. Fletcher*, 1 Cr. & M. 23. The declaration recited a joint liability on the part of the defendant and one Fulljames, for a debt due by them jointly more than six years before action brought, and then averred that this liability had been

barred by the statute of limitations, and that the defendant had promised to pay his proportion of the debt in consideration of the premises. It appeared in evidence, that subsequently to this promise, the plaintiff had sued Fulljames and the defendant upon the original contract, and obtained a verdict and judgment against the former on the general issue, but that a verdict and judgment had been entered for the latter, on a plea of the statute of limitations. It was, however, decided by the court, not only that the declaration on the new promise was good, but that it was not barred by what took place in the first suit, which was held to have been for a different cause of action.

It has been said that an acknowledgment of a debt barred by the statute, revives the debt, but does not create a new cause of action; *Dean v. Hewitt*, 5 Wend. 257; *Carshore v. Huyk*, 6 Barbour's S. C., 583; but the better view seems to be, that although the old debt is revived, there is a new cause of action. Many causes of action may, unquestionably, be founded upon the same consideration, as in the common case of a sale on credit, for the notes of the vendee, when the vendor may sue on the notes if given, and if not, for the default of the purchaser in not giving them, and, finally, for goods sold and delivered at the expiration of the credit. But a recovery for a demand barred by the statute, is always upon a new cause of action, although this is not apparent where the declaration is in debt or assumpsit on an executed consideration, because the form of pleading is so general as to admit of any proof which shows an obligation founded on the consideration, and between the parties, set forth on the declaration. Thus, when the plaintiff declares on what are commonly called the money counts, he is not restricted as to time or amount, and may recover on proving any debt corresponding with that declared on. Hence, as proving a new promise or acknowledgment within six years, introduces no new consideration, and merely establishes the existence of a liability, answering to that averred in the pleadings, it cannot be regarded as a variance from the declaration. Although a new promise is said to be necessary to remove the bar of the statute, yet this promise may be implied, and when the declaration is general, an express promise is only admissible for the purpose of proving an implied promise. And instead of saying that there must be a new promise to remove the bar of the statute, it is more correct to say, that the evidence must be such that the law can imply a new promise, when the form of action is such as to render a promise material. A declaration in debt on an executed consideration, need only allege the existence of the consideration and of the legal obligation to which it gives rise. And such a declaration may good, without the allegation of a promise, not only in debt, but even in assumpsit; for as the promise is an implication of law, the omission to allege it is a mere irregularity in form, which, unless on special demurrer, will be supplied by legal intendment. Hence, any subsequent acknowledgment of a debt, whether in the form of an express promise, or of a mere acknowledgment within six years, will sustain an action of indebitatus assumpsit, by showing a liability corresponding with that alleged in the declaration, and thus enabling the law to imply a promise within the period fixed by the statute. Nothing, therefore, is better settled, than that an acknowledgment may be given in evidence as a revival of the debt, under the common counts in assumpsit, and without being specially pleaded;

Thompkins v. Brown, 1 Denio, 247; Wilkins v. Stevens, 4 Barbour, 168; Carshore v. Huysk, 6 id. 583.

The rule as to variance, is, however, as well established with reference to declarations on executed considerations, and promises implied by law, as to any of the other forms of pleading or action, and no acknowledgment will be admissible, which does not show a liability corresponding with that alleged in the declaration. It must, therefore, be based upon the same consideration, and between the same parties. Thus, Lord HOLT decided, in *Green v. Crane*, 2 Lord Raymond, 1101, that an acknowledgment made within six years to an executor, could not be given in evidence under a declaration averring a promise to the testator. This decision was followed many years afterwards, by the Court of Common Pleas, in *Ward v. Hunter*, 6 Taunton, 210. It was held, in like manner, in *Jones v. Moore*, 5 Binney, 577, and *Lund v. Jamison*, 4 McCord, 93, that an issue joined under a plea of the statute to a declaration averring a promise to the testator, could not be supported by an acknowledgment to his personal representatives. It necessarily follows, from the doctrine held in these cases, that the converse of the proposition which they establish is also true, and that an acknowledgment made by an executor, cannot be pleaded or given in evidence in answer to a plea of non assumpsit, *infra sex annos* to a declaration, setting forth a promise by the testator, without giving rise to a departure or variance; *Thompson v. Peters*, 12 Wheaton, 565; *Benjamin v. De Groot*, 1 Denio, 151.

The difficulty which might otherwise arise from this course of decision, is obviated by introducing a count averring a promise to the executor, whenever it is meant to rely on an acknowledgment made to him, and by declaring on a promise by the executor, when it is intended to use his engagements or admissions for the purpose of charging the estate of the testator; *The executors of the Duke of Marlborough v. Widmore*, 2 Strange, 890; *Martin v. Williams*, 17 Johnson, 331. No doubt exists as to the validity of this mode of pleading, nor that when it is resorted to, acknowledgments of the debt may be given in evidence without a variance, whether made before or after the death of the debtor, and whether they proceed from himself or from his personal representatives.

In many of the earlier and some of the more recent decisions, an acknowledgment by an executor or administrator, has been held to have the same effect in removing the bar of the statute, as if it had been made by the debtor in his lifetime; *Whittaker v. Whittaker*, 6 Johnson, 112; *Lawson v. Lambert*, 7 Halsted, 247; *Chambers v. Fennemore*, 4 Harrington, 168. But the weight of authority seems to be in favour of the position, that although the acknowledgment of a debt by the debtor, will justify the implication of a promise to pay it, and constitute a new cause of action, yet that such is not the case, when the acknowledgment is of the debt of another, and the party who makes it is acting in a fiduciary capacity as a trustee or executor, and, consequently, that an admission of a debt by the personal representatives of a deceased debtor, will not deprive them of the right to resort to the statute for protection; *Oakes v. Mitchell*, 15 Maine, 360; *Executors of Head v. Administrators of Manners*, 5 Marshall, 263; *Tullock v. Dunn*, *Ryan & Moody*, 478. In the latter case it was ruled by ABBOT, C. J. in an action against two executors, on promises averred to have been made by them in their representative capacity, that evidence of an unqualified ac-

knowledge by both, and an express promise by one, would not entitle the plaintiff to a verdict, on an issue joined under a plea of the statute of limitations. The point raised in these cases did not, however, turn on the power of the personal representatives of a debtor, to remove the bar of the statute of limitations by an express promise for the payment of the debt, but merely on whether their acknowledgments or admissions, were to be placed on the same footing with those of persons acting in their own right, and whether an obligation binding the estate could be created by the act of one of several executors or administrators, or required the concurrence of all. On both these points, the decision of Lord TENTERDEN, in *Tullock v. Dunn*, is supported by the language held by PARKE, Baron, in *Scholey v. Walton*, 10 M. & W. 510, 512, where it was said, that *Tullock v. Dunn* was founded in good sense, and ought to be followed. And in the recent case of *The Cayuga Bank v. Bennett*, 5 Hill, 236, it was said by COWEN, J., that if the acts or admissions of one of several executors were sufficient to remove the bar of the statute of limitations, it could only be as an exception to the general rule, which renders them inadmissible in evidence against the estate, unless made by all, and it was therefore decided, that in an action brought against three executors on a promissory note made by the testator, a promise to pay by two would not support a recovery, nor even enure as evidence that due notice had been given, of the dishonour of the instrument.

It is, notwithstanding, held in general, that an express promise by one of several executors, will take the case out of the statute as against all. *Johnson v. Beardslee*, 15 Johnson, 3; *Briggs v. Ex'or of Starkie*, 2 Constitutional R. 111; *Hand's Ad'ors v. Lee*, 4 Monroe, 46. And in Massachusetts, the distinction between a promise and acknowledgment by an executor is denied, and either held sufficient to charge the estate; *Baxter v. Penniman*, 8 Mass. 133. In Pennsylvania, on the other hand, the courts have gone still further than the ruling of Lord Tenterden in *Tullock v. Dunn*, and decided that an express undertaking by one or all of the executors of a deceased debtor, will not deprive them of the right to set up the bar of the statute, as an answer to a subsequent action; *Fritz v. Thomas*, 1 Wheaton, 71; *Reynolds v. Hamilton*, 7 Watts, 426; *Forney v. Benedict*, 5 Barr, 225. The law was held the same way in *Peck v. Botsford*, 7 Conn. 172. But it does not appear that the case of *Thompson v. Peters*, 12 Wheaton, 565, which has sometimes been cited as establishing the same proposition, goes further than the point that a promise by an executor, cannot be given in evidence without a variance, under a count setting forth a promise by the testator.

Amidst this discordancy of decision, some doubt must exist as to what is correct in principle. The courts of Pennsylvania appear to entertain the opinion, that as the law will not raise an implied promise for the payment of a debt barred by the statute, an express promise can have no greater effect, because such a promise is not binding without proof of assets, and then only on the executor personally, and not on the estate. It is undoubtedly true, that an express promise by an executor for the payment of a debt due by the estate, is not binding, unless he has assets at the time when it is made; and that the judgment in any suit based upon it, will be against his own goods, and not against those of the testator. *Rann v. Hughes*, 7 Term, 350; *Trevinian v. Howell*, Croke Eliz. 91; 1 Rolle's

Abridg. 24, 30. But it does not necessarily follow, that because a promise by an executor cannot take effect as an express promise, and thus give rise to a personal liability without some new consideration, it cannot revive the obligation of a debt which has been barred by the statute, and thus sustain a suit founded on an implied promise for its payment. It is held in Pennsylvania, that although a promise by an executor to discharge a debt which has been barred, is not binding, he may, notwithstanding, discharge it if he think fit, and claim a credit for the payment in his account. And this seems to be a concession of the whole question, for it is difficult to hold either that such a credit can be claimed for the payment of a debt, which is not legally valid, or that the executor can give the debt validity in one way and not in another.

The cases of *Green v. Crane*, and *Jones v. Moore*, proceed on the ground that to take a case out of the statute, the acknowledgment must be such as to justify the implication of a new promise, and give rise to a new cause of action, although founded on the old consideration. For, if an acknowledgment be regarded merely as evidence, and not as entering into and constituting the cause of action, it is immaterial to whom it is made, provided it proceed from the debtor; *Whitney v. Bigelow*, 4 Pick. 110, 113; while a different rule prevails when it is relied on as giving a right, and not merely as proving it. Whether an acknowledgment of a debt be made to the party interested, or to a mere stranger, the law will imply an obligation to the person to whom the debt is due at the time of the acknowledgment, but this obligation must obviously follow the right on which it is founded. The acknowledgment need not, therefore, be made directly to the creditor; *Soulden v. Renselaer*, 9 Wend. 293; *Carshore v. Huyck*, 6 Barbour, 583; *Watkins v. Stevens*, 4 id. 168; *Oliver v. Gray*, 1 Har. & Gill, 204; *Mounstephen v. Brook*, 5 B. & A. 141, but it cannot take effect as a promise in his favour unless he is in existence. This distinction has been disregarded in Massachusetts, where the courts hold that admissions made in the lifetime of the debtor, and after his death, stand on the same footing, and are equally admissible in evidence whether the declaration proceed on a promise to himself, or to his personal representatives. *Baxter v. Penniman*, 8 Mass. 133; *Emerson v. Thomas*, 16 id. 41.

The general doctrine that, in order to sustain a traverse of a plea of the statute, the evidence must show a cause of action within six years, corresponding with that laid in the declaration, was applied in *Atkins v. Tregold*, 2 B. & C. 225, to a suit against the executors, of one of the makers of a joint and several promissory note. The declaration contained a variety of counts, in some of which the promise was stated as made by the testator, in others by the executors, and the plaintiff endeavoured to support the issue on his part, by proving a part payment within six years by one of the executors. But as the party who made the payment, was one of the original promissors on the note, and was shown to have made it on his own account, and not on that of the testator, it was held inadmissible by the court, for the purpose either of proving a promise by the testator or by the executors. The law was held the same way in *Lane v. Doty*, 4 Barbour S. Ct. 530. And in *Slater v. Lawson*, 1 B. & A. 396, a payment by the executor of a deceased contractor, was held not to take the case out of the statute, as against another party liable on the same contract. A similar point was decided in *Hathaway v. Haswell*,

9 Pick. 42, although the reasoning of the court was in some respects different.

The same principles were applied in another form in the case of *Pittam v. Foster*, 1 B. & C. 248, where suit was brought against a husband and wife, and one Foster, on a promise made by Foster and the wife before the marriage; and it was decided that a promise made by Foster after the marriage, was not an answer to a plea of the statute, by the other defendants. The court held that the effect of such a promise, must necessarily be dependent on the situation and powers of the parties at the time when it was made; and that while it would be void as the promise of the wife, it would produce a variance, if treated as that of the husband. And it is a necessary consequence of this decision, that an express undertaking by a husband, cannot be given in evidence, under an issue joined on a plea of the statute, to a declaration on promises made by the wife before marriage. *Kline v. Guthart*, 2 Penna. R. 290; *Bonnell v. Taintor's Ex'ors*, 5 Conn. 273; *Ridgway v. English*, 2 Zabriskie, 409; *Powers v. Southgate*, 15 Vermont, 471.

It is equally well settled, that although a part payment of a debt admits its existence as a subsisting obligation, and will therefore be sufficient to take it out of the statute, yet that it has no greater effect than any other unqualified acknowledgment, and must, consequently be connected by sufficient evidence, both with the persons charged in the suit, and the claim sought to be enforced. *Tippets v. Hearne*, 1 C. M. & R. 253; *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fouke*, 4 Bing. N. C. 76; *Wainman v. Kynman*, 1 Exchequer, 118. The law, on this head, was distinctly defined by Lord ABINGER in *Waugh v. Cope*, 6 M. & W. 824, and the rule adopted in all the courts declared to be, "that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be in *part* payment of the debt in question. If it stands ambiguous, whether it be part payment of an existing debt, or payment generally, without admission of any greater debt as due to the party: if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the statute of limitations." This opinion was delivered subsequently to the statute 9 Geo. 4, c. 14; but that enactment changes the medium of the proof of payment, and not its effect or operation when proved.

The extent and bearing of the doctrine thus held, is illustrated by the case of *Linsell v. Bonsor*, 2 Bing. N. C. 241. The defendant had there given a sum of money to a party acting as his agent, with instructions not to pay it to the plaintiff, unless the latter would receive it in full of the demand; but the agent disregarded his instructions, and took a receipt at the time of the payment, in which it was stated to be merely on account. Under these circumstances it was held, that as there was no intention on the part of the defendant to admit his liability for the rest of the debt, and the authority which he gave had been exceeded, the payment could not be relied on as evidence, for the purpose of taking the case out of the statute. Upon the same general principle, it is necessary not only to show a payment or acknowledgment of the debt by the defendant, but that it was made by him in the character in which he is sued; and consequently, in an action

against an executor, the acts and admissions relied on to take the case out of the statute, must appear to have been in his representative character; *Scholey v. Walton*, 12 M. & W. 510; *Larrason v. Lambert*, 7 Halsted, 255. And when the defendant, on being applied to for the interest of the debt, made a part payment, but said at the same time that he did not owe the principal and would not pay it, it was held that the payment was not conclusive, and that it should have been left to the jury to determine whether his disclaimer was serious, or only spoken in jest; *Wainman v. Kynman*.

The interpretation given to the statute 9 Geo. 4, c. 19, in *Willis v. Newnham*, (supra 611,) has been confirmed by several subsequent decisions; *Maghee v. O'Neill*, 7 M. & W. 531; *Bayley v. Ashton*, 4 Per. & D. 214. But it has notwithstanding been intimated, that the decision there made, went further than the courts would be disposed to go again, were the matter *res integra*. And in *Williams v. Godley*, 9 Metcalf, 482, where the same point arose under the revised statutes of Massachusetts, which contain a provision similar to the 9 Geo. 4, it was decided that as a writing is not made necessary to the proof of a part payment, it may be established by the admissions of the defendant, although such admissions are no longer admissible as a direct acknowledgment of the debt. The same construction has been given to a similar legislative enactment by the courts of Maine; *Sibley v. Lumbert*, 30 Maine, 253. And as an admission of payment, is much less likely to be misconstrued or mistated than an admission of the debt itself, there is no reason to question the soundness of this interpretation. The statute law of Mississippi, however, goes further, and renders a payment however proved, insufficient, without an express promise; *Smith v. Westmoreland*, 12 Smedes & Marshall, 663; *Davidson v. Marshall*, 5 Id. 564. It was held in *Eastwood v. Saville*, 9 M. & W. 618, on the authority of *Willis v. Newnham*, that an endorsement of part payment on the back of the instrument, on which suit is brought, is not evidence to take the case out of the statute, even when in the handwriting of the defendant, unless it is also signed by him. It is, however, well settled in most of the States of this country, on general principles, as it was in England before the passage of the 9 Geo. 4, that an endorsement on a note in reduction of the debt, may be submitted to the jury as a recognition of its existence, whether such endorsement be made by the plaintiff or the defendant; in the latter case as an admission of the fact which it sets forth, *Porter v. Blood*, 5 Pick. 54, and in the former, as an entry against interest, and consequently admissible in favour of, as well as against the person by whom it is made. *Roseboom v. Billington*, 17 Johnson, 182; *Clapp v. Ingersoll*, 11 Maine, 83; *Coffin v. Buckman*, 12 Id. 471; *The Trustees v. Osgood*, 21 Id. 176; *Adams v. Seitzinger*, 1 W. & S. 243. In order, however, to give such an endorsement by the plaintiff, the character of an entry against interest, it must appear to have been made before the bar of the statute attached to the instrument; *Cremer's estate*, 5 W. & S. 331; *Howe v. Hathaway*, 20 Maine, 345, for otherwise he would be able to manufacture evidence for himself. And in *Whitney v. Bigelow*, 4 Pick. 113; *Conelly v. Pierson*, 4 Gilman, 108; and *Taylor v. McDonald*, 2 Constitutional R., 178, a naked endorsement of payment in the handwriting of the plaintiff, was held inadmissible in his favour for any purpose.

The cases cited above, fully establish that when the original cause of action

is barred by the statute, the plaintiff cannot recover without proving a new cause of action within six years, consistent with that set forth in the declaration, and between the same parties; yet in *Whitcomb v. Whiting*, a payment by one party, was held to establish the liability of another, without proof of authority or ratification as against the person thus charged. But in truth, this decision did not proceed upon the doctrine, that the statute applies unless a cause of action is shown within six years, and was adjudged upon another and rival notion, that the statute is a bar to the proof of the cause of action, rather than to the cause of action itself, and merely raises a presumption of satisfaction or payment, which may be rebutted by proper evidence. Of course under this doctrine, any proof of the existence of the debt within six years, is sufficient; and a payment by one co-contractor, is evidence whence the jury may find that the debt is due and unpaid by the rest, although manifestly insufficient to raise a promise on their part for its payment. *Whitcomb v. Whiting* has notwithstanding been followed in a great number of subsequent decisions, and no rule is better established in England, than that part payment by one of several joint debtors, will take the debt out of the statute as against all. It is evident, therefore, that the statute has received two different and inconsistent interpretations, and that while proof of the existence of the debt within six years, is sufficient under the one, there must be a new promise, or a new cause of action, under the other. The courts of the United States have been obliged either to adopt both these propositions, or to choose between them. Hence it has happened, that the cases differ more widely on the point involved in *Whitcomb v. Whiting*, than upon any other question of law, and that there are opposite sets of determinations in the different states of this country, and even in the same state; in one of which the authority of that decision has been followed, and in the other denied and overruled. The latter course has been adopted in the Supreme Court of the United States, in New Hampshire, South Carolina, Tennessee, Indiana and Delaware, and until recently in Pennsylvania, while the former prevails in New England with the exception of New Hampshire, and in most other parts of the Union.

It is accordingly held in the states last referred to, that the acknowledgment of a debt by one of several co-contractors, will remove the bar of the statute as effectually as if made by all. *Frye v. Barker*, 4 Pick. 382; *Sigourney v. Drury*, 14 Id. 387; *Hunt v. Bridgham*, 2 Id. 501; *Cady v. Shepherd*, 11 Id. 400; *Vinal v. Burrill*, 16 Id. 40; *Ilsey v. Jewett*, 2 Metcalf, 168; *Getchill v. Held*, 7 Maine, 26; *Pike v. Warren*, 15 Id. 393; *Dinsmore v. Dinsmore*, 21 Id. 453; *Shipley v. Waterhouse*, 22 Id. 497; *Joslyn v. Smith*, 13 Vermont, 356; *Wheelock v. Dolittle*, 18 Id. 441; *Bond v. Lathrop*, 4 Conn. 33; *Austin v. Bostwick*, 9 Id. 562; *Shelton v. Cocks*, 3 Munford, 411; *Beck v. Fuller*, 1 McCord, 541; *Davis v. Coleman*, 7 Iredell, 424. And although the power of one member of a firm to bind the rest, terminates in all other particulars by the dissolution of the partnership, yet it is held to survive as to this, because although the partnership may be dissolved, the partners are still jointly liable for its debts, and their payments or acknowledgments consequently have the same effect, with those of ordinary co-contractors. *Smith v. Ludlow*, 6 Johnson, 267; *Johnson v. Beardslee*, 15 Id. 3; *Patterson v. Choate*, 7 Wend. 441; *White v. Hile*, 3 Pick. 391; *McIntyre v. Oliver*, 2 Hawks, 209; *Roosevelt v. Mark*, 6 Johnson's Ch.

291. The rule is the same when the person who makes the acknowledgment or payment is a principal, and the party bound by it a mere surety. *Frye v. Barker*, 4 Pick. 382; *Sigourney v. Drury*, 14 Id. 387; *Lent v. Hewit*, 8 Barr, 337; *Clarke v. Sigourney*, 17 Conn. 511; *Caldwell v. Sigourney*, 19 Id. And as the debt may be revived by the acknowledgment of one of the debtors, without a part payment, the legal effect of such a payment, will not be varied by showing that it was small in amount, and merely intended as a revival; *Goddard v. Ingram*, 3 Q. B. 399. But it would seem that a payment or acknowledgment, made collusively and not in the course of business, will not sustain an action against any other than the party who makes it. *Cort v. Tracy*, 1 Conn. 268; 9 Id. 4.

It is, however, well settled, that although an acknowledgment by one man may take the debt out of the statute as against another, when it is shown to be jointly binding on both, yet that this must appear aliunde, and not merely by the acknowledgment; for otherwise the defendant might be charged with a new obligation, under the pretence of reviving one previously in existence. And the same rule applies to co-partners after the dissolution of the partnership, for they then lose the power to bind each other, even as to the antecedent business of the firm, and stand on the footing of ordinary co-contractors. *Hackley v. Hastie*, 3 Johnson, 537; *Skilton v. Cooke*; *Smith v. Ludlow*.

Nothing is in fact better settled, than that partners, after the dissolution of the partnership, or other joint-debtors, have no power to bind each other to any variation or modification of their original contract, and cannot even renew a note which has been made and discounted at bank by all; *Baker v. Stackpole*, 9 Cowen, 420. *Yale v. Eames*, 1 Metcalf, 486. The *National Bank v. Norton*, 1 Hill, 572; *Mitchell v. Ostron*, 2 Id. 520; *Schoneman v. Fegeley*, 7 Barr, 433. And these decisions seem to show that if, as would seem undeniable, the revival of a debt barred by the statute, is in effect, the creation of a new cause of action, founded upon the original consideration, the admission of one co-contractor cannot revive it against the rest. It was accordingly held by the Supreme Court of the United States in *Clementson v. Williamson*, 8 Cranch, 72, and *Bell v. Morrison*, 1 Peters, 361, that as the power of a partner to bind the firm is absolutely at an end on the dissolution of the partnership, it cannot be exercised for the purpose of binding his co-partners to the payment of a debt, from which they have been discharged by the statute, or in any other manner. The law is held the same way in several of the state courts, and on the same principle; *The Exeter Bank v. Sullivan*, 6 New Hampshire, 124; *State v. Dennings*, 1 McMullin, 297; *Belotes Ex'rs v. Wymore*, 7 Yerger, 536; *Muse v. Donelson*, 2 Humphreys, 166; *Yandes v. Le Favour*, 2 Blackford, 371; *Levy v. Cadet*, 17 S. & R. 126; *Searight v. Craighead*, 1 Penna. R. 135. In the *Exeter Bank v. Sullivan*, RICHARDSON, J., who delivered the opinion of the Court, sustained his position with great force of argument, and pointed out that "although where one joint debtor admits a debt, and says nothing to the contrary, it may be inferred from his silence that he is willing to pay, yet that it can furnish no ground for presuming, that another, who is absent, is also willing."

The Supreme Court of Pennsylvania was among the first to lead the way in denying the authority of *Whitcomb v. Whiting*, for the case of *Levy v.*

Cadet was decided nearly at the same time, with that of *Bell v. Morrison*, and without, as it would seem, any knowledge of that decision. But in the subsequent case of *Houser v. Irvine*, 3 Watts & Sergeant, 345, the acknowledgment or promise of one partner, was held to deprive the rest of the protection of the statute. This, however, was put on the ground, that as he had been intrusted by them with the charge of winding up and liquidating the affairs of the firm, he was virtually their agent, and might bind them by his acts in all matters within the scope of his authority; *Davis v. Desauque*, 5 Wharton, 530; *Petriken v. Collier*, 1 Barr, 247. But in the recent case of *Zent v. Heart*, 8 Barr, 337, *Levy v. Cadet* and *Searight v. Craighead* were virtually overruled without being cited, and a part payment by one of the members of a firm after its dissolution, held to render the debt binding on all. It is true, that the evidence given in these cases, consisted in mere acknowledgments, while in *Zent v. Heart* there was a part payment, but this is a distinction without a difference, and will not serve to reconcile the more recent decision, with those by which it was preceded.

On the other hand, the earlier cases in New York, which recognised the authority of *Whitcomb v. Whiting*, have been recently overruled by the Court of Appeals of that state, and it has been decided, that as the power of a partner to bind the firm is terminated by a dissolution of the partnership, it cannot extend to revive a debt against his co-partners, which has been barred by the statute; *Van Keuren v. Parmelee*, 2 Comstock, 524.

It would seem, that if praise is due to either of these tribunals, for thus departing from prior authority, in a matter where theoretic truth is less important than uniformity of decision, it should be awarded to the latter rather than to the former. It is admitted on all hands, that a direct acknowledgment of a debt will not revive it, even against the person who makes the acknowledgment, if accompanied with expressions showing a refusal, or even an unwillingness to pay it. And it would, therefore, appear, that even if the acknowledgment of one co-contractor is to be regarded as the acknowledgment of the rest, it cannot deprive them of the right to annul or avoid its effect by a refusal of payment, whether made at the time, if they are then present, or as soon afterwards as it is brought to their knowledge. Silence on their part, after notice, might perhaps amount to proof of acquiescence, but it would seem unjust to deny them a right, on the ground of the admission by another before notice, which they would have, if the admission proceeded from themselves.

Although there can be little doubt, either under the express words of the statute, or the forms of pleading, that any suit in *assumpsit*, or debt on simple contract, must come under its bar, unless a cause of action is shown within six years, there is yet some difficulty in reconciling the theory of the law on this point, with its practice. We have seen, that consistently with the rules of pleading, which do not permit any variance between proof and allegations, the subsequent cause of action relied on in answer to a plea of the statute, must be between the parties named in the declaration, and that acknowledgments made by, or to an executor, cannot be admitted under counts alleging promises by, or to the testator. It is obvious, that the declaration must be pursued with regard to the nature of the cause of action, as well as with regard to the parties. And it has been sup-

posed, that when the declaration is founded on the original cause of action, there is an inconsistency in sustaining it by evidence of a new promise; *Carshore v. Huyck*, 6 Barbour's S. C. 583. But when the declaration is on a promise implied by the law from an executed consideration, this difficulty is apparent rather than real. The declaration proceeds, in such cases, on an obligation, which is a legal implication from the facts as set forth. It cannot, therefore, be said to be founded upon a special cause of action, but is general in its character, and admits of any proof consistent with the consideration. And the replication of a cause of action within six years to a plea of the statute, and evidence of a new promise or acknowledgment, under such a replication, so far from being a departure, are in the nature of a new assignment, and merely show, that the plaintiff relies not on the obligation or promise, implied from the premises in the first instance, which has been barred, but on the new obligation, which has grown out of the subsequent admissions of the defendant, to which there is no bar. Thus when the plaintiff declares on the common counts for goods sold, or for money had and received to his use, the promise set forth in the declaration is an implied promise, which is not tied down to any circumstances of time or place, and which only requires proof of two things to support it; that the defendant was indebted to the plaintiff at the time when the writ was purchased, and that the debt grew out of the consideration set forth. Now both these requisitions are satisfied, by proving the facts constituting the consideration, which originally created the debt, and showing, that the defendant was liable to pay it, whether in consequence of a new undertaking or otherwise, at the time of the commencement of the suit. Upon proof of this, the law raises a promise, which necessarily accords with that laid in the declaration.

The same principles apply, where a new promise is relied on, to support an action upon a bill of exchange, or promissory note barred by the statute. For after stating the express promise, the declaration goes on to aver a resulting legal liability and another promise, which the law implies as a consequence of this liability, but which has no existence in point of fact; *Griffith v. Roxborough*, 2 M. & W. 734; *Stericker v. Barker*, 9 Id. 321. Now the operation of the statute destroys this liability, and the resulting implied promise, but the note still remains, and forms a sufficient consideration to give effect to a subsequent acknowledgment, and render it the foundation of a new liability dating from the acknowledgment. Hence such an acknowledgment, may be given in evidence to support the allegation of an implied promise, without producing a variance from the declaration.

When, however, the breach complained of, is the failure to comply with an express particular promise, which the law cannot imply, and which must, therefore, be proved to have been actually made by the defendant, this reasoning does not apply, and a recovery cannot be had on a subsequent acknowledgment or promise. Thus when the declaration is on an undertaking by the defendant to build a house in a particular manner, and a breach by a total failure to comply with the undertaking, or by the erection of the building in a different manner, an acknowledgment of the breach, and a promise to make compensation for it in damages, are insufficient to remove the bar of the statute, and sustain the action. For as the promise declared on is to build a house, and the admission of a pecuniary liability, the one is necessarily inconsistent in terms and substance with the other. Thus it was said by Lord ELLENBOROUGH, in *Boydell v. Drummond*, 2 Campbell, 157, that

"if a man acknowledge the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay, it and thus the remedy is revived; but no such effect can be given to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract." And where the action was in assumpsit against an attorney, for not using due care and diligence in the investment of money, which he had been retained to invest, an acknowledgment made by him within six years, that he had been guilty of negligence, and was responsible for it, was held inadmissible under a replication to a plea of the statute; *Short v. McCarthy*, 3 B. & Ald. 626. "If," said ABBOTT, C. J., in delivering the opinion of the court in this case, "the plaintiff can, consistently with the rules of law, rely on the subsequent promise, he may do so, upon a new declaration specially framed for that purpose. But I am of opinion, that he cannot do so upon a declaration in this form. If his want of knowledge of the actual injury sustained, till within the period of six years, anterior to the commencement of this action, be sufficient, it will be competent for him to avail himself of that hereafter. Upon the present declaration, I cannot say, that the cause of action there stated, arose within six years before the commencement of the present action: for the cause of action there stated, is the omission of the defendant to make due inquiries at the bank. Leaving it, therefore, open to the plaintiff to avail himself of these points, in case he shall be advised to bring a fresh action, I am of opinion, that, in the present case, a nonsuit must be entered." The law was held the same way in *Whitehead v. Howard*, 2 Brod. & Bing. 372, where the defendant pleaded the statute to a declaration setting forth a promise to invest money on good security, and a breach by an investment made on insufficient security, and the plaintiff was not allowed to prove an admission within six years, that the security was insufficient, although coupled with an express promise of payment. And in *Wetzell v. Bussard*, 11 Wheaton, 315, where an attempt was made to render the defendant liable in an action for a breach of contract, in not delivering gunpowder, by proof of a subsequent acknowledgment, MARSHALL, C. J., expressed much doubt as to whether the acknowledgment, was admissible in evidence under the declaration, although he decided the case on the ground, that it was not sufficiently clear and explicit.

It was said by PARK, J., in *Whitehead v. Howard*, that he was not aware of any case, where the doctrine of revival after the operation of the statute, had been applied to any thing, but an actual debt. It would, notwithstanding, appear, that whenever the declaration is on an executed consideration, and consequently on an obligation implied by law, the plaintiff may recover on proof of a subsequent admission, whether the obligation be for the payment of money, or the performance of any other act. For in such cases, it is enough if the obligation exist when the writ is issued, although it may have been barred at an antecedent period. But although it may be true theoretically, that every obligation, which is the result of a legal deduction from the promises set forth in the declaration, may be revived by a subsequent admission, yet it is a truth of little practical importance, save where the obligation is a debt. For when it is a duty of any other description, as for the delivery of goods by a bailee or carrier, or the execution of a retainer by an attorney, it will seldom happen, that the duty still subsists when the writ

issues, or that the admission will tend to show its existence. Thus in *Short v. McCarthy*, where the action was for the breach of the obligation implied by law, from the retainer of the defendant as an attorney, in the business of the plaintiff, had the admission been, that the obligation was binding and unfulfilled, it might have sustained the declaration, and removed the bar of the statute. But the acknowledgment in fact showed, that the retainer was at an end, and merely admitted that the defendant was bound to make compensation in damages for its non-fulfilment. And as this obligation differed from that alleged in the declaration, it could not be made a ground of recovery by the plaintiff. Whether the difficulty could be obviated in this, or other cases, where the subsequent admissions do not pursue the original cause of action, by a special count setting forth the original contract, the breach, the consequent liability in damages, the interposition of the statute, and the new promise or acknowledgment, is a different question, and one which has not been expressly determined. Such a declaration, however, would seem to be within the principle suggested by *TINDAL, C. J.* in *Kaye v. Dutton*, 7 M. & G. 807, that where there is a liability or duty, from which the law cannot imply a promise, one may be raised by the subsequent promise of the parties. And the case of *Lechmere v. Fletcher*, *supra*, would seem to show, that an admission by the defendant of his willingness to meet a liability barred by the statute, will enable the plaintiff to recover on proper pleadings, although the admission does not pursue the original contract.

It is well settled law, that when the acknowledgment or promise relied on as reviving the debt is conditional, the plaintiff cannot recover without proving, that the condition has been fulfilled. *Cocks v. Weeks*, 7 Hill, 45; *Tompkins v. Brown*, 1 Denio, 247; *Manning v. Wheeler*, 13 New Hampshire, 486, *supra*. In *Lousdale v. Brown*, 3 W. C. C. R. 407, *WASHINGTON, J.*, went further, and held evidence of a conditional promise inadmissible on the ground of variance, under a traverse of a plea of the statute to a declaration on an absolute promise. And in *Watkins v. Stevens*, 4 Barbour, 168, the point was treated as doubtful, although the weight of authority was admitted to be in favour of the admission of the evidence. The difficulty seems, notwithstanding, to be apparent rather than real. Nothing can be a variance under a plea of the statute, which would have been admissible under the general issue; and no rule of law is better established than that a conditional promise for the payment of money, becomes absolute as soon as the condition is fulfilled, and may be declared on, as if it had never existed; *Stone v. Rogers*, 2 M. & W. 443. For as the engagement of the promisor finally results in such cases, in an unqualified obligation, the law implies an unqualified promise for its fulfilment. Thus the indebitatus counts are sustained every day on promises, which, although contingent originally, have ended in an absolute liability. It is, therefore, immaterial, whether the revival of a debt barred by the statute, be absolute or conditional in the first instance, for it becomes absolute as soon as the condition is performed, and may be given in evidence under the ordinary forms of declaration, without producing a variance. The law on this point was stated with great precision by Baron *ALDERSON*, in *Hall v. Prendergrass*, 14 M. & W. 741, 746, where, he said, "the plaintiff must prove an acknowledgment conformable to the promise laid in the declaration, viz., either

an unconditional acknowledgment, from which a promise to pay is inferred, or an acknowledgment subject to a condition, which has been performed, and which thus becomes absolute, and so equally maintaining the promise in the declaration." The rule thus laid down is applicable to actions upon negotiable paper, as well as to all other forms of assumpsit, in which the promise declared on is implied by law, from the existence of a debt shown by the facts set forth in the declaration, and anything which revives the debt, necessarily revives the promise. The law was so held by the Court of Exchequer, in *Irving v. Veitch*, 3 M. & W. 90, where it was decided, that a conditional promise might be given in evidence, under a traverse of a plea of the statute, to an action on a promissory note, although it was strenuously contended for the defence, that it was inconsistent with the demand set forth in the declaration, and that there could be no recovery under such circumstances, without a special declaration. The same point arose in *Humphreys v. Jones*, 14 M. & W. 1, and was decided in the same manner.

It is well settled, that no promise or acknowledgment can defeat the operation of the statute in actions of tort; *Hurst v. Parker*, 1 B. & Ald. 92. Hence a suit brought in case for a fraud, cannot be taken out of the statute by the admissions of the defendant, although the fraud may have been committed in the course of a contract; *Oothout v. Thompson*, 20 Johnson, 278. But this rule does not apply, where the circumstances are such that the law can imply a contract from the tort, as in the ordinary case where the plaintiff waives the conversion of his goods, and sues in assumpsit for the proceeds. *Morton v. Chandler*, 8 Maine, 9. II.

*BRISTOW v. WRIGHT. [324]

EASTER.—21 GEO. 3.—B. R.

[REPORTED, DOUGL. 665.]

In an action against the sheriff for taking goods without leaving a year's rent, the declaration needs not state all the particulars of the demise, but if it does, and they are not proved as stated, there shall be a nonsuit.

IN last Hilary Term, on Thursday, the 25th of January, *Lee* obtained a rule to shew cause why the verdict which had been found for the plaintiff should not be set aside, and a new trial granted, or a nonsuit entered.

This was an action on the case, against the defendants as sheriff of Middlesex,† on the statute of 8 Ann. c. 14, s. 1, for taking the goods of one Pope, in execution, in a house let from year to year, by the plaintiff to Pope, without paying or contenting him for a year's rent then due, and of which the defendants, before the removal of the goods, had notice.

† The two sheriffs of London make one sheriff of Middlesex. *Barker v. Weedon*, 4 Tyrwh. 841.

The declaration stated the demise, as follows:—

"The said plaintiff, on, &c., demised to one Benjamin Pope, a certain messuage, &c., to have and to hold unto the said Benjamin, from the feast of St. Michael, then next following, for and during the term of one year from thence next ensuing, and fully to be complete and ended, and so, from year to year, for so long as it should please the plaintiff, and the said Benjamin, yielding and paying therefore, yearly and every year during the said term, unto the plaintiff, the yearly rent or sum of, &c., by four even and equal quarterly payments; to wit, at the feast of, &c."

The principal witness called on the part of the plaintiff was Pope himself; [*325] who proved, that the plaintiff let the *house to him, by parole, for a year, and that there was no stipulation about any time or times for the payment of the rent.

It was contended at the trial (which came on before Lord Mansfield, at the sittings for Middlesex), that, as the plaintiff had laid a demise with a reservation of rent payable quarterly, he was bound to prove it exactly as laid; and that, having failed in that proof, he ought to be nonsuited. His lordship overruled the objection, being then of opinion, that enough of the demise as laid had been proved to entitle the plaintiff to his action. The present rule was moved for, on the ground of a misdirection.

On Thursday, the 3rd of May, the *Attorney-General* and *Dunning* showed cause, and urged that the contract was not the gist of the action: the material part was, that a year's rent was in arrear, and that having been proved, the plaintiff had shown enough to entitle himself to a verdict.

Wood, on the other side, insisted, that, as the plaintiff had set forth the particulars of the contract, he was bound to prove them as laid; and for this he cited an anonymous case in Lord Raymond, where, a promise being laid, "to deliver good merchantable wheat," and the evidence being of a promise to deliver "good second sort of wheat," Lord Holt held the variance to be fatal, and nonsuited the plaintiff; (a) the *King v. Nudigate*, (b) where, upon a traverse of an office found, the issue being, whether J. S. devised "to J. N. and his heirs" or not, and the jury having found that "J. S." devised "to A. for years, remainder to J. N. in fee," the court adjudged "*quod non devisavit modo et formâ*:" *Sands and Tash v. Ledger*, (c) where, in action of debt for rent, the plaintiffs declared on a demise, "for 15*l.* rent per annum," under a power "to make leases for twenty-one years," and the evidence being of a demise "for 15*l.* rent per annum, and three fowls," under a power "to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not dispunishable of waste," Lord Holt directed a nonsuit; and *Savage, qui tam, v. Smith*, which was afterwards stated by Lord Mansfield in delivering the judgment of the court. (d)

The case stood over till this day.

[*326] *Lord Mansfield (after stating the case.)—I am very free to own, that the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertence of gentlemen of the profession; because

(a) Bedford Assizes, 12 W. 3. 1 Ld. Raym. 735.

(b) B. R. E. 6 Car. 1, Sir W. Jones, 221.

(c) Surry Assizes, 1 Ann. 2 Ld. Raym. 792.

(d) *Infra*, p. 327.

it is extremely hard on the party to be turned round, and put to expense, from such mistakes of the counsel or attorney he employs. It is hard also on the profession. It was on this ground that I overruled the objection on this case; but I am since convinced, both on the authorities which I am about to mention, and on the reasoning in them, that I was wrong, and that it is better, for the sake of justice, that the strict rule should in this case prevail. I have always thought, and often said, that the rules of pleading are found in good sense. Their objects are precision and brevity. Nothing is more desirable for the court than precision, nor for the parties than brevity. It is easy for a party to state his ground of action. If it is founded on a deed; he needs not set forth more than that part which is necessary to entitle him to recover.^(e) If he states what is impertinent, it is an injury to the other party, and may be struck out and costs allowed, upon motion. I remember a case, where, in an action on one covenant, the whole of a very long deed was set forth. The court referred it to the master, and all was struck out except the covenant on which the action was brought, and costs paid to the amount of 100*l*. When I say that the plaintiff needs only set forth that part of a deed on which his action is founded, I do not mean to say that even that is necessary. He is not bound to set forth the material parts in letters and words. It will be sufficient to state the substance and legal effect. This is shorter, and not liable to mis-recitals, and literal mistakes. Here that method might have been followed. It certainly was not necessary to allege this part of the lease that relates to the time of payment, in order to maintain the action. But, since it has been alleged, it was necessary to prove it. The distinction is between that which may be rejected as surplusage, (which might have been struck out on motion,) and what cannot. Where the declaration contains impertinent matter, foreign to the cause, and which the master, on a reference to him, would strike out, (irrelevant covenants, for instance,) that will be rejected by the *court, [*327] and need not be proved. But if the very ground of the action is misstated, as where you undertake to recite that part of a deed on which the action is founded, and it is mis-recited, that will be fatal. For then, the case declared on is different from that which is proved, and you must recover *secundum allegata et probata*. This will reconcile all the cases. In the present instance, the plaintiff undertakes to state the lease, and states it falsely. There are many authorities which go to prove this distinction. I will mention three (which are very strong), where matter, which it was unnecessary to set forth, being stated, and not proved, the variance was held to be fatal. The first is the case of *Cudlip v. Rundle*.^(f) There, in an action by a lessor against his tenant, for negligently keeping his fire, by means whereof the house was consumed, a demise to the defendant for seven years was stated in the declaration; the defendant pleaded, that the plaintiff did not demise *modo et formâ*; and issue being joined, it appeared on the finding by the jury in a special verdict, to be a lease at will. The court agreed that the action would have lain against the defendant as tenant at will; but, as the plaintiff had stated him to be a lessee for years, and had proved him tenant at will, the variance was held to be fatal, and there was judgment for the defendant. The next is the case of *Savage, qui tam v.*

(e) Vide Cowp. 665.

(f) B. R. T. 2 W. & M. Carth. 202.

Smith, in the Common Pleas. *(g)* That was an action of debt against a sheriff's officer, by an informer. The declaration stated a judgment, and a fieri facias upon that judgment. The fieri facias was given in evidence, but not the judgment, and the court held, that, though it might be unnecessary to aver the judgment, yet, having been averred, it ought to be proved; and my Lord Chief Justice de Grey expressly went upon the distinction between immaterial and impertinent averments, and said that the former must be proved, because relative to the point in question. *(h)* The third case is *Shute v. Hornsey* in this court. *(i)* That was an action for double rent on the statute. *(k)* The declaration stated a lease for three years; but, on the evidence, it appeared that the lease for three years was void, under the Statute of Frauds; and that the defendant was only tenant from year to year. This [*328] was sufficient for the purpose of *the action; but a lease for three years having been laid, and not proved, the plaintiff was nonsuited; and a rule for setting aside the nonsuit having been obtained, it was upon the argument of the case, discharged. These authorities are in point to the doctrine I have laid down. But perhaps, notwithstanding the weight of the cases, if that doctrine were highly detrimental, and the setting it right would be attended with no mischief, as it is only a mode of practice, it might deserve consideration. But I believe it stands right, and upon the best footing; for it may prevent the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof; and may lead pleaders to confine themselves to state the legal effect. We are all of opinion that the verdict should be set aside, and judgment of nonsuit entered.

The rule made absolute.

"I AM aware," said Mr. Justice Buller, in *Pepin v. Solomons*, 5 T. R. 496, "that the case of *Bristow v. Wright* has been sometimes doubted, but I am still of opinion that it was rightly decided. In order to entitle the plaintiff to maintain that action, it was necessary for him to show that he was landlord, it being an action for taking the lessee's goods, without leaving a year's rent; and, to show that the plaintiff was the landlord, he was obliged to set forth a contract between himself and the tenant. Now contracts are in their nature entire, and in pleading they must be stated accurately; but as the evidence in that case did not accord with the contract stated in the declaration, and which was

the foundation of his action, it was properly determined that a judgment of nonsuit should be entered." Accord. *Savage v. Smith*, Blacks. 1101; *Williamson v. Allison*, 2 East, 452, ubi per Lord Ellenborough, C. J.—"With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, though the averment may be more particular than it need have been, the whole must be proved or the plaintiff cannot recover." This, it may be

(g) T. 16 G. 3. 2 Blackst. 1101.

(h) By a mistake of the press, the word "*material*" is printed instead of "*immaterial*," in the report of this case in 2 Blackst. 1101. "*Immaterial*" certainly was the word used by De Grey, Chief Justice, as appears not only from what is here said by Ld. Mansfield, but also from a very accurate manuscript note I have seen of *Savage v. Smith*, and indeed from the context in Blackstone's own report.

(i) E. 19 Geo. 3.

(k) 11 Geo. 2, cap. 19, s. 18.

observed, is an expression of the same doctrine that was laid down by Lord Mansfield in the principal case, in the following words:—"The distinction is between that which may be rejected as surplusage and what cannot." [Accord. *Shearm v. Burnard*, 10 A. & E. 593]. See *Harris v. Mantle*, 3 T. R. 307, where in covenant the breach was that the defendant had not performed his covenant to repair, *but on the contrary had committed waste*. Held that he could prove no non-repair not amounting to waste, for the plaintiff must recover *secundum allegata et probata*. See too *Hawkes v. Orton*, 5 A. & E. 367; [East v. Skinner, 11 M. & W. 161]; and *Alexander v. Bonnin*, 4 Bing. N. C. 799; where to trespass *qu. c. f.* the defendant pleaded that he had license to *erect and maintain* a brick wall on the locus in quo, and having proved a license to *erect* but not to *maintain*, it was held that the verdict on that plea must be entered against him. In *Martin v. Graham*, 7 Ad. & Ell. 51, the declaration alleged that "the defendant cut down trees, and otherwise used the premises in so untenanted and improper a manner, that they became and were dilapidated." Held that he could not give evidence of *permissive waste*. On the other hand, see *Wells v. Hopkins*, 5 M. & W. 7; where in an action on a bill, the defendant pleaded that it was accepted for hops to be delivered according to sample, and that plaintiff had not delivered hops according to sample. *or any hops whatever*, the words in italics were rejected as surplusage, [and in *Davis v. Chapnan*, 2 M. & Gr. 920, where to a count for an escape the plea, after stating a return of the debtor into custody, alleged *that he was still kept in it*, that allegation was held surplusage upon a replication *de injuria*.]

Upon this doctrine appears mainly to depend the real utility of the *videlicet* or *to wit*, so often introduced by pleaders before matter of description; a precaution which is totally useless where the statement placed after the *videlicet* is material; {*S. P. Stone v. Knowlton*, 3 Wendell, 374; *Gleasons v. McVicker*, 7 Cowen, 42; *Janson v. Ostander*, 1 id. 670; *Bissell v. Drake*, 19 Johnson, 66; *Vail v. Lewis & Livingston*, 4 id. 450; *Watson v. Osborne*, 8 Connecticut, 363; *Curley v. Dean*, 4 id. 259; } but which, in other cases, prevents the danger of a variance, by separating the description

from the material averment, so that the former, if not proved, may be rejected, without mutilating the sentence which contains the latter. See *Symons v. Knox*, 3 T. R. 63. Thus in *Lamplough v. Braithwaite*, ante, p. 67, it is laid down by the court, that under the averment, *that the plaintiff did his endeavour, videlicet, in equitendo*, it would not have been necessary to prove *riding*, but any other endeavour would have served; [see *Parkinson v. Whitehead*, 2 M. & Gr. 329; per *Wightman, J.* in *Atkinson v. Raleigh*, 3 Q. B. 88, per *Tindal, C. J.*, in *King v. Green*, 6 Scott, N. R. 869; *Cooper v. Blick*, 3 Q. B. 915; *Newlands v. Holmes*, 3 Q. B. 682]. *Bristow v. Wright* *continues to be the leading case upon the subject of variance; the subsequent decisions will be found collected and ably commented upon in the notes to *Goram v. Sweeting*, 2 Wms. Saund. 199, and will all be found to bear out and exemplify Lord Mansfield's doctrine. But the law respecting variances has, since the decision of *Bristow v. Wright*, received some very beneficial alterations from the legislature. In order to understand these perfectly, it will be necessary to occupy the reader for a few moments in something like an historical disquisition. After the decision in *Bristow v. Wright* had pointed out in glaring colours the fatal nature of a variance, the pleaders naturally terrified at the idea of incurring a nonsuit in consequence of a mistake in stating facts, of which their clients had, perhaps, furnished them with no very accurate account, began to swell their declarations to an extraordinary and portentous size, by introducing counts calculated to meet every aspect which it was supposed that the evidence could, at the trial, possibly assume, in hopes that some one count, at least, would be found free from any material variance. While, on the other hand, the pleader for the defendant was equally astute in framing a variety of pleas, in order to meet every possible defence upon which the evidence might enable counsel to rely at the trial. Yet, notwithstanding all these pains, it was often found, at *Nisi Prius*, that the case assumed some shape which the ingenuity of the pleader had not been able to divine; and the suitor, after incurring great expense, was defeated at the moment when the merits of his case were rendered apparent by the same evidence

which created the variance between it and the statements contained in his pleading. In order, in some degree, to obviate these mischiefs, St. 9 G. 4, cap. 15, after reciting "that great expense was often incurred and delay or failure of justice took place at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial was had, in matters not material to the merits of the case," enacted "that it should and might be lawful for every court of record holding plea in civil actions, any judge sitting at Nisi Prius, and any court of *oyer and terminer* and general gaol delivery in England, Wales, Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such court or judge, in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing, or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon such trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs, if any, to the other party, as such court or judge shall think reasonable; and, thereupon, the trial shall proceed as if no such variance had appeared; and, in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the *postea*, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly." [The powers of amendment given by this statute are now extended to Indictments and Informations for all offences whatever, 11 & 12 Vict. c. 46, s. 4.]

The effects of the 9 G. 4, c. 15, though limited to one class of cases, being found beneficial, it was determined to extend its enactments, and at the same time to compel the parties who were to have the advantage of the increased facility of amendment to co-operate with the legislature in reducing the expense of actions, by diminishing the length of their pleadings. Accordingly, stat. 3 & 4 W. 4, c. 42, s. 23, reciting "that great expense is often incurred, and delay or failure of justice takes place at trials by reason of variances, as to some particular or particulars, between the proof and the re-

cord or setting forth, on the record or document on which the trial is had of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot, in any case, be amended at the trial, except where the variance is between any matter in writing or in print, produced in evidence, and the record," enacts "that it shall be lawful for any *court of record [*330] holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings in which such variance occurs, and in every other part of the pleadings, which it may become necessary to amend, on such terms as to the payment of costs to the other party, or postponing the trial to be had before the same, or another, jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars, in the judgment of such court or judge, not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and, after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect

to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at *Nisi Prius*, or by virtue of such writ as aforesaid (*alluding to the writ of trial given by ss. 17 & 18*), the order for the amendment shall be indorsed on the *postea* or the writ, as the case may be, and returned together with the record or writ; and, thereupon, such papers, rolls, and other records of the court, from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and, in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had. Provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at *Nisi Prius*, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit; or the court shall make such other order as to them shall seem meet." And it is further enacted by section 24, "that the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts, according to the evidence; and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statements such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

This statute does not repeal the 9 G. 4, c. 15; a circumstance which it may be found in some cases material to remember, for the power of amendment given by that statute extends to "any civil action, or any indictment or information for any misdemeanor;" whereas the 3 & 4 W. 4, c. 42, only includes "civil actions, informations in the nature of a *quo warranto*, and proceedings on writs of *mandamus*." An indictment

for misdemeanor could, therefore, be amended at the trial in any particular falling within the 9 G. 4, c. 15, though it certainly is not included in the purview of the 3 & 4 W. 4, c. 42. [In criminal cases, however, the power to amend should be exercised very sparingly, per Coleridge, J., *R. v. Hewins*, 9 C. & P. 789.] There *is another [*331] difference between the two statutes, though perhaps not likely to become of any practical importance. It had been considered upon the 9 G. 4, c. 15, (though some doubts at first existed on the subject,) that the decision of the judge at *Nisi Prius*, upon an application to amend, was conclusive, and that the court *in banco* had no jurisdiction to review it. *Parks v. Edge*, 3 Tyrw. 364; 1 C. & M. 433. The 3 & 4 W. 4, c. 42, gives, it has been seen, an express power to move for a new trial, on the ground that an amendment under that statute has been improperly allowed; so that, if a variance between the record and a written document were to be amended, it might perhaps even now be contended, though probably without success, that the amendment had been made under the 9 G. 4, cap. 15, and that the judge's discretion was, therefore, not subject to review. I say probably without success, because it would be answered that, although the 9 G. 4, c. 15, stands unrepealed, still that the words of 3 & 4 W. 4, c. 42, are large enough to give a concurrent power of certifying under that statute in matters comprehended within the 9 G. 4, c. 15. If that *be the true construction, it [*331a] would be for the judge to elect under which statute he should be taken to have certified, and he would probably elect to certify under that which leaves his judgment open to appeal. Here it must be observed, that although the party dissatisfied with an amendment made at *Nisi Prius* may move for a new trial on that ground, it has been held that a party dissatisfied on account of the judge's refusal to amend cannot do so. *Doe v. Errington*, 1 M. & Rob. 341, n.; 3 Nev. & Mann. 646. [1 Ad. & Ell. 750, S. C. Another difference between the 9 G. 4, c. 15 and the 3 & 4 W. 4, c. 42, as pointed out by Tindal, C. J., in *Smith v. Brandram*, 2 Man. & Gr. 250, 2 Sc. N. R. 539, S. C., is that the former does not, in the enacting part, expressly restrict the power of amending to those cases only where the

defect to be amended is "*not material to the merits of the case*;" those words, as observed by Maule, J., S. C., though occurring in the recital, not being repeated in the enacting clause; but, with submission, it seems that the discretion of the judge ought in each case to be so limited by a just view of the circumstances, as, even without the guidance of those words, to avoid perilling the merits by an amendment under either statute. So, it has been suggested that on the trial of an issue upon a plea of *nul tiel record*, a variance between the pleading and the record produced, would be amendable under the 9 G. 4, c. 15, although not so under 3 & 4 W. 4, c. 42. Hopkins v. Francis, 13 Mee. & W. 668, per Alderson, B.; but see Davis v. Dunne, 1 Dowl. N. S. 31.]

The judges seem disposed to give a *very liberal construction to this statute*, and it has been announced, that leave to amend under it will not be refused on account of the supposed hardship or impropriety of the action, Doe dem. Marriott v. Edwards, 1 M. & Rob. 321, Parke, B.; [but Alderson, B., refused to alter the day of the demise laid in the declaration to a day after a demand of possession had been made, where the recovery in ejectment would disturb an equitable arrangement to which the lessor of the plaintiff had been a party. Doe d. Loscombe v. Clifford, 2 Car. & K. 448.] "Unless," said Parke, B., in Sainsbury v. Matthews, 4 Mee. & W. 347, "the judges are very liberal in the allowance of amendments," the rule which binds a plaintiff to one count will operate very harshly." [See to the same effect per Alderson, B., in Parry v. Fairhurst, 5 Tyrw. 655; 2 C. M. & R. 191, S. C.; and per Tindal, C. J., Maule and Bosanquet, JJ., Smith v. Knowelden, 2 Man. & Gr. 561. The power to amend under the statute being confined to variances, "*not material to the merits of the case*," (meaning thereby not merely legal merits on demurrer, but such as are required in an affidavit of merits, per Alderson, B., 5 Mee. & W. 429,) "and *by which the [*331b] opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence," the propriety of an amendment must, in each case, depend on its own peculiar circumstances. To lay down any rule, therefore, which should apply to every case would be manifestly impossible, and per-

haps the most convenient mode of considering the decisions upon this statute will be to advert in the first instance to those which have *limited the jurisdiction* as well as the *discretion* of the courts and judges in acting upon it. It has already been seen that the court above cannot control the *refusal* of the judge at *Nisi Prius* to amend, Doe v. Errington, supra, and although a judge at *Nisi Prius*, under sec. 23, may, on allowing an amendment, impose terms on the party asking for it, yet the court in banc has no similar power when acting under sect. 24, Guest v. Elwes, 5 Ad. & Ell. 118; Serjeant v. Chafy, 5 Ad. & Ell. 354; unless such power be reserved to it by consent of the parties; Cooke v. Stratford, 13 Mee. & W. 379; Perry v. Watts, 3 Man. & Gr. 775, 4 Sc. N. R. 366, S. C.; nor can the court, under sect. 24, "give judgment according to the right and justice of the case," when the mis-statement which the judge has refused to amend, is one by which the other party may have been prejudiced; nor expunge the indorsement, Knight v. McDouall, 12 Ad. & Ell. 438. In Doe d. Parsons v. Heather, 8 Mee. & W. 158, the Court expressed an opinion that a judge at *Nisi Prius* has no power under this statute to supply a *total omission*, such as the omission of a year in the demise in ejectment. So, in replevin, for taking in a house and brewery, with an avowry for taking in a house, omitting *the brewery*, Baron Parke held that the omission could not be supplied under this statute, Bye v. Bower, 1 Car. & M. 262; and see a previous decision to that effect by the same learned judge, John v. Currie, 6 C. & P. 618. But where in an action of trespass with *not guilty* pleaded, it appeared that the date of the writ was omitted in the *Nisi Prius* record, so that the damages could not be correctly estimated, Parke, B., allowed *the writ itself*, which was produced and proved, *to be annexed to the record*, to supply the date, and the court above held that he was right, and seemed to think that even if the date had been inserted on the record upon proof of the writ itself, it might have been done, there being something to amend by, Cox v. Painter, 7 C. & P. 769, 6 Ad. & Ell. 492, and see Forman v. Davis, 9 C. & P. 127; Ernest v. Brown, 2 Mo. & R. 13. It seems clear that a judge at *Nisi Prius* has no power to make an order for the amendment of the record

at a future time after verdict, *Brashier v. Jackson*, 6 Mee. & W. 549, because, as observed by Baron Alderson, at p. 555, "the jury are to pass their opinion upon the amended record;" and see *Doe d. Bennett v. Long*, 9 C. & P. 773. Nor can he make an amendment which would introduce a new contract and a new breach, as, by altering a declaration upon an actual demise into one upon an agreement to demise, and a breach stating an eviction, to one negating title to demise, *Brashier v. Jackson*, supra; nor can a judge make an amendment which would occasion a different set of issues, per *Tindal, C. J., Callender v. Dittrich*, 4 Man. & Gr. 90, or make the pleading bad, per *Cresswell, J., S. C., Evans v. Powis*, 1 Exch. 601, or introduce entirely new facts, *David v. Preece*, 5 Q. B. 440; *Boucher v. Murray*, 6 Q. B. 362; see *Perry v. Watts*, 3 Man. & Gr. 775. In *Bowers v. Nixon*, 2 Car. & K. 372, Mr. Justice Maule expressed an opinion that the power of amendment does not extend to cases where a party has designedly set forth his own view of the legal effect of an instrument, from which the judge differs, (but see *Whitwell v. Scheer*, 8 Ad. & Ell. 301;) and the Court of Queen's Bench doubted whether it could be exercised under this statute where a defendant would thereby be deprived of his motion in arrest of judgment, *Atkinson v. Raleigh*, 3 Q. B. 79. {It has since been decided in the Common Pleas, that it is not any objection to an amendment under the statute, that it may remove a ground of motion in arrest of judgment; *Harvey v. Johnson*, 6 C. B. 295, 306.} In *Geekie v. Monck*, 1 Car. & K., the Lord Chief Baron refused an amendment to a plaintiff who had previously obtained a judge's order to make it upon payment of costs, but of which he had not availed himself; and in *Doe d. Poole v. Errington*, 1 Mo. & R. 344, *Taunton, J.*, refused to allow a joint demise by two, to be amended to a several demise by each; see *Prudhomme v. Frazer*, 1 Mo. & R. 435. Where one of several defendants sued in debt was not fixed by the evidence, *Alderson, B.*, refused to strike his name out, *Cooper v. Whitehouse*, 6 C. & P. 545. But whenever the proposed amendment would not, if made, cast an additional burden of proof on the opposite party, or alter the form of the record, so as to make it probable that a different

course of pleading would have been adopted had the record been originally framed as amended, the judges are liberal in the exercise of the power given them by this statute; see the judgment of Baron Rolfe in *Cooke v. Stratford*, 13 Mee. & W. 387, and *Southee v. Denny*, 1 Exch. 202. To enter at any length into the particulars of the numerous cases in which amendments have been allowed at *Nisi Prius*, would be quite beyond the scope of the present note; but some may be usefully referred to, as showing the disposition of the judges to give full effect to these salutary enactments. Thus, in actions upon *negotiable instruments*, the statement of an instrument declared on as a bill was altered to that of a note; per *Alderson, B., Moilliet v. Powell*, 6 C. & P. 233; and the Court of Exchequer has approved of the alteration of the statement of a note as payable "on demand" to one payable "twelve months after date," *Beckett v. Dutton*, [331d] 7 Mee. & W. 157; see *Cooke v. Stratford*, 13 Mee. & W. 379; *Higgins v. Nicholls*, 7 Dowl. P. C. 551; and under the 9 G. 4, c. 15, a variance in the name of the payee of a bill not being a party to the action, was amended, *Parks v. Edge*, 1 C. & M. 429; but see *Jelf v. Oriel*, 4 C. & P. 22. In an action upon a *guaranty* stated to have been given "in consideration of past advances by A. & B. (plaintiffs) and that A. & B. would from time to time make advances to Z.," that statement was held amendable to the statement of a guaranty in consideration of "advances made and to be made by A. & B., or by any other persons of whom the firm might consist;" and also an allegation of a promise to pay "the plaintiffs" was held amendable to a promise to pay "the plaintiffs, or those who might constitute the firm," *Chapman v. Sutton*, 2 C. B. 634. So a statement that the guaranty was given in consideration of a sale and delivery of goods to S. "to an extent not exceeding 100l.," was held amendable to "in consideration of your supplying S. with goods to the extent of 100l.," *Dimmock v. Sturla*, 14 Mee. & W. 758, and see *Smith v. Brandram*, 2 Man. & Gr. 244. In actions upon other *Contracts*, a promise to pay has been altered to a promise to guarantee, *Hanbury v. Ella*, 1 Ad. & Ell. 61. So a count for goods bargained and sold, may be amended (on terms) to a special count for not accept-

ing, per Parke, B., *Jacob v. Kirk*, 2 Mo. & R. 221. And the Court of Exchequer approved of the amendment of a contract stated to be "to build a *room, booth, or building, according to certain plans*, by the 25th June, 1838," to a contract "to place certain *seats or tables, &c.* to be completed four or five days before the 25th June, 1838," *Ward v. Pearson*, 5 Mee. & W. 16. So the statement of a contract as carriers has been altered to one as wharfingers, *Parry v. Fairhurst*, 2 C. M. & R. 190; see *Humming v. Parry*, 6 C. & P. 550; see also *Sainsbury v. Matthews*, 4 Mee. & W. 343; *Read v. Dunsmore*, 9 C. & P. 588; *Ivey v. Young*, 1 Mo. & R. 545; *Boys v. Ancell*, 5 N. C. 390; *Whitwell v. Scheer*, 8 Ad. & Ell. 301; *Gurford v. Bayley*, 3 Man. & Gr. 781, 4 Sc. N. R. 393, S. C.; *Nickisson v. Trotter*, 3 Mee. & W. 130. And in *Debt*, the amount of the penalty of a bond declared on may be amended, *Hill v. Salt*, 2 C. & M. 460. In *Replevin*, the terms of the tenancy in an avowry may be amended in the *holding*, *Gayler v. Farrant*, 4 N. C. 286, 5 Scott, 701, S. C.; the amount of *rent*, see *Roberts v. Snell*, 1 Man. & Gr. 577; or by substituting an avowry at common law for one under the statute, S. C. per Tindal, C. J.; see also *Serjeant v. Chafy*, 5 Ad. & Ell. 354. In *Ejectment*, the day of the demise as laid may be altered, to suit the right of entry as proved, Doe d. [**331e*] *Edwards v. Leach*, 3 Man. & Gr. **229*; Doe d. *Simpson v. Hall*, 5 Man. & Gr. 795; likewise the description of the premises has been amended, Doe d. *Marriott v. Edwards*, 1 M. & Rob. 319. In actions for *Slander*, the power of amendment under this statute has been frequently used; in one of the latest cases, *Southee v. Denny*, 1 Exch. Rep. 196, one part of the slanderous language as laid was, "there have been many inquests held upon persons who have died *because* he attended them; and they were altered by amendment to those proved, viz., "that several have died, that he (the plaintiff) had attended, and there have been inquests held upon them,"—and the court approved of the amendment, though pressed with the argument that the defendant might have been able to justify the words as proved, although not those as laid. It was observed however by the court, that no application for a postponement had been made at the trial, and that even striking out the words altered, there remained

sufficient to support the declaration; see also *Smith v. Knowelden*, 2 Man. & Gr. 561; *Pater v. Baker*, 3 C. B. 531; *Jenkins v. Phillips*, 9 C. & P. 766, where, it appearing that the words had been spoken in Welsh, but that the words laid were an exact translation of the words spoken, Coleridge, J., allowed the Welsh words to be inserted. See *Foster v. Pointer*, 9 C. & P. 718, a case of *libel*; and *Mark v. Densham*, 1 Mo. & R. 442, a case of false warranty. In an action *against the sheriff*, a count for an escape may be amended to one for negligently omitting to arrest, *Guest v. Elwes*, 5 Ad. & Ell. 118. As to amending where there is a *demurrer* on the record, see *Duckworth v. Harrison*, 5 Mee. & W. 427; *Chanter v. Leese*, 4 Mee. & W. 295. It is said to be no objection to an amendment under this statute, that the amount of *damages* may be affected by it, per Maule, J., *Smith v. Knowelden*, 2 Man. & Gr. 565. To this enumeration of some of the cases decided upon these statutes, it may be added that whenever the misstatement to be amended is one by which the opposite party may be prejudiced unless a postponement or other terms be imposed, he should apply for such postponement or other terms at the time; and his omission to do so may be taken to show that he really was not prejudiced by the amendment made; see the judgment of the court in *Southee v. Denny*, 1 Exch. 196. As to the *costs* of amending variances, it has been said that if upon the amendment of a declaration the defendant submits to pay whatever is recoverable under the amended declaration, he will be entitled to the costs from the time at which he could have paid the amount into court; but if he insist on going to the jury upon the amended record, he will only be entitled to the costs of such amendment; *Smith v. Brandram*, 2 Man. & Gr. 244, 2 Sc. N. R. 539, **S. C.*] Besides [**331f*] these statutes, there is a provision in one of the rules of court made in pursuance of it, in Hilary Term, 1834, which diminishes the danger of variance that formerly existed in one particular case. It was a well-established doctrine, that where a party prescribed in pleading, and his prescriptive right was traversed, he was bound upon the trial to prove a prescription to the full extent of that which was put in issue. He might indeed prove a larger prescription, and then, as that would have included the

prescription traversed, he would have succeeded; but he could never be admitted to sever the prescription traversed, so as to take a verdict for as much of it as he could prove: but if the issue were on a larger right, and the proof were of a smaller one, he must have altogether failed, upon the ground of a variance between the allegation traversed, and the evidence adduced upon the trial in support of it. 1 Wm. Saund. 269, in notis; 1 Camp. 309; Rogers v. Allen, et notas; 9 East, 185; 4 Camp. 189. Therefore among other instances, in Pring v. Henley, B. N. P. 59, it was held that if the plaintiff in replevin for taking cattle, in answer to an avowry for *damage feasant*, prescribe for common for all commonable cattle, evidence of a right of common for sheep and horses only, would not maintain the issue, though, if he had a general common, and prescribed for common for any particular sort of cattle, it would be good. However, as this doctrine was found productive of great injustice, it was directed by Reg. Gen. Hil. 1834, that "where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages, and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found; and for the plaintiff in respect of such of the trespasses as shall not be so justified." See Higham v. Rabett, 5 Bing. N. C. 622.

"And where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of common of pasture for divers kind of cattle, *ex. gr.*, horses, sheep, oxen, and cows, and issue is taken thereon; if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the *right of common so found; and for the plaintiff in respect of the trespasses which shall not be so justified."

"And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded that the allegations as to the extent [*332a] of the right are *capable of being taken distributively, they shall be

construed distributively." See Knight v. Woore, 3 Bing. N. C. 3; Phythian v. White, 3 C. M. & R. 216. As to the effect of a severed verdict on such a plea, see Knight v. Woore, 3 Bing. N. C. 534. However, though proof of a more extensive right will now support the claim of a less extensive one, yet the latter, as is obvious, must be such a one as is in contemplation of law capable of being included in the former: thus the claim of a profit *à prendre* does not include that of a mere easement, Bailey v. Appleyard, 8 Ad. & Ell. 161; and see Higham v. Rabett, 5 N. C. 622. [So a right of common over certain commons, for sheep *levant couchant* upon Blackacre, cannot be sustained under a claim for and in respect of Blackacre, to a separate right of *feeding and folding* an unlimited number of sheep over those commons. Ivatt v. Mann, 3 Man. & Gr. 691. See Paddock v. Forrester, 3 Man. & Gr. 903; Anderson v. Chapman, 5 Mee. & W. 483; Drewell v. Towler, 3 B. & Ad. 735.]

The danger of a variance was always much diminished by the circumstance that there existed a certain class of allegations which were always held to be distributive and divisible, so that it was not necessary to prove them in their full extent. Thus the allegations of trespass in a declaration, Wilson v. Lainson, 5 Dowl. 341; [Routledge v. Abbott, 8 Ad. & Ell. 592,] and of payment in a plea, Cousins v. Paddon, 4 Dowl. 488, [5 Tyrw. 535, 2 C. M. & R. 547; Falcon v. Benn, 2 Q. B. 314,] are divisible, and the plaintiff in the one case and defendant in the other will succeed only for so much as he can prove. [And where A. declared that he was possessed of a messuage and land, and by reason thereof, entitled to common, he recovered upon proof that he was possessed of land only. Ricketts v. Solway, 2 B. & Ad. 360.] But where the action was for trespass to a wall which turned out to be half the plaintiff's and half defendant's, semble that the plaintiff could not recover on proof of an injury to his side, Murly v. Macdermott, 8 Ad. & Ell. 142, [the distinction seems to be between claiming too large a right, and claiming the right in respect of, or as applicable to, more than the proof warrants: in the first case the right itself cannot be divided; but in the other, it is not the right itself which is affected by the proof, but only the subjects in respect of which it is claimed, or

to which its exercise is sought to be applied. See *Beardsworth v. Torkington*, 1 Q. B. 782; *Brunton v. Hall*, 1 Q. B. 795; *Drewell v. Towler*, 3 B. & Ad. 735.] The consequence of this distributive mode of reading pleas and declarations is frequently to save the plaintiff from the inconvenience of a new assignment: see *Cowling v. Higginson*, *4 Mee. & W. 245; *Freeman v. Crafts*, 4 Mee. & W. 4; *James v. Lingham*, 5 Bing. N. C. 553. [Routledge v. Abbott, 8 Ad. & Ell. 592; *Alston v. Mills*, 9 Ad. & Ell. 249; and see *Smith v. Royston*, 8 Mee. & W. 385, where it was decided that the declaration in trespass *quare clausum fregit* being divisible, a plea of *liberum tenementum* is satisfied by proof that the place on which the trespasses were committed was the defendant's freehold, though the declaration named a place to part of which the defendant was not entitled.]

The opinion was for a long time generally entertained, that in consequence of the divisible nature of a plea of payment, and of the usual subject-matter of a plea of set-off, a defendant pleading those pleas might obtain a verdict upon part of each, though he might fail in establishing enough of either to form a complete answer to the action. The Court of Exchequer, has however, lately decided otherwise, *Tuck v. Tuck*, 5 Mee. & W. 109; *Kilner v. Bailey*, *ibid.* 382, and see *Moore v. Butlin*, 7 Ad. & Ell. 595, [and *Falcon v. Benn*, 2 Q. B. 314, where the case of *Tuck v. Tuck* was referred to in the judgment without disapprobation.] Great objections might, I apprehend, be urged against these decisions. [See vol. 2, 442, *Green v. Marsh*, 5 Dowl. 669; and, as to the difficulties which arise in replying affirmatively to part of a cause of set-off, see *Francis v. Dodsworth*, 4 C. B. 202.]

There is another distinction which frequently prevented injustice from being occasioned by a trifling variance, that, namely, between matter of *description* and matter of *averment*: for though it was necessary to prove the former literally, it was always sufficient that the latter should be proved *substantially*. See *Pope v. Skinner*, Hob. 72, B. N. P. 400; *Forty v. Imber*, 6 East, 431; *Young v. Wright*, 1 Camp. 139; *Stoddart v. Barker*, 3 B. & C. 2; [Saxby v. Wilkin, 11 Mee. & W. 622; *Galloway v. Jackson*, 3 Man. & Gr. 960.]

By the different legislative provisions above enumerated, the severity of the law relating to variances in *civil cases* has been much alleviated, and very beneficial effects have been produced. In *criminal cases*, however, the law of variance, as laid down in *Bristow v. Wright*, still prevails in all its pristine severity; except, indeed, that it has received the slight modification produced by Lord Tenterden's act, and which has been above stated. Thus, when the prisoner was indicted for stealing "four live tame turkeys," and it turned out that the turkeys had been killed before the prisoner brought them into the county in which he was indicted, it was held that the word *live* was descriptive, and could not be rejected as surplusage, and consequently that he was entitled to his acquittal. *Edward's case*, Russ. and Ry., 497. So if the name of the prosecutor be *stated in the indictment [*332c] wrongly, as if *Shakepear* be [*332c] put for *Shakespeare*, or *McCann* for *McCarn*, the variance will be fatal. *Janet's case*, Russ. & Ry., 351; *Shakespeare's case*, 10 East, 83. Indeed, if the name used were idem sonans with the true one, no variance would be held to exist; as if *Segrave* were put for *Seagrave*, *Williams v. Ogle*, 2 Str. 89; and *Benedetto* for *Beneditto* has been considered no variance. *Abitbol v. Benedetto*, 2 Taunt. 401.

So, too, if the name of any third person be material to be stated in the indictment, it must be correctly stated, or the variance will be fatal: see *Duror's case*, 1 Leach, 352; *Jenk's case*, 2 East, P. C. 514; *Deely's case*, 1 Moody, 303; though, if the mention of that third person could be rejected as wholly immaterial, a variance in stating it would not be fatal; *Pye's case*, 1 Leach, 352, n.; for then the rule laid down in *Bristow v. Wright*, and explained in *Williamson v. Alison*, would apply, viz., that when the whole of an averment may be struck out, without destroying the plaintiff's right of action, it is unnecessary to prove it; which rule is as much applicable to an indictment as to an action; and was expressed as follows by Lord *Ellenborough*, in *Hunt's case*, 2 Camp. 585, viz.: "It is a distinction that runs through the whole of the criminal law, that it is enough to prove so much of an indictment as shows the prisoner to have committed a substantive crime therein specified." And therefore it is the common

practice to indict a man for stealing several articles, when in fact he has only stolen one, on proof of which the allegation respecting the others is rejected as surplusage, and he is convicted of the larceny which he has really committed. So it frequently happens that a man is indicted for committing a crime with certain aggravations, as for committing burglary and larceny, or larceny in a dwelling-house, some person therein being put in fear. In such a case, if the allegations in the indictment respecting the matter of aggravation be not proved; as if, in the former case the theft turn out to have been committed by day, or, in the latter case, not in a dwelling-house; they may be rejected as surplusage, and the defendant may still be found guilty of simple larceny; see Withal's case, 1 Leach, 88; Etherington's case, 2 Leach, 671. This doctrine is exemplified by the recent case of *R. v. Jones*, 2 B. & Ad. 611. The act 9 G. 4, c. 41, provides that no person (not a parish patient) shall be taken into any house for the reception of lunatics without a certificate of two medical practitioners. Sect. 30 enacts that any person who shall *knowingly, and with intention to deceive*, sign any such certificate, shall be guilty of a misdemeanor; and likewise that any physician, surgeon, &c., who shall sign any such certificate, *without having visited and personally examined the patient*, shall be guilty of a misdemeanor. The indictment stated that the defendant, a surgeon, *knowingly, and with intention to deceive*, signed a certificate required by the act, *without having visited and personally examined the patient*, contrary to the statute. The jury negatived any intention to deceive, and found [*333] the defendant guilty, *subject to the opinion of the court on a case containing in substance what is above stated. The court held that the conviction was right. "Two species of misdemeanor," said Mr. Justice Taunton, "are constituted by the twentieth section of the act. To the offence first described, knowledge and an intention to deceive are essential; but the second clause makes it a substantive offence to certify without having visited, independently of knowledge or intention. The objection to this indictment on the latter clause is, not that the offence is charged with less fulness than was requisite, but with more. But if the averment which

has been added to the statutory description of the offence be unnecessary, there is no reason that it should not be rejected. A man may be convicted of manslaughter on an indictment for murder, and of larceny on an indictment for burglary; and where an assault is alleged with certain intents, the party may be found guilty of assaulting, with only one of the intents alleged. These are stronger cases than the present, especially the first two, where the words rejected imply a great aggravation of crime, and call for a much higher punishment."

But this rule, viz., "that it is sufficient to prove a substantive offence contained in the indictment," must be received with one qualification, viz., that the offence proved must be of the *same degree* as the offence charged in the indictment; for felony and misdemeanor are offences of so distinct a nature, and so different in their consequences, that they cannot be charged in the same indictment; nor can a man accused of one be convicted of the other. Therefore, if a man be indicted for a misdemeanor, and his offence turn out to be a felony, he must be acquitted, and a new bill preferred against him for the graver offence. So where the prisoner was indicted for larceny of a parchment, which turned out to concern the realty, it was contended that he might receive judgment for the trespass of which he had been guilty in taking it. But the court held otherwise, and directed him to be discharged. Westbeer's case, 1 Leach, 14; 2 Str. 1133. To this, there is, however, an exception, created by stat. 7 & 8 G. 4, c. 29, s. 53, which enacts that if a defendant, indicted for obtaining property under false pretences, appear at the trial to have obtained it in such a manner as amounts to larceny, he shall not be acquitted by reason thereof. But the converse case is not provided for; and therefore, if it turned out that a prisoner indicted for larceny had obtained the property by false pretences, he would be entitled to his acquittal. There is another exception introduced by stat. 1 Vict. c. 85, s. 11, by which any person indicted for a felony which includes an assault, may be acquitted of the former and found guilty of the latter charge. And by 9 G. 4, c. 31, s. 14, a woman indicted for the felony of child-murder may be convicted of the misdemeanor of concealment.

[A recent enactment likely to be very useful in cases analogous to the above, is the 11 & 12 Vict. c. 46, the third section of which provides that a count for feloniously receiving stolen property may be joined in the same indictment with a count for feloniously stealing the same property.]

THE ground of the rule, as now understood, which requires an *immaterial* allegation, in some cases, to be proved, is, the ascertaining of the *identity* of the thing which is the cause of action. If the allegation be not a formal *part* of that which is set forth as the cause of action, but be clearly separable from it, it is surplusage, and an error there will do no harm; but if it be an inseparable and characteristic part of the matter, which is the cause of action, and such as fixes its identity, the variance in respect to such a particular, however in itself unimportant, between the matter declared on, and the matter offered in evidence, will make the two things *specifically* different; and, if such evidence were held to be sufficient, not only would the other side be misled as to the individual matter, which he is called upon to oppose, but (which is the more important legal consideration,) the record would not show the specific thing which was in controversy, and the judgment would not be a bar to a second suit upon the same thing. The requirement of the law, therefore, is, that the matter offered in evidence shall be legally identical with that alleged in the pleadings.

In respect to *written instruments*, to *records*, and to *parol contracts*, many examples occur, in which an unimportant particular so far affects the identity of the thing in issue, viz., of the instrument, the record, or the contract, that the matter given in evidence must correspond in that particular, or else it will be a different thing from that which is declared upon. See *Twiss and another v. Baldwin and another*, 9 Connecticut, 291, 302.

With regard to *written instruments*, it is obvious, upon the reason above stated, that the only immaterial matters, in respect to which a variance will be fatal, are such as appear upon the face of the instrument, and thereby affect its identity, and that the averment of an immaterial particular *dehors* the instrument need not be proved: per MARSHALL, C. J., in *Wilson v. Codman's Executor*, 3 Cranch, 193. Thus, as to *deeds* and *promissory notes*, if the plaintiff declare that on such a day, the defendant made and delivered or executed his deed, or made his note, and the date of the deed or note when produced, be different, here is no variance, for a deed may be delivered, or a note made on one day and dated another; *Goddard's case*, 2 Coke, 4; *Coxon v. Lyon*, 2 Camp. 307, note; *Barry et al. v. Crowley*, 4 Gill, 195, 204; see *Battles v. Fobes*, 2 Metcalf, 93, 95, but if the plaintiff allege that the deed or note was dated a certain day, and the instrument in evidence is dated another day, this is a fatal variance, because, says Lord MANSFIELD, in *Mostyn v. Fabrigas*, "it makes it appear to be a different instrument." *Cooke v. Graham's Adm'r*, 3 Cranch, 229; *Stephens v. Graham and another*, 7 Sergeant & Rawle, 505; *Church v. Peterow*, 2 Penrose & Watts, 301; see *Alder v. Griner*, 13 Johnson, 449. In like manner, if, in setting forth the tenor of the instrument, the words "value

received," be erroneously inserted or omitted, the variance is fatal; Saxton & Hutcheson v. Johnson, 10 Johnson, 418; Rossiter v. Marsh, 4 Connecticut, 196: but if in claiming under an assignment of an instrument, it be stated that the assignment was for 'value received,' when it was not, or was by both administrators, when it was by but one, or was assigned by another name, such a variation does not affect the identity of the cause of action, and is unimportant; Wilson v. Codman's Executor, 3 Cranch, 193; Lautermilch v. Kneagy, 3 Sergeant & Rawle, 202; Wilson v. Irwin and another, 14 id. 176. Upon this distinction, it was held in The Chesnut Hill Reservoir v. Chase, 14 Connecticut, 123, that where a declaration alleged that a corporation, by James A. Arnold and others, their committee, made a certain promissory note, and the note when produced was signed James S. Arnold and others, committee, there was no variance, because though the declaration alleged that James A. Arnold signed, it did not allege that he signed by the name of James A. Arnold, and he might have signed by the name of James S. Arnold. See, also, Pickering v. Pulsifer et al. 4 Gilman, 79. But if a note, sued on, be copied in the declaration, and the name of the payee be wrongly given, the variance amounts to a misdescription, and will be fatal; Harden v. Harden, 1 Strobhart, 56.

In declaring upon a *record*, the principle is the same; an immaterial difference in a matter not set forth on the record itself, is not fatal; as, where in debt, on a recognizance of bail, the declaration alleged that the defendant came into court "by the name of S. F., of K. in G. county, farmer, and became bail," and the recognizance roll states that "S. F. of the town of K. and county of D., farmer," came into court and became bail; this is not a variance, for it is an allegation *dehors* the record, as the record, though it states that a person of the description which it gives came into court, does not allege that by that description he came into court and became bail, &c.; Rodman and others v. Forman, 8 Johnson, 26; the second objection: but in reciting the record itself, the slightest variation is fatal, for it makes it a different record; as, for example, omitting "Jr.," after a man's name, Kentland v. Somers, 2 Root, 437; though "Jr." is immaterial, and no part of a man's name, Coit v. Starkweather, 8 Connecticut, 290; or misstating the amount, by a single penny, Eichelberger v. Smyser, 8 Watts, 181.

These, it will be observed, are cases where the *record* is declared on as the instrument creating and constituting the cause of action; and the question is, of identity between the *record* set forth, and the *record* given in evidence; but where part of the cause of action or defence is, a transaction in a court of record, the time of the transaction is no part of the transaction itself; and the allegation of the time is like that in an action of trespass, of which the court will take no notice, or will regard the number as merely a *representative* of whatever number may be proved. Purcell v. McNamara, 9 East, 157; Stoddart v. Palmer, 3 B. & C. 2; Brooks v. Bemiss, 8 Johnson, 455.

This need of verbal and literal accuracy may be avoided, by declaring upon the instrument or record, not according to its tenor, or in his *verbis*, but according to its legal effect. The *principle*, however, is the same: that is to say; if the instrument be set forth according to its legal effect, there is a variance if the legal effect of the instrument which is offered in evidence be different; Sheehy v. Mandeville, 7 Cranch, 208; Willoughby

v. Raymond, 4 Connecticut, 131; Russell v. South-Britain Society, 9 id. 509: but if the legal effect, in case of either written agreements or records, be the same, there is no variance; Ferguson v. Harwood, 7 Cranch, 408; Wilson v. Codman's Executor, 3 id. 193, 208; De Forest v. Brainerd, 2 Day, 528; Andrews v. Williams, 11 Connecticut, 326; Fay v. Goulding, Jr. et al. 10 Pickering, 122; Wardell et al. v. Pinney, 1 Wendell, 217; Rodman and others v. Forman, 8 Johnson, 26; Bissell v. Kip, 5 Johnson, 89; Weed v. Marsh, 14 Vermont, 80.

The rule, therefore, is, that if the plaintiff has undertaken to set forth the instrument or record, in his verbis, a verbal difference will be fatal; but if he has not undertaken to do that, it is enough if the legal effect be the same: but it is sometimes difficult to determine, whether the plaintiff has undertaken to set forth the instrument according to its tenor or not; and even where he has, and the difference is of so slight a kind, being merely in part of a word, that there could not be any mistake as to the identity of the thing in question, the difference has sometimes been held unimportant. Jones v. Mars, 2 Campbell, 305; and see Whittier v. Gould, 8 Watts, 485; and Ellis's Adm'r v. Merriman, 5 B. Monroe, 296; sed contra, Craig v. Brown, 1 Peters's C. C. 139: but this is a discretion to be exercised tenderly, and probably it extends only to clerical errors; the amendment of which, by a single judge on the trial, is, to some extent, allowable at common law; see Jackson v. Young, 1 Cowen, 131; Jansen v. Ostrander, id. 670; Every v. Merwin, 6 id. 360. In Dunbar v. Jumper, assignee, 2 Yeates, 74, it was said that the rule requiring literal accuracy, was to be confined to those cases where the plaintiff has the original in his possession, or can by due exertion obtain it; but probably the decision in that case is to be sustained on the ground that the record-copy was, by statute, as good evidence as the original, and there was fraud in the defendant.

In respect to *parol contracts*; it has sometimes been supposed, that C. J. MARSHALL, in Wilson v. Codman's Executors, 3 Cranch, 193, had said, that a variance in an immaterial allegation, never could be fatal, except in written instruments and records; but that is a misapprehension of his language and of the point decided; which are in accordance with the distinction above stated; that where a written instrument is the cause of action, an immaterial variance in a matter *dehors* the cause of action, and not affecting its identity, will do no harm; and in Sheehy v. Mandeville, 7 id. 208, to which the reader is referred, as containing an extremely clear exposition of this subject, the same judge states it as a fixed rule of law, "that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration."

The cases show that there is an *identity* in *parol contracts*, in consequence of which, a variance in some particular, not of the merits of the case, nor affecting the right of recovery, but characteristic of the contract, shall cause the contract in evidence to be a different contract from that which is declared upon; for contracts, says BULLER, are in their nature entire. The case of Bristow v. Wright, was of a *parol contract*; and in Alexander v. Harris, 4 Cranch, 299, a case very like Bristow v. Wright, it was held by Chief Justice MARSHALL, that where the avowry alleged a demise for three years, and the demise proved was for one year certain, and

there were two years' possession with consent of the landlord, there was a variance, though the lease was not by a written instrument.

This identity consists in the *terms of the contract*, that is to say, in the *consideration* and the *promise*; not, of course, in the time or place when or where the contract was made, for these are no part of the contract. The rule may be stated as follows; if a parol contract be set forth as that from which the cause of action arises; see *Repsher v. Shane*, 3 Yeates, 575; *Cunningham v. Timball*, 7 Massachusetts, 65; and the terms of the contract be stated with needless particularity; yet if the contract proved differ in any of those particulars, the two contracts are not the same: there is a *variance*. See *Curley v. Dean*, 4 Connecticut, 259. Thus, as to CONSIDERATION: the rule of law is, that the entire identical consideration laid must be proved, neither more, less, nor other; see *Lansing v. McKillip*, 3 Caines, 286; *Brooks v. Lawrie*, 1 Nott & McCord, 342; and *Cunningham v. Shaw*, 7 Barr, 401, 409; *Russell v. South-Britain Company*, 9 Connecticut, 508: thus, *part* of the consideration alleged, was, the plaintiff's engagement to give employment to the defendant's son, at a price per month, as long as the plaintiff should wish to employ him, and the engagement proved was, to employ him at that rate during the season, the variance was held material and fatal, for the things were in law essentially different; *Curley v. Dean*, 4 Connecticut, 259: and, where the declaration was for *pine* timber sold and delivered, and the only evidence was of *spruce* timber, the variance was held fatal, because the two things are specifically different; *Robins v. Otis*, 1 Pickering, 368: and where a past consideration is alleged, and an executory one proved; *Robertson v. Lynch*, 18 Johnson, 451; and see *Bulkley and others v. Landon and others*, 2 Connecticut, 404: and where the alleged consideration was a promise to pay thirty-five dollars, three dollars a ton, and the tolls, and the consideration proved was a promise to pay three dollars a ton, and the tolls, and thirty-five dollars at once, on account of the tolls; *Stone v. Knowlton*, 3 Wendell, 374; and where the consideration of a warranty was alleged to be the purchase of an article for a certain price, and the proof was of one entire contract of purchase of several articles, among which was the article alleged, which was rated at the price averred, but which thus appeared to be but part of the consideration; *Kellogg v. Denslow*, 14 Connecticut, 412: and again, where the consideration of a warranty was averred to be the sale of a horse for sixty-six dollars, and the proof was of fifty dollars paid, and a note given for sixteen dollars, payable on a contingency, the price averred being certain and unconditional, and that proved being in part dependent on a contingency; *Howard v. Chiles*, 8 B. Monroe, 377; and where the consideration alleged is a lease for one year from April 1, and so on from year to year, and the proof is of a lease dated February 1, for one year, and so on from year to year, which was decided to be from the date; *Keyes v. Dearborn*, 12 New Hampshire, 52; it has been held a variance. And as to the PROMISE, or matter to be performed, the principle is the same; the entire identical promise alleged, must be proved, and neither a greater, less, nor other promise; but this distinction is to be noted between the consideration and promise:—the consideration of every contract is one and entire, as being, the whole of it, the material cause of action, and, therefore, no part can be omitted in the declaration; but there may be several and separate promises, made on one consideration,

being so many different formal causes of action : therefore, the plaintiff need not set out all the distinct and several promises which defendant has made, since some may have been performed or remitted, and, at all events, the breach of them may be no part of the present cause of action; *Curley v. Dean*; *Alvord v. Smith et al.*, 5 Pickering, 232; and see *Henry v. Cleland*, 14 Johnson, 400; and *Howard v. Chiles*, 8 B. Monroe, 377; yet that identical and entire promise set forth, must precisely be proved. Thus, where, in *assumpsit*, the declaration alleged a warranty that machine cards were *good and merchantable*, and the evidence proved the warranty to be that the cards were *equal to any in America*, this was held to be a variance; *Goulding et al. v. Skinner et al.*, 1 Pickering, 162: and where the promise alleged was, to pay 11*l.* 5*s.* at the plaintiff's house, and the promise proved was to pay 11*l.* 13*s.* 4*d.*, at the defendant's house, it was held that the two contracts were dissimilar, and that there was a variance; *Umbehoeker v. Russell*, 2 Yeates, 339; and see *Robertson v. Lynch*, 18 Johnson, 451: and, if the promise alleged, be, that the defendant is to pay for one-half of the lands included in a certain road, and the evidence show a promise to pay for all the lands included in that road, and further show it to be a part of the same single and entire agreement, that defendant was also to pay for other lands at the same rate, in both these respects, the variance is fatal; *Crawford v. Morrell*, 8 Johnson, 253; and where the declaration avers a promise to pay and supply to the plaintiff such sum or sums of money as would be sufficient for the procurement of reasonable food, raiment, &c., and the proof was of a promise to support the plaintiff, there is a fatal variance; *Bull v. McCrea*, 8 B. Monroe, 422, 424: and if the promise alleged be *absolute*, and that proved be conditional or in the alternative; *Trask et al. v. Duval*, 4 Washington, C. C. 97; *Lower v. Winters*, 7 Cowen, 263; *Stone v. Knowlton*, 3 Wendell, 374; *Stump v. Hutchinson*, 1 Jones, 533; *Starnes v. Erwin*, 10 Iredell, 226: and if the declaration allege that the contract was to terminate "at the expiration of the season for dressing cloth, to wit, on the 1st day of May, 1819," and the proof be a contract to end with "the season for dressing cloth," the variance is fatal, for the time at which the contract is to end is characteristic and descriptive, and fixes its identity; *Curley v. Dean*: and for other examples, see *Harris v. Rainer*, 8 Pickering, 541; *Baylies and another v. Fettyplace and another*, 7 Massachusetts, 325; *Colt v. Root*, 17 id. 229; *Kellogg v. Denslow*, 14 Connecticut, 412; *Bannister v. Weatherford*, 7 B. Monroe, 271.

But in *parol* contracts, it is always enough if the legal effect is the same. *Coonley v. Anderson*, 1 Hill's N. Y. 520.

Upon the whole, the principle seems to be, that the matter given in evidence must agree with that set forth as the cause of action, in all those minute allegations which are an inseparable and characteristic part of it, and determine its identity. If there be any allegation which may be stricken out without impairing the legal cause of action, and which is therefore no legal part of it, such need not be proved, being surplusage. See *Gibbs v. Cannon*, 9 Sergeant & Rawle, 198; per SPENCER, J., in *Lansing v. McKillip*, 3 Caines, 286; *Livingston et al. v. Swanwick*, 2 Dallas, 300, but *quære?* *Panton v. Holland*, 17 Johnson, 92; *Twiss and another v. Baldwin and another*, 9 Connecticut, 291.

Variance in an instrument or contract can be taken advantage of, only

under a plea which puts the instrument or contract in issue. *Alexander v. Harris*, 4 Cranch, 299; *Douglas v. Beam*, 2 Binney, 76; *Whitlock v. Ramsey's Adm'x*, 2 Munford, 510; *Abbott v. Lyon*, 4 Watts & Sergeant, 38. The proper mode, however, of taking advantage of a variance in the condition of a bond, as recited in the declaration, is to craveoyer, and set it out at full, and then demur; *Douglass v. Rathbone*, 5 Hill, 143.

No part of the law is more strongly founded in good sense and reason, than this relating to variance. "These rules of law," says Mr. Washington, in *arguendo*, *Wroe v. Washington* and others, 1 Washington, 358, "are in strict conformity with the real and substantial purposes of a declaration; which are, 1st, To apprise the defendant of the nature of the charge; and, 2ndly, To enable him, by reference to the record itself, to plead the judgment in bar to a second action, for the same cause."

It must be observed that in New York, the rule respecting immaterial variances has given way; it being now held, that no variance is fatal, but such as in the opinion of the judge would mislead or surprise the opposite side; and in such cases, it is usual to amend after verdict. In *The East Boston Timber Co. v. Persons* and another, 2 Hill's N. Y. 126, a case precisely like *Bristow v. Wright*, an avowry in replevin set out a parol lease, reserving rent yearly, and the proof was of a reservation half-yearly, but the judge admitted the evidence; the court in banc said, that under the rule formerly prevailing, the variance would certainly have been fatal, but that a more liberal rule now prevailed, and as the judge was satisfied that the variance was not calculated to mislead or surprise, it was properly disregarded; they directed an amendment, though they doubted if it was necessary.

The ground on which a variance in an *immaterial* particular is fatal in an indictment, is the same as in a declaration: that is to say, any variance which destroys the legal identity of the thing charged with the thing proved, is fatal; but if that specific thing which is proved, be found charged in the indictment, it is good. Thus in setting out a libel in an indictment, if any word be written in a different manner from that in the original libel, the question will be, whether the variance has made it a different word, or whether it still stands for the same word: if it be a different word, the variance is fatal; but if it be the same word in an abbreviated or erroneous form, if it be the representation of the same thing, the sign of the same idea, it is not a variance. See *Lewis v. Few*, 5 Johnson, 1; where the subject is ably considered; *United States v. Hinman*, 1 Baldwin, 292; and if the question of identity is doubtful, the court will refer it to the jury. In *United States v. John McNeal*, 1 Gallison, 387, it was held that charging a perjury at a trial of the United States Court, holden 19th May, when the record in evidence showed that the court was first holden in that year on 20th May, 19th May being Sunday, was a fatal variance; but the correctness of that decision seems to be very doubtful. Where an indictment set out a note, according to the purport and effect following, "*I promise*," &c. and the proof was of a note, "*I promised*," &c, it was held no variance, for legally the purport and effect are the same. *Commonwealth v. Parmenter*, 5 Pickering, 279. See *The People v. White*, 22 Wendell, 167, 175, where the subject of variance in indictments, is extensively examined, and the above-mentioned principle established; confirmed in *The People v.*

Jackson, 3 Hill's N. Y. 92. The People v. White was reversed by the Court of Errors, 24 Wendell, 520, not because the general principle of variance laid down was wrong, but because the application of it in that case was mistaken.

Amendment at Nisi Prius is, in some states, allowed by statute.

In Pennsylvania, by act of 21 March, 1806, sec. 6, amendments affecting the merits are to be granted on or before trial; and, if thereby the other party be surprised, a continuance shall be granted. The effect of this act is to allow at trial, and after the jury are sworn, those amendments, which, at common law, could only be had previously or in banc; F. & M. Bank v. Israel, 6 Sergeant & Rawle, 293; under this act, any amendment which does not change the cause of action, is to be granted; and as to the application of this principle, the following rule is established by SERGEANT, J., upon a review of the cases, in Coxe and others v. Tilghman, 1 Wharton, 282: "In actions ex contractu, so long as the plaintiff adheres to the original instrument or contract on which the declaration is founded, an alteration of the grounds of recovery on that instrument or contract, or of the modes in which the defendant has violated it, is not an alteration of the cause of action, [confirmed in Caldwell v. Remington, 2 id. 137]; * * * on the other hand, when a new instrument or contract is introduced as a ground of action, the amendment is not permitted. * * * In actions ex delicto, the rule is the same: the foundation of the complaint laid in the declaration must be adhered to, although the modes of stating that complaint may be varied by an amendment." As amendment by this act is mandatory, the decision of the judge is the subject of error; Sandback v. Quigley, 8 Watts, 460; Proper v. Luce, 3 Penrose & Watts, 65: whereas amendment at common law is discretionary, and error does not lie. Burke v. Huber, 2 Watts, 306: yet if the court in *granting* amendments at common law, exceed the limits of their discretion, and transcend their *power* of action, no doubt error lies; see Catlin v. Robinson, 2 id. 273; Carpenter v. Gookin, 2 Vermont, 495; Probate Court v. Hall & Wentworth, 14 id. 159. The ground on which a superior court may interfere in a case of discretion, is very clearly stated by Lord COTTENHAM, in a late case: "The rule of the Court of Chancery throughout, is, that in matters of pure discretion the Court of Appeal is very unwilling to interfere; for instance, in the appointment of guardians or trustees, because it is merely the conjecture of one mind as opposed to the conjecture of another; but if the master has acted on a wrong principle in his appointment, then the court is bound to interfere to establish a right principle;" Ironmongers Co. v. Atty-Gen. 10 Cl. & Fin. Appeal Cases, 926. And in Virginia, it seems to be held, that the discretion of courts always is a legal discretion, and the subject of revision; Cooke v. Beale's Executors, 1 Washington, 313.

In Massachusetts, Maine, New Hampshire, Vermont and Connecticut, by statutes and rules of court, amendments in form or substance may be granted *at any time* before judgment, on proper and reasonable terms: but the rule is, that this cannot extend to change the *form* of action, nor the *cause* of action: that is to say, the new count must be such as has the same plea, and might originally have been joined, and therefore debt cannot be changed to case or trespass, nor assumpsit to trover; and "the subject-matter of the new count, must be the same as of the old; it must not be for

an additional claim or demand, but only a variation of the form of demanding the same thing;" *Ball v. Claffin*; and, therefore, in an action for the price of goods, a count on a promissory note given in full payment, cannot be joined; nor can a contract to carry with due care, be changed to a contract of insurance; nor case for malicious prosecution, be changed to case for conspiracy. *Haynes and wife v. Morgan*, 3 Massachusetts, 208; 9th rule of court in 16 id. 373; *Willis v. Crooker*, 1 Pickering, 204; *Vancleef v. Therasson et al.* 3 id. 12; *Ball v. Claffin*, 5 id. 303; *Slater et al. v. Nason*, 15 id. 345; *Eaton v. Ogier*, 3 Greenleaf, 46; *Butterfield v. Harvell*, 3 New Hampshire, 201; *Lawrence v. Langley*, 14 id. 70, 72; and see *Edgerley v. Emerson*, 4 id. 147; *Carpenter v. Gookin*, 2 Vermont, 495; *Ross v. Bates*, 2 Root, 188; *Smith v. Barker*, 3 Day, 312, 315. In *Boston India Rubber Factory v. Hoit*, 14 Vermont, 92, the court was divided equally upon the question whether the *form* of action might not be changed by amendment, upon terms of discharging the bail, which it seems may now be done in England.

As to the practice in case of a variance on account of formal errors, in those states where there is no statutory power of amendment at the trial, see *Lyon v. Burtis and The Bank of New York*, 19 Johnson, 510; 1 Cowen, 131, 670; *Craig v. Elisha Brown*, 1 Peters, C. C. 139; *Girard v. Stiles*, 4 Yeates, 1, 3; *Every v. Mervin*, 6 Cowen, 350; *Cole v. Goodwin*, 19 Wendell, 252, 254; *Clark v. Faxton and others*, 21 id. 153.

H. B. W.

*RUSHTON v. ASPINALL. [334]

TRINITY—21 GEO. 3.

[REPORTED DOUGL. 679.]

In an action against the indorser of a bill of exchange, if the plaintiff do not allege a demand and refusal by the acceptor on the day when the note was payable it is error, and not cured by verdict.—In like manner, it is error, and not cured by verdict, if he do not allege notice to the defendant of the refusal by the acceptor.

A verdict cures the statement of a title defectively set out, but not of a defective title.

THIS case came on upon a writ of error, from the court of the county palatine of Lancaster. It was an action of *assumpsit*. The first count in the declaration, after stating a bill of exchange drawn by one Billinge on one Meyer, dated the 27th of November 1778, and payable to one Jones, or order, three months after date; that Jones had endorsed it to Rush-

ton; and Rushton to Aspinall; proceeded as follows: "which said bill of exchange, so made, subscribed, and indorsed as aforesaid, afterwards, to wit, on the same day and year aforesaid, (viz. the day of the date of the bill,) at Manchester aforesaid, was shewn and presented to the said Peter Meyer, for his acceptance thereof, and the said Peter Meyer, according to the usage and custom of merchants aforesaid, did, then and there, accept the same, and promise to pay the said sum of 22l. 10s. therein mentioned, according to the tenor and effect of the said bill of exchange, and the indorsements thereupon so made as aforesaid; yet the said Peter Meyer, although afterwards, to wit, the same day and year aforesaid, at Manchester aforesaid, requested to pay the said sum of [*335] money in the *said bill specified, according to the tenor and effect thereof, and of his acceptance thereof, so made as aforesaid, altogether neglected and refused, and still doth neglect and refuse to pay the same, of all which premises the said John Jones, George Billinge and Peter Meyer, respectively, the same day and year aforesaid, at Manchester aforesaid, in the county aforesaid, had notice, *and by reason thereof, and according to the said usage and custom of merchants, the said Thomas Rushton became liable to pay the said Joseph Aspinall the said sum of money in the said bill of exchange contained, according to the tenor and effect thereof, and of the several indorsements so made thereon as aforesaid, and, being so liable, the said Thomas, afterwards, to wit, the same day and year last-mentioned, at Manchester aforesaid, in the county aforesaid, in consideration thereof, undertook, and to the said Joseph then and there faithfully promised, to pay to him the said sum of money, in the said bill of exchange contained, according to the tenor and effect thereof, and according to the several indorsements made thereon, as aforesaid."*

The second count was for another bill for 60l., drawn, indorsed, and accepted by the same parties; and was framed in the same manner as the first.

The last count which was upon an *insimul computasset*, concluded that the said Thomas was found in arrear, and indebted to the said Joseph in the further sum of, &c., "and thereupon, being so found in arrear and indebted as aforesaid, the said Thomas, in consideration thereof, afterwards, to wit, &c., undertook, and to the said Thomas then and there faithfully promised, to pay to him the said last sum, when he should be afterwards thereto requested."

There was a general verdict for the plaintiff, and judgment being entered, the record was removed into this court, and the plaintiff in error assigned several errors on the different counts, but which contained only three objections; two to the two first counts, and one to the third: viz., 1. That it appeared by the record that the bill was made on the 27th of November, 1778, payable three months after date, and that the payment was demanded of Meyer on the very same 27th of November; whereas, according to the tenor of the bill, and the custom of merchants, it was not payable, nor the [*336] payment demandable of Meyer, until *the expiration of three months after the date thereof. 2. That it did not appear that Rushton, to whom the bill was indorsed, and who endorsed it to Aspinall, had any notice of the refusal of Meyer to pay the money in the bill mentioned, when the same was and became due, and had been demanded of him,

without which notice the said Thomas Rushton, as an indorser of the said bill of exchange, was not liable by the law of this kingdom, and according to the usage and custom of merchants aforesaid, to the payment of the money therein mentioned, as such indorser of the same bill. 3. That by the record, it appeared that the promise of the said Thomas Rushton, mentioned in the last count, was made to himself the said Thomas Rushton, and not to the said Joseph Aspinall: wherefore the said Joseph Aspinall could not have or maintain any action thereof against the said Thomas Rushton.

In the last term, on Friday, the 25th of May, the case was argued, by *Chambre* for the plaintiff in error, and *Wood* for the defendant.

Chambre abandoned the objection to the last count, but contended that the other two were fatal. 1. The contract by the indorser to pay the bill was not absolute, he said, but conditional, i. e. in the event of a demand being made on the acceptor at the time of payment, and his refusal. Such demand, therefore, must be made, in order to render the indorser liable. It was a necessary circumstance to entitle the drawer to an action against him, and a plaintiff must in all cases state a sufficient cause of action in his declaration. 2. In like manner the indorser is not liable till after he has had notice of a demand having been made upon the drawer, and of his refusal. How soon such notice shall be given, what shall or shall not be reasonable time for notice, is a matter for the consideration of the jury; but some notice must be given, and therefore ought to be alleged.

Wood argued, in answer to both objections, that the facts of the demand and notice being circumstances without which the jury could not have found for the plaintiff, they must now be presumed to have been proved, and that the omission to allege them in the declaration could not be taken advantage of after verdict. For this he cited the case of *Hitchin v. Stevens* in *Showers*,^(a) where in an action of debt for rent by the bargainee of a reversion, after a *verdict for the plaintiff, it was objected, in arrest of judgment, that the plaintiff had not alleged attornment, without [*337] which, (as the law then stood) he could have no title; "but a rule was taken and agreed by all the court, that, in any case where anything is omitted in the declaration, though it be matter of substance, if it be such as without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment;" and thereupon, after solemn debate, judgment was given for the plaintiff. With regard to the first objection in particular, he contended, that the allegation, under a videlicet, that the demand of payment was made on the 27th of November, might be rejected as surplusage. This was no more than appeared to have been done in a case of *Sorrell v. Lewin*, reported by *Keble*.^(b) There, in an action of indebitatus assumpsit, the promise was laid on the 1st of January, 27 Car. 2, which was a day not yet come, and, after verdict, it was held to be cured, because that must have been found on evidence of a promise before the action and a duty before the promise. And, as to the second objection in this case, although there was no allegation of notice to the indorser, yet it was stated, that he promised to pay, after the acceptor had refused, which he could not be supposed to have done without a knowledge of the refusal by the acceptor.

(a) B. R. M. 4 Cor. 2. *Showers*. 233.

(b) B. R. M. 26 Car. 2. 3 *Keble*. 354.

Chambre, in reply observed, that the rule mentioned by *Wood* could not extend so far as he would carry it, otherwise a writ of error could never be supported, in any case after verdict. The court would intend, that facts imperfectly stated had been completely proved, but they never could presume, that a material fact, which was not at all stated, had been proved. The first objection would not be removed by rejecting the words stating the demand to have been on the day when the bill was drawn, for still the declaration would remain without an allegation of a demand at the time when the bill became due. As to the promise by *Rushton*, that is only considered as inference of law, and no such inference arises, unless it appears by the preceding part of the declaration that he was liable; or, if it is taken as an actual promise, yet it might have been made without notice of a refusal [*338] by the acceptor; and if it was *no action could be maintained upon it, because without such notice there could be no consideration.

The court were prepared to have given judgment the last day of Easter Term, (Monday, the 28th of May,) but neither of the counsel in the cause being present when Lord Mansfield was obliged to go to the House of Lords, the cause stood over till this day.

Lord Mansfield.—The two objections insisted upon are, 1. That the declaration does not allege a demand on the acceptor. 2. That it does not state notice to the defendant, of the acceptor's refusal to pay. The answer was, that after verdict, it must be presumed, that those facts were proved at the trial: and our wishes strongly inclined us to support the judgment if we could. But, on looking into the cases, we find the rule to be, that, where the plaintiff has stated his title or ground of action defectively or inaccurately, because, to entitle him to recover, all circumstances necessary, in form or substance, to complete the title so imperfectly stated, must be proved at the trial, it is a fair presumption, after a verdict, that they were proved; but, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and, therefore, there is no room for presumption. The case cited from *Shower* comes within this distinction; for the grant of the reversion was stated, which could not have taken effect without attornment, and therefore, that being a necessary ceremony, it was presumed to have been proved. But, in the present case, it was not requisite for the plaintiff to prove either the demand on the acceptor, or the notice to the defendant, because they are neither laid in the declaration, nor are they circumstances necessary to any of the facts charged. If they were presumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn.

I see, in a note of a case(a) in this court, in Easter Term, 18 Geo. 3, I

(a) Cowp. 825, *Avery v. Hoole*. It was an action against an unqualified person for using a gun. The declaration stated, that the defendant used a gun, being an engine for the destruction of game. In arrest of judgment, it was objected, that it was not averred that the defendant used the gun for the destruction of game, but the court overruled the objection. Lord Mansfield observed, that, according to one way of pointing, the offence was sufficiently charged, and that such an ambiguity, though it might be a good cause of

am stated to have said, "A verdict will not mend the matter where the gist of the case is not laid in the declaration, but it will cure ambiguity;" and there is a strong case in print of an action for keeping a malicious bull,^(b) where the *scienter* having been omitted in *the declaration, it was held bad after verdict. Therefore we are all of opinion, that there [*339] should be judgment for the plaintiff in error.

The judgment reversed.

THE principle on which this case was decided, and which it is commonly cited to establish, viz., that a *verdict cures the statement of a title defectively set out*, (see *Tibbitts v. Yorke*, 4 A. & E. 137,) but not of a defective title, is learnedly discussed in the notes to *Stennell v. Hogg*, 1 Wms. Saund. 227; see *Hayter v. Moat*, 5 Dowl. 298, 2 M. & W. 56, S. C. [*Galloway v. Jackson*, 3 M. & Gr. 960; 3 Sc. N. R. 753, S. C.; *Harris v. Goodwyn*, 2 M. & Gr. 405; 2 Sc. N. R. 450, S. C.; *Davis v. Black*, 1 Q. B. 900; *Taylor v. Dennie*, 7 A. & E. 409; *France v. White*, 1 M. & Gr. 731; {*Smith v. Keating*, 6 C. B. 136, 159; } *Sheen v. Rickie*, 5 M. & W. 175]. In *Henry v. Burbidge*, 3 Bing. N. C. 501, a count against the drawer of a bill not alleging a promise to pay was held bad on special demurrer. [*Acc. Smith v. Cox*, 11 M. & W. 475, and see *Lee v. Welch*, 2 Lord Raym. 1516; 2 Str. 793, S. C.; *Head v. Baldrey*, 6 Ad. & El. 469; 2 N. & P. 223, per curiam]. But such a count is good after verdict, *Griffith v. Roxborough*, 2 Mee. & Welsb. 734, 6 Dowl. 135, S. C. See *Chevers v. Parkington*, 6 Dowl. 75; [or on a general demurrer, *Stericker v. Barker*, 9 M. & W. 321. This may seem, at first sight, inconsistent with the decision in *Hayter v. Moat*, supra, that an indebitatus count in *assumpsit*, not averring in the usual form a promise to pay on request, is bad after verdict. But that case was put upon its true footing in *Brown v. Boorman*, 11 Cl. & Fin. 1, from which it appears that the omission to state an express promise is not fatal after verdict, if the declaration show

facts which necessarily imply a promise, with a breach of that promise before action; and *Hayter v. Moat* was there sustained on the ground stated by Parke and Alderson, B. B., in the course of the argument, that for want of the usual averment of a promise to pay on request, the count did not state *debitum solvendum in presenti*, and that it was consistent with the averment of a debt that it was payable after a credit which had not expired. In *Gurney v. Hill*, 2 Dowl. & L. 936, *Wightman, J.*, considered a count on a promissory note not stating when it was to be paid, unobjectionable even on special demurrer; but perhaps that case turned upon the character of the instrument declared upon, in which a general promise to pay means to pay immediately. See, also, the common form of declaration on a bond, 2 Chit. Pl. 284, 6th edition, and 315, 7th edition.]

The want of an allegation of *malice* in an action for arresting without probable cause, is bad after verdict, *Saxton v. Castle*, 6 A. & E. 660.

Libel.—The words in a letter from the defendant to P. were as follows:—"I have reason to believe that many of the flowers of which I have been robbed are growing on your premises." *Innuendo*, that the plaintiff had been guilty of larceny, had stolen flowers, plants, and roots, and unlawfully disposed of them to P., and placed them in P.'s garden. Held that after verdict the court would intend that they were flowers capable of being subjects of larceny. *Gardiner v. Williams*, 5 Tyrw. 757.

special demurrer, or an objection to a conviction (as was held in a case of *Rex v. Hunt*,) was cured by a verdict.

(b) *Buxendin v. Sharp*, C. B. E. 8 Will. 3, 2 Salk. 662, 3 Salk. 12.

THE distinction here noted is, in principle, a clear one; but the quibbling rule quoted in the preceding note, rather confuses than explains it. The amount of the principle is this: the declaration must state a cause of action; if some matter material to the cause of action be averred only impliedly, inferentially, indirectly, or with too much generality, yet substantially be averred, the defect in the form and manner of the allegation will be commonly cured by verdict: but if it be not stated in the declaration at all, the omission cannot be supplied by the verdict.

"It may be laid down as a general rule," says Judge WASHINGTON, in *Gray & Osgood v. James et al.*, 1 Peters's C. C. 476, 482, (adopted in *Shaw v. Redmond*, 11 Sergeant & Rawle, 27,) "that a declaration ought always to show a title in the plaintiff, and that with convenient certainty. It ought to state all matters that are of the essence of the action, without which the plaintiff fails to show a right in point of law to ask for the judgment of the court in his favour. If enough is stated to show title in the plaintiff, and with sufficient certainty to enable the court to give judgment, but with less certainty than the case admitted of, and which, for the purpose of notice to the adverse party or otherwise, ought to have been stated, the defect is cured by the verdict. The court will presume that all such omissions were supplied, and obscurities explained, at the trial, by the evidence given to the jury." . . . "The rule of law," says TILGHMAN, C. J., "is, that where the declaration contains a substantial cause of action, it shall be aided, though defective in form;" *Miles v. Oldfield*, 4 Yeates, 423; *Welsh v. Vanberger & Chambers*, id. 420; *Schlosser v. Brown*, 17 Sergeant & Rawle, 250. . . . "Those defects, or omissions, in pleading, which are cured by the verdict," says Mr. Chancellor KENT in *Bartlett v. Crozier*, in error, 17 Johnson, 439, 458, "are those necessary circumstances which are implied by law, and which invariably follow from the substantial fact charged. Thus, where it is pleaded, that land was assigned for dower, it is not necessary to say it was by metes and bounds, for that follows of course, as included in a lawful assignment; and where it is pleaded that the sheriff made his warrant, it is presumed to have been under seal, for it could not have been a warrant if it was not; and if a man avers he is heir to A., the death of A. is implied, for there could be no heir if he were living."—See *Bayard v. Malcolm and Malcolm*, 1 id. 453, S. C. in error, 2 id. 550, where the whole subject is thoroughly examined; *Addington v. Allen*, 11 Wendell, 375; *Dobson v. Campbell*, 1 Sumner, 319; *Kingsley v. Bill et al.*, 9 Massachusetts, 199; *Ward v. Bartholomew*, 6 Pickering, 409; *Hendrick v. Seeley*, 6 Connecticut, 176; *Warren v. Hastings*, 2 Gilman, 307; *McKee v. Bartley*, 9 Barr, 189; *Moor v. Boswell*, 5 Massachusetts, 306, where defects in certainty, i. e. particularity, and in directness, were decided to be aided by verdict.

On the other hand the entire omission of something that is necessary to give the plaintiff a right to recover what he claims; as, in an action of covenant, omitting to state the covenant, whose breach is averred; *Pumeroy v. Bruce*, 13 Sergeant & Rawle, 186; in an action of assumpsit, omitting to state the *consideration* of the promise; *Whitall v. Morse*, 5 id. 358; *Gains v. Kendrick*, 2 Mills's Reports Const. Ct. of So. Car. 339; *Hall v. Smith, Young & Hyde*, 3 Munford, 550; *Beverleys v. Holmes*, 4 id. 95; *Moseley v. Jones*, 5 id. 23; *Hemmenway v. Hiekes*, 4 Pickering, 497; in

an action on an award, omitting to state that notice of the award was given to the defendant before the commencement of the suit, such notice being necessary as part of the foundation of the action; *Kingsley v. Bill et al.*, 9 Massachusetts, 199: in an action to recover a penalty for extortion, omitting to state *who* was guilty of the extortion; *Stilson v. Tobey*, 2 id. 521: in trespass de bonis asportatis, omitting to state the plaintiff's title to the goods, *Carlisle and wife v. Weston*, 1 Metcalf, 26, will not be helped by the verdict: and in debt on bond conditioned for the performance of an award which required certain acts to be done by the defendant, an omission to state the time when the acts were to be done, and thereby show a breach of duty by defendant, was held not to be cured by a verdict on special issues relating to the validity of the award, and not to its performance; *Dale v. Dean*, 16 Connecticut, 580. The cases of *White v. Delavan*, 17 Wendell, 49, and 21 id. 26, and *Fidler v. Delavan*, 20 id. 57, go upon this distinction. See *Griffin v. Pratt* and another, 3 Connecticut, 513, where from a review of the cases, the principle is deduced, that "the omission to allege a matter in the pleadings, essential to the action, unless it may be implied from the allegations made, is never cured by verdict."

The point decided in the principal case,—that notice to the endorser is a part of the plaintiff's title to recover, and is, indispensably, to be alleged in the declaration, has been approved of by numerous dicta in this country; see *Renner v. Bank of Columbia*, 9 Wheaton, 582, 595. In Pennsylvania, it was expressly decided in *Miles in error v. O'Hara*, High Court of Errors and Appeals, July, 1807, of which there is the following note in 1 Smith's Laws, p. 18: "It is a settled principle, that judgment cannot be rendered for a plaintiff, unless a cause of action appears on the face of his declaration. If it appears in substance, the court, after verdict, will support it, though defectively set forth; because it will be presumed the deficient matters were proved on the trial; but a verdict will not mend the matter, where the *gist* of the case is not laid in the declaration, though it will cure ambiguity. The want of an *express* promise might be dispensed with, provided enough was stated to raise a promise by implication of law. But the drawer of a bill of exchange is not liable, unless he receives notice of the non-payment of the acceptor, and such notice must be alleged in the declaration; an allegation in the declaration that the drawer became liable by the *custom of merchants*, is not sufficient; because the law-merchant is not a matter of *fact*, but of *law*." And this case is approved of in *Weigley's adm'rs v. Wier*, 7 Sergeant & Rawle, 309, 310, and in the *Juniata Bank v. Hale* and another, 16 id. 157, 160: See also *Smith v. The Bank of Washington*, 5 id. 318, 321.

The cases most usually occurring in which a defect in particularity is *not* aided by verdict, are those in which the cause of action is given by some statute. It is a well settled rule of pleading, that in declaring upon a cause of action arising under a statute, the plaintiff must state specially every fact required by the statute to ground the action, so that the court may judge whether the liability of the defendant under the statute has accrued; and if this be not done, the declaration is bad after verdict. *Bartlett v. Crozier*, 17 Johnson, 439; *Williams v. Hingham and Quiney Bridge and Turnpike Corporation*, 4 Pickering, 340.

It is of the first importance that the distinction in *Rushton v. Aspinall*

should be preserved, because of another rule of law, that a plaintiff is not bound to prove more than is laid in his declaration, and if he proves all that is substantially alleged there, he must have a verdict, without reference to its legal sufficiency; per Lord MANSFIELD in *Spierces v. Parker*, 1 T. R. 141, 145. See *Howell and others v. M'Coy*, 3 Rawle, 256, and remarks of Woodworth, Senator, in *Bayard v. Malcolm*, 2 Johnson, 550, 553. The importance of keeping up the distinction, in this view, is stated with great clearness by Judge WASHINGTON: "The plaintiff is not bound to prove more than he lays in his declaration; and therefore we must presume the case stated in it to have been proved and no other. If a proper case be laid, but not with sufficient precision, and the defendant will not at a proper time take advantage of the defect, the court, after verdict, will presume that the want of precision was supported at the time, by evidence; because, as a proper ground for such evidence was laid, it would have been proper; not so, if no ground at all is laid:" *The United States v. The Virgin*, 1 Peters's C. C. 7, 9: accordingly, in this case, in an information against a vessel for receiving from another vessel bound to the United States, goods without permit, against the act of Congress, the decree of the District Court, on the finding of the jury, against the vessel, was reversed, because the libel did not allege it to have been done within four leagues of the coast, and without that fact, there was no forfeiture under the act.

H. B. W.

[*340] *MOSTYN v. FABRIGAS.

MICHAELMAS.—15 G. 3, B. R.(a)

[REPORTED COWP. 161.]

Trespass and false imprisonment lies in England by a native Minorquin, against a governor of Minorca, for such injury committed by him in Minorca. If the imprisonment was justifiable the governor must plead his authority specially.

ON the 8th of June, in last term, Mr. Justice Gould came personally into court, to acknowledge his seal affixed to a bill of exceptions in this case; and errors having been assigned thereupon, they were now argued.

This was an action of trespass, brought in the Court of Common Pleas, by Anthony Fabrigas against John Mostyn, for an assault and false imprisonment; in which the plaintiff declared, that the defendant on the 1st of September, in the year 1771, with force and arms, &c., made an assault upon the said Anthony at Minorca, (*to wit*) at London aforesaid, in the parish

(a) See *Briant v. Clutton*, 5 Dowl. 66.

of St. Mary-le-Bow, in the ward of Cheap, and beat, wounded, and ill-treated him, and then and there imprisoned him, and kept and detained him in prison there for a long time, (*to wit*) for the space of ten months, without any reasonable or probable cause, contrary to the laws and customs of this realm, and against the will of the said Anthony, and compelled him to depart from Minorca aforesaid, where he was then dwelling and resident, and carried, and caused to be carried, the said Anthony from Minorca aforesaid, to Carthagera, in the dominions of the King of Spain, &c., to the plaintiff's damage of 10,000*l*.

The defendant pleaded, 1st. Not guilty; upon which issue was joined. 2ndly. A special justification, that the *defendant at that time, &c., [*341] and long before, was governor of the said island of Minorca, and during all that time was invested with, and did exercise all the powers, privileges, and authorities, civil and military, belonging to the government of the said island of Minorca, in parts beyond the seas; and the said Anthony, before the said time when, &c., *to wit*, on the said 1st of September, in the year aforesaid, at the island of Minorca aforesaid, was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants of the said island, in breach of the peace; whereupon the said John, so being governor of the said island of Minorca as aforesaid, at the same time, when, &c., in order to preserve the peace and government of the said island, was obliged to, and did then and there order the said Anthony to be banished from the said island of Minorca; and, in order to banish the said Anthony, did then and there gently lay hands upon the said Anthony, and did then and there seize and arrest him, and did keep and detain the said Anthony, before he could be banished from the said island, for a short space of time, *to wit*, for the space of six days, then next following; and afterwards, *to wit*, on the 7th of September, in the year aforesaid, at Minorca, aforesaid, did carry and caused to be carried the said Anthony, on board a certain vessel, from the island of Minorca aforesaid, to Carthagera aforesaid, as it was lawful for him to do, for the cause aforesaid; which are the same making the said assault upon the said Anthony in the first count of the said declaration mentioned, and beating, and ill-treating him, and imprisoning him, and keeping and detaining him in prison for the said space of time, in the said first count of the said declaration mentioned, and compelling the said Anthony to depart from Minorca aforesaid, and carrying and causing to be carried the said Anthony from Minorca to Carthagera, in the dominions of the King of Spain, whereof the said Anthony has above complained against him, and this he is ready to verify; wherefore he prays judgment, &c., without this, that the said John was guilty of the said trespass, assault, and imprisonment, at the parish of St. Mary-le-Bow, in the ward of Cheap, or elsewhere, out of the said island of Minorca aforesaid. *Replication de injuriâ suâ propriâ absq. tali causâ.* At the trial the jury gave a [*342] verdict for the *plaintiff, upon both issues, with 3000*l*. damages, and 90*l*. costs.

The substance of the evidence, as stated by the bill of exceptions, was as follows; on behalf of the plaintiff, that the defendant at the island of Minorca on the 17th of September, 1771, seized the plaintiff, and without any trial, imprisoned him for the space of six days against his will, and banished him for the space of twelve months from the said island of Minorca

to Carthageria in Spain. On behalf of the defendant; that the plaintiff was a native of Minorea, and at the time of seizing, imprisoning, and banishing him as aforesaid, was an inhabitant of and residing in the Arraval of St. Phillip's, in the said island; that Minorea was ceded to the crown of Great Britain, by the treaty of Utrecht, in the year 1713. That the Minorquins are in general governed by the Spanish laws, but when it serves their purpose plead the English laws; that there are certain magistrates, called the Chief Justice Criminal, and the Chief Justice Civil, in the said island: that the said island is divided into four districts, exclusive of the Arraval of St. Phillip's; which the witness always understood to be separate and distinct from the others, and under the immediate order of the governor; so that no magistrate of Mahon could go there to exercise any function, without leave first had from the governor: that the Arraval of St. Phillip's is surrounded by a line wall on one side, and on the other by the sea, and is called the Royalty, where the governor has greater power than anywhere else in the island; and where the judges cannot interfere but by the governor's consent; that nothing can be executed in the Arraval but by the governor's leave, and the judges have applied to him, the witness, for the governor's leave to execute process there. That for the trial of murder, and other great offences committed within the said Arraval, upon application to the governor, he generally appoints the *assesseur criminel* of Mahon, and for lesser offences, the *mustastaph*; and that the said John Mostyn, at the time of the seizing, imprisoning, and banishing the said Anthony, was the governor of the said island of Minorea, by virtue of certain letters-patent [*343] of his present Majesty. Being so governor of the said island, he caused the said Anthony to *be seized, imprisoned, and banished, as aforesaid, without any reasonable or probable cause, or any other matter alleged in his plea, or any act tending thereto.

This case was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards in Hilary Term, 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glyn*, for the defendant.

For the plaintiff in error. There are two questions, 1st. Whether in any case an action can be maintained in this country for an imprisonment committed at Minorea, upon a native of that place?

2ndly. Supposing an action will lie against any other person, whether it can be maintained against the governor, acting as such, in the peculiar district of the Arraval of St. Phillip's?

In the discussion of both these questions, the constitution of the island of Minorea, and of the Arraval of St. Phillip's, are material. Upon the record it appears, that by the treaty of Utrecht, the inhabitants had their own property and laws preserved to them. The record further states that the Arraval of St. Phillip's, where the present cause of action arose, is subject to the immediate control and order of the governor only, and that no judge of the island can execute any function there, without the particular leave of the governor for that purpose. 1st. If that be so, and the *lex loci* differs from the law of this country; the *lex loci* must decide, and not the law of this country. The case of *Robinson v. Bland*, 2 Bur. 1078, does not interfere with this position; for the doctrine laid down in that case is, that where a transaction is entered into between British subjects with a view

to the law of England, the law of the place can never be the rule which is to govern. But where an act is done, as in this case, which by the law of England would be a crime, but in the country where it is committed is no crime at all, the *lex loci* cannot but be the rule. It was so held by Lord Chief Justice Pratt, in the case of *Pons v. Johnson*, and in a like case of *Ballister v. Johnson*, sittings after Trinity Term, 1765.

2nd. In criminal cases, an offence committed in foreign parts cannot, except by particular statutes, be tried in this country. 1 Vesey, 246, *The East India Company v. Campbell*. *If crimes committed [*344] abroad cannot be tried here, much less ought civil injuries, because the latter depend upon the police and constitution of the country where they occur, and the same conduct may be actionable in one country, which is justifiable in another. But in crimes, as murder, perjury, and many other offences, the law of most countries take for their basis the law of God and the law of nature; and, therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of distributing equal justice in such cases than in civil actions. In *Keilwey*, 202, it was held that the Court of Chancery cannot entertain a suit for dower in the Isle of Man, though it is part of the territorial dominions of the crown of England. 3rd. The cases where the courts of Westminster have taken cognizance of transactions arising abroad, seem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of England, and between English subjects; and even there it is done by a legal fiction; namely, by supposing under a *videlicet*, that the cause of action did arise within this country, and that the place abroad lay either in London or in Islington. But where it appears upon the face of the record, that the cause of action did arise in foreign parts, there it has been held that the court has no jurisdiction, 2 Lutw. 946. Assault and false imprisonment of the plaintiff, at Fort St. George, in the East Indies, in parts beyond the seas; viz., at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. It was resolved, by the whole court, that the declaration was ill, because the trespass is supposed to be committed at Fort St. George, in parts beyond the seas, *videlicet*, in London; which is repugnant and absurd: and it was said, by the Chief Justice, that if a bond bore date at Paris, in the kingdom of France, it is not triable here. In the present case, it does appear upon the record, that the offence complained of was committed in parts beyond the seas, and the defendant has concluded his plea with a traverse, that he was not guilty in London, in the parish of St. Mary-le-Bow, or elsewhere out of the island of Minorca. Besides, it stands admitted by the plaintiff; because if he had thought fit to have denied it, he should have made a new assignment, or have taken issue on the place. Therefore, *as Justice Dodderidge says, in *Latch*. 4, the court must take notice, [*345] that the cause of action arose out of their jurisdiction.

Before the statute of Jeofails, even in cases the most transitory, if the cause of action was laid in London, and there was a local justification, as at Oxford, the cause must have been tried at Oxford, and not in London. But the statute of Jeofails does not extend to Minorca: therefore, this case stands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law, amenable to another totally opposite. If by the law of Minorca, how is it to be proved? There is no legal mode of certifying it, no process to compel the attendance of witnesses, nor means to make them answer. The consequence would be to encourage every disaffected or mutinous soldier to bring actions against his officer, and to put him upon his defence without the power of proving either the law or the facts of his case.

Second point. If an action would lie against any other person, yet it cannot be maintained against the Governor of Minorca, acting as such, within the Arraval of St. Phillip's.

The Governor of Minorca, at least within the district of St. Phillip's, is absolute; both the civil and criminal jurisdiction vest in him as the supreme power, and as such he is accountable to none but God. But supposing he were not absolute: in this case, the act complained of was done by him in a judicial capacity as criminal judge; for which no man is answerable. 1 Salk. 396, *Groenvelt v. Burwell*; 2 Mod. 218, *Show. Parl. Cases*, 24, *Dutton v. Howell*, are in point to this position; but more particularly the last case, where, in trespass, assault, and false imprisonment, the defendant justified as Governor of Barbadoes, under an order from the council of state in Barbadoes, made by himself and the council, against the plaintiff (who was the deputy-governor,) for mal-administration in his office; and the [*346] *House of Lords determined, that the action would not lie here. All the grounds and reasons urged in that case, and all the inconveniences pointed out against that action, hold strongly in the present. This is an action brought against the defendant for what he did as judge; all the records and evidence which relate to the transaction, are in Minorca, and cannot be brought here; the laws there are different from what they are in this country; and as it is said in the conclusion of that argument, government must be very weak indeed, and the persons entrusted with it very uneasy, if they are subject to be charged with actions here, for what they do in that character in those countries. Therefore, unless that case can be materially distinguished from the present, it will be an authority, and the highest authority that can be adduced, to show that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the court.

Mr. Peckham, for the defendant in error. 1st. The objection to the jurisdiction is now too late; for wherever a party has once submitted to the jurisdiction of the court, he is for ever after precluded from making any objection to it. Year Book, 22 H. 6, fol. 7; Co Litt. 127, b; T. Raym. 34; 1 Mod. 81; 2 Mod. 273; 2 Lord Raym. 884; 2 Vern. 483.

Secondly. An action of trespass can be brought in England for an injury done abroad. It is a transitory action, and may be brought any where. Co. Litt. 282; 12 Co. 114; Co. Litt. 261, b, where Lord Coke says, that an obligation made beyond seas, at Bordeaux in France, may be sued here in England, in what place the plaintiff will. Captain Parker brought an action for trespass and false imprisonment against Lord Clive, for injuries received

in India, and it was never doubted but that the action did lie. And at this time there is an action depending between Gregory Cojimaui, an Armenian merchant, and Governor Verelst, in which the cause of action arose in Bengal. A bill was filed by the Governor in the Exchequer for an injunction, which was granted; but on appeal to the House of Lords, the injunction was dissolved; therefore, the Supreme Court of Judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in England, though the cause of action arose in India.

Thirdly. There is no disability in the plaintiff which *incapacitates him from bringing this action. Every person born within the [*347] ligeance of the King, though without the realm, is a natural-born subject, and, as such, is entitled to sue in the King's courts. Co. Litt. 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King, 2 Burr. 858.

In 1 Salk. 404, upon a bill to foreclose a mortgage in the island of Sarke, the defendants pleaded to the jurisdiction, viz., that the island was governed by the laws of Normandy, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper Wright overruled the plea; "otherwise there might be a failure of justice, if the Chancery could not hold plea in such case, the party being here." In this case both the parties are upon the spot. In case of Ramkissenseat v. Barker, upon a bill filed against the representatives of the Governor of Patna, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no suit here. But Lord Hardwicke said, "as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this court." And he overruled the defendant's plea without hearing one counsel on either side.

The case of the Countess of Derby, Keilwey, 202, does not affect the present question; for that was a claim of dower; which is a local action, and cannot, as a transitory action, be tried any where. The other cases from Latch and Lutwyche were either local actions, or questions upon demurrer; therefore, not applicable to the case before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true distinction is between transitory and local actions; the former of which may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. Skinner, referred to the twelve Judges from the council board. In the year 1657, when trade was open to the East Indies, he possessed himself of a house and warehouse, which he filled with goods at Jamby, and he purchased of the King at Great Jamby the islands of Baretha. The agents of the East India Company assaulted his person, seized his warehouse, carried away his goods, and took [*348] and *possessed themselves of the islands of Baretha. Upon this case it was propounded to the Judges, by an order from the King in council, dated the 12th April, 1665, "Whether Mr. Skinner could have a full relief in an ordinary court of law?" Their opinion was, "That his Majesty's ordinary courts of justice at Westminster can give relief for taking away and spoiling his ship, goods and papers, and assaulting and wounding his person, notwithstanding the same was done beyond the seas. But that as to the detaining and possessing of the house and islands in the case men-

tioned, he is not relievable in any ordinary court of justice." It is manifest from this case that the twelve Judges held, that an action might be maintained here for spoiling his goods, and seizing his person, because an action of trespass is a transitory action; but an action could not be maintained for possessing the house and land, because it is a local action.

Fourth point. It is contended that General Mostyn governs as all absolute sovereigns do, and that *stet pro ratione voluntas* is the only rule of his conduct. From whom does the governor derive this despotism? Not from the King, for the King has no such power, and therefore cannot delegate it to another. Many cases have been cited, and much argument has been adduced, to prove that a man is not responsible in an action for what he has done as a judge; and the case of *Dutton v. Howell* has been much dwelt upon; but that case has not the least resemblance to the present. The ground of that decision was, that Sir John Dutton was acting with his council in a judicial capacity, in a matter of public accusation, and agreeable to the laws of Barbadoes, and only let the law take its course against a criminal. But Governor Mostyn neither sat as a military nor as civil judge; he heard no accusation, he entered into no proof; he did not even see the prisoner; but in direct opposition to all laws, and in violation of the first principles of justice, followed no rule but his own arbitrary will, and went out of his way to prosecute the innocent. It that be so, he is responsible for the injury he has done: and so was the opinion of the court of C. B., as delivered by Lord Chief Justice De Grey, on the motion for a new trial. If the Governor had secured him, said his Lordship, nay, if he had barely [*349] committed him, that he might have been *amenable to justice: and if he had immediately ordered a prosecution upon any part of his conduct, it would have been another question; but the governor knew he could no more imprison him for a twelvemonth (and the banishment for a year is a continuation of the original imprisonment), than that he could inflict the torture. Lord Bellamont's case, 2 Salk. 625, Pas. 12 W. 3, is a case in point to show that a governor abroad is responsible here: and the stat. 12 W. 3, passed the same year, for making governors abroad amenable here in criminal cases, affords a strong inference that they were already answerable for civil injuries, or the legislature would at the same time have provided against that mischief. But there is a late decision not distinguishable from the case in question. *Comyn v. Sabine*, Governor of Gibraltar, Mich. 11 Geo. 2. The declaration stated, that the plaintiff was a master carpenter of the office of ordnance at Gibraltar; That Governor Sabine tried him by a court-martial, to which he was not subject; that he underwent a sentence of 500 lashes; and that he was compelled to depart from Gibraltar, which he laid to his damage of 10,000*l*. The defendant pleaded not guilty, and justified under the sentence of the court-martial. There was a verdict for the plaintiff, with 700*l*. damages. A writ of error was brought, but the judgment affirmed.

With respect to the Arraval of St. Phillip's being a peculiar district, under the immediate authority of the governor alone, the opinion of Lord Chief Justice De Grey, upon the motion for a new trial, is a complete answer: "One of the witnesses in the cause," said his Lordship, "represented to the jury, that in some particular cases, especially in criminal matters, the governor resident upon the island does exercise a legislative

power. It was gross ignorance in that person to imagine such a thing ; I may say it was impossible, that a man who lived upon the island in the station he had done, should not know better, than to think that the governor had a civil and a criminal power in him. The governor is the King's servant ; his commission is from him, and he is to execute the power he is invested with under that commission ; which is, to execute the laws of Minorca, under such regulations as the King shall make in council. It was a vain imagination in the witnesses to say, that there were five terminos in the island of Minorca : I *have at various times seen a multitude of [*350] authentic documents and papers relative to that island ; and I do not believe that, in any one of them, the idea of the Arraval of St. Phillip's being a distinct jurisdiction was ever started. Mahon is one of the four terminos, and St. Phillip's, and all the district about it, is comprehended within that termino ; but to suppose that there is a distinct jurisdiction, separate from the government of the island, is ridiculous and absurd." Therefore, as the defendant by pleading in chief, and submitting his cause to the decision of an English jury, is too late in his objection to the jurisdiction of the court ; as no disability incapacitates the plaintiff from seeking redress here ; and as the action which is a transitory one is clearly maintainable in this country, though the cause of action arose abroad, the judgment ought to be affirmed. Should it be reversed, I fear the public, with too much truth, will apply the lines of the Roman satirist, on the drunken Marius, to the present occasion ; and they will say of Governor Mostyn, as was formerly said of him,

Hic est damnatus inani iudicio ;

and to the Minorquins, if Mr. Fabrigas should be deprived of that satisfaction in damages, which the jury gave him,

At tu victrix provincia ploras.

Lord *Mansfield*.—Let it stand for another argument. It has been extremely well argued on both sides.

On Friday, 27th January, 1775, it was very ably argued by Mr. Serjeant *Glynn* for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord *Mansfield*.—This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment ; and part of the complaint made being for banishing him from the island of Minorca to Carthage in Spain, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose : therefore, he has stated it to be in Minorca ; with a *videlicet*, at London, in the parish of St. Mary-le-Bow, in the ward of Cheap. Had it not been for that particular requisite, he might have stated it to have been in the county of Middlesex. To this declaration the defendant put in two pleas. First, "not guilty ;" secondly, that he was Governor of Minorca, by letters-patent from the crown ; [*351] *that the plaintiff was raising a sedition and mutiny ; and that, in consequence of such sedition and mutiny, he did imprison him, and send him out of the island ; which, as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plain-

tiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the fact: and puts in issue whether the fact of the plea is true. The plea avers that the assault for which the action was brought arose in the island of Minorca, out of the realm of England, and nowhere else. To this the plaintiff has made no new assignment, and therefore by his replication he admits the locality of the cause of action.

Thus it stood on the pleadings. At the trial the plaintiff went into the evidence of his case, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in his plea of justification was given, to show that the Arraval of St. Phillip's, where the injury complained of was done, was not within either of the four precincts, but is a district of itself, more immediately under the power of the governor; and that no judge of the island can exercise jurisdiction there, without a special appointment from him. Upon the facts of the case, the judge left it to the jury, who found a verdict for the plaintiff, with 3000*l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cause comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the question is, which is meant seriously to be brought before the court.

If I understand the counsel for Governor Mostyn right, what they say is this: The plea of not guilty is totally immaterial; and so is the plea of justification: because upon the plaintiff's own showing it appears, 1st, that the cause of action arose in Minorca, out of the realm; 2ndly, that the defendant was Governor of Minorca, and by virtue of such his authority imprisoned the plaintiff. From thence it is argued, that the judge who tried the cause ought to have refused any evidence whatsoever, and have directed the jury to find for the defendant: and three reasons have been assigned. One, insisted upon in the former argument, was, that the plaintiff, being a
 [*352] Minorquin, is incapacitated from *bringing an action in the King's courts in England. To dispose of that objection at once, I shall only say, it is wisely abandoned to-day; for it is impossible there ever could exist a doubt, but that a subject born in Minorca has as good a right to appeal to the King's courts of justice as one who is born within the sound of Bow bell; and the objection made in this case, of its not being stated on the record that the plaintiff was born since the treaty of Utrecht, makes no difference. The two other grounds are, 1st, That the defendant being Governor of Minorca is answerable for no injury whatsoever done by him in that capacity: 2ndly, That the injury being done at Minorca, out of the realm, is not cognizable by the King's courts in England.—As to the first, nothing is so clear as that to an action of this kind, the defendant, if he has any justification, must plead it; and there is nothing more clear, than that if the court has not a general jurisdiction of the subject-matter, he must plead to the jurisdiction, and cannot take advantage of it upon the general issue. Therefore, by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete justification. So in this case, if the injury complained of had been done by the defendant as a judge, though it arose in a foreign country, where the technical distinction of a court of record does not exist, yet sitting as a judge in a court of justice, subject to a superior review, he would be within the reason of the

rule which the law of England says shall be a justification ; but then it must be pleaded.† Here no such matter is pleaded, nor is it even in evidence that he sat as judge of a court of justice. Therefore I lay out of the case everything relative to the Arraval of St. Phillip's.

The first point, then, upon this ground is, the sacredness of the defendant's person as governor. If it were true that the law makes him that sacred character, he must plead it, and set forth his commission as special matter of justification ; because *prima facie* the court has jurisdiction. But I will not rest the answer upon that only. It has been insisted by way of distinction, that, supposing an action will lie for an injury of this kind committed by one individual against another, in a country beyond the seas, but within *the dominion of the crown of England, yet it shall not emphatically [*353] lie against the governor. In answer to which I say, that for many reasons, if it did not lie against any other man, it shall most emphatically lie against the governor.

In every plea to the jurisdiction, you must state another jurisdiction ; therefore, if an action is brought here for a matter arising in Wales, to bar the remedy sought in this court, you must show the jurisdiction of the court of Wales ; and in every case to repel the jurisdiction of the King's court, you must show a more proper and more sufficient jurisdiction : for if there is no other mode of trial, that alone will give the King's courts a jurisdiction. Now, in this case no other jurisdiction is shown, even so much as in argument. And if the King's courts of justice cannot hold plea in such case, no other court can do it. For it is truly said that a governor is in the nature of a viceroy ; and therefore locally, during his government, no civil or criminal action will lie against him : the reason is, because upon process he would be subject to imprisonment.‡ But here the injury is said to have happened in the Arraval of St. Phillip's, where, without his leave, no jurisdiction can exist. If that be so, there can be no remedy whatsoever, if it is not in the King's courts : because when he is out of the government, and is returned with his property into this country, there are not even his effects left in the island to be attached.

Another very strong reason, which was alluded to by Mr. Serjeant Glynn, would alone be decisive ; and it is this : that though the charge brought against him is for a civil injury, yet it is likewise of a criminal nature ; because it is in abuse of the authority delegated to him by the King's letters-patent, under the great seal. Now, if everything committed within a dominion is triable by the courts within that dominion, yet the effect or extent of the King's letters-patent, which gave the authority, can only be tried in the King's courts ; for no question concerning the seignory can be tried within the seignory itself. Therefore, where a question respecting the seignory arises in the proprietary governments, or between two provinces of America, or in the Isle of Man, it is cognizable by the King's courts in England only. In the case of the Isle of Man, it was so *decided in the time of Queen Elizabeth, by the chief justice and many of the judges. [*354] So that emphatically the governor must be tried in England, to see whether

† See Salk. 306 ; Vaugh. 138 ; 12 C. 24 ; Lord Raym. 466 ; 6 T. R. 449 ; 3 M. & S. 411. See too 1 T. R. 513, 514, 535, 550, 493, 784. 4 Taunt. 67 ; 2 C. & P. 146. 1 B. & C. 163. 4 B. & C. 292.

‡ [But see as to this position the note 368 b.]

he has exercised the authority delegated to him by the letters-patent, legally and properly; or whether he has abused it, in violation of the laws of England, and the trust so reposed in him.

It does not follow from hence, that, let the cause of action arise where it may, a man is not entitled to make use of every justification his case will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is invested, he must lay it before the court by way of plea, and the court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the court might have considered it as a sufficient answer: and, if the nature of the case would have allowed of it, might have adjudged, that the raising a mutiny was a good ground for such a summary proceeding. I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace. Suppose, during a siege or upon an invasion of Minorca, the governor should judge it proper to send a hundred of the inhabitants out of the island, from motives of real and general expediency; or suppose, upon a general suspicion, he should take people up as spies; upon proper circumstances laid before the court, it would be very fit to see whether he had acted as the governor of a garrison ought, according to the circumstances of the case. But it is objected, supposing the defendant to have acted as the Spanish governor was empowered to do before, how is it to be known here that by the laws and constitution of Spain he was authorized so to act? The way of knowing foreign laws is, by admitting them to be proved as facts, and the court must assist the jury in ascertaining what the law is. For instance, if there is a French settlement, the construction of which depends upon the custom of Paris, witnesses must be received to explain what the custom is; as evidence is received of customs in respect of trade. There is a case of the kind I have just stated. So in the supreme resort before the king in council, the privy council determines all cases that arise in the plantations, in Gibraltar, or Minorca, in Jersey or Guernsey; and they inform themselves, *by having the law stated to them.—As to suggestions with [*355] regard to the difficulty of bringing witnesses, the court must take care that the defendant is not surprised, and that he has a fair opportunity of bringing his evidence, if it is a case proper in other respects for the jurisdiction of the court. There may be some cases arising abroad, which may not be fit to be tried here; but that cannot be the case of a governor, injuring a man contrary to the duty of his office, and in violation of the trust reposed in him by the king's commission.

If he wants the testimony of witnesses whom he cannot compel to attend, the court may do what this court did in the case of a criminal prosecution of a woman who had received a pension as an officer's widow: and it was charged in the indictment, that she never was married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up, to give evidence. The court obliged the prosecutor to consent that the witnesses might be examined before any of the judges of the court of session, or any of the barons of the court of exchequer in Scotland, and that the depositions so taken should be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time

for ever, unless the prosecutor had so consented. The witnesses were so examined before the lord president of the court of session.

It is a matter of course in aid of a trial at law, to apply to a court of equity for a commission and injunction in the meantime: and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff.† Therefore, in every light in which I see the subject, I am of opinion that the action holds emphatically against the governor, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable nowhere, for the king in council has no jurisdiction. Complaints made to the king in council tend to remove the governor, or to take from him any commission which he holds during the pleasure of the crown. But if he is in England, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an English *court of justice such a monstrous proposition, as that a governor acting by virtue of letters-patent under the great seal is accountable only to God and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord Bellamont's case, 2 Salk. 625, cited by Mr. Peckham, a motion was made for a trial at bar, and granted because the attorney-general was to defend it on the part of the king; which shows plainly that such an action existed. And in *Way v. Yally*, 6 Mod. 195, Justice Powell says, that an action of false imprisonment has been brought here against a governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought that he was not amenable. He defended himself and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against Governor Sabine who was governor of Gibraltar, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being proved at the trial, that the tradesmen who follow the train are not liable to martial law, the court were of opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave 500*l.* damages.

The next objection which has been made is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in England.

There is a formal and a substantial distinction as to the locality of trials.

† And now, by st. 1 W. 4, c. 22, courts of common law can order the examination of witnesses to be taken in writing whether they reside in a foreign country, a colony, or in England, but under circumstances which disable them from attending to give evidence. See *Doe v. Pattison*, 3 Dowl. 35; *Bain v. De Vetrie*, 3 Dowl. 517; *Bridges v. Fisher*, 1 Bing. N. C. 512; *Prince v. Samo*, 4 Dowl. 5; *Bordeaux v. Rowe*, 1 Bing. N. C. 721; *Duckett v. Williams*, 1 Tyrwh. 502; *Wainwright v. Bland*, 3 Dowl. 653.

I state them as different things: the substantial distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments *where [*357] possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise out of the realm, there is a substantial distinction of locality too; for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise; as in the case alluded to by Serjeant Walker: if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king;† but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only and not of damages, there might be a solid distinction of locality.

But there is likewise a formal distinction, which arises from the mode of trial: for trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between transitory actions and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county—the place is not material; and if an imprisonment in Middlesex it may be laid in Surrey, and though proved to be done in Middlesex, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases, which require the action to be brought in the county. The parties, upon sufficient ground, have an opportunity of applying to the court in time to change the venue; but if *they go to trial without [*358] it, that is no objection. So all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration, that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth. If the declaration states a specialty to have been made at Westminster in Middlesex, and upon producing the

† But it seems questionable whether the words *contra pacem* be now necessary in a declaration of trespass, for the fine to the king is abolished, and though in *Day v. Musket*, L. Raym, 985, Lord Holt said that it was not the *contra pacem*, but the *vi et armis*, that may now be omitted, yet *quære*, whether they can be held to stand on a different footing especially since reg. Hil., 1832, has substituted the single word '*trespass*' for the recital of the writ, which formerly rendered the omission of *contra pacem* at the end of the declaration immaterial. See *Com. Di. Pleader*, 3 M. 8.

deed, it bears date at Bengal, the action is gone; because it is such a variance between the deed and the declaration as makes it appear to be a different instrument. There is some confusion in the books upon the stat. 6 Rich. 2. But I do not put the objection upon that statute. I rest it singly upon this ground. If the true date or description of the bond is not stated, it is at variance. But the law has in that case invented a fiction; and has said, the party shall first set out the description truly, and then give a venue only for form, and for the sake of trial by a *videlicet*, in the county of Middlesex, or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz., in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms, which are invented for the furtherance of justice; and it is a certain rule, that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial; to every other purpose, therefore, it shall be contradicted, but not for the purpose of saying the cause shall not be tried. So in the case that was long agitated and finally determined some years ago, upon a fiction of the teste of writs taken out in the vacation, which bear date as of the last day of the term, it was held, that the fiction shall not be contradicted so as to invalidate the writ, by averring that it issued on a day in the vacation: because the fiction was invented for the furtherance of justice, and to make the writ appear right in form. But where the true time of suing out a *latitat* is material, as on a plea of non assumpsit *infra sex annos*, there it may be shown that the *latitat* was sued out after the six years, notwithstanding the teste. I am sorry to observe, that some sayings have been alluded to, inaccurately taken down, and improperly printed, where the court has been made to say, that as men they have one **way of thinking*, and as judges they have another, which is an absurdity; whereas in fact [*359] they only meant to support the fiction. I will mention a case or two to show that that is the meaning of it.

In 6 Mod. 228, the case of *Roberts v. Harnage* is thus stated: The plaintiff declared that the defendant became bound to him at Fort St. David's in the East Indies at London, in such a bond; upon demurrer the objection was, that the bond appeared to have been sealed and delivered at Fort St. David's in the East Indies, and therefore the date made it local, and, by consequence, the declaration ought to have been of a bond made at Fort St. David's, in the East Indies, viz., at Islington in the county of Middlesex; or in such a ward or parish in London: and of that opinion was the whole court. This is an inaccurate state of the case. But in 2 Lord Raym. 1042, it is more truly reported, and stated as follows: it appeared by the declaration, that the bond was made at London in the ward of Cheap; upon oyer, the bond was set out, and it appeared upon the face of it to be dated at Fort St. George in the East Indies; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court said that it would not have been good, if laid at Fort St. George, in the East Indies, to wit, at London in the ward of Cheap. The objection there was, that they had laid it falsely; for they had laid the bond as made at London; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A case was quoted from *Latch*, and a case from *Lutwyche*, on the

former argument, but I will mention a case posterior in point of time, where both these cases were cited, and no regard at all paid to them; and that is the case of *Parker v. Crook*, 10 Mod. 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is said in the declaration to continue at Fort St. George, in the East Indies: and upon the oyer of the deed it bore date at Fort St. George, and therefore the court, as was pretended, had no jurisdiction; Latch, fol. 4. Lutwyche, 950. Lord Chief Justice Parker said, that an action will lie in England upon a deed dated in foreign parts; or else the party can have no remedy; but then in the declaration a place in England must be alleged

[*360] *pro forma*. Generally speaking, the deed, *upon the oyer of it, must be consistent with the declaration; but in these cases, *propter necessitatem*, if the inconsistency be as little as possible, it is not to be regarded; and here the contract being of a voyage which was to be performed from Fort St. George to Great Britain, does import, that Fort St. George is different from Great Britain; and after taking time to consider of it in Hilary term, the plaintiff had his judgment, notwithstanding the objection. Therefore, the whole amounts to this; that where the action is substantially such a one as the court can hold plea of, as the mode of trial is by jury, and as the jury must be called together by process directed to the sheriff of the county, matter of form is added to the fiction, to say it is in that county, and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the persons, but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satisfaction to be made by process against the person or his effects, within the jurisdiction of the court? We know it is within every day's experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it. In sea batteries the plaintiff often lays the injury to have been done in Middlesex, and then proves it to be done a thousand leagues distant on the other side of the Atlantic. There are cases of offences on the high seas, where it is of necessity to lay in the declaration, that it was done upon the high seas; as the taking a ship. There is a case of that sort occurs to my memory; the reason I remember it is, because there was a question about the jurisdiction. There likewise was an action of that kind before Lord Chief Justice Lee, and another before me, in which I quoted that determination, to show that when the lords commissioners of prizes have given judgment, that is conclusive in the action; and likewise when they have given judgment, it is conclusive as to the costs, whether they have given costs or not. It is necessary in such actions to state in the declaration, that the ship was taken, or seized on the high seas, *videlicet*, in Cheapside. But it cannot be seriously contended that the judge

[*361] and jury who try the cause fancy the ship is sailing in Cheapside: *no, the plain sense of it is that, as an action lies in England for the ship which was taken on the high seas, Cheapside is named as a venue; which is saying no more, than that the party prays the action may be tried in London. But if a party were at liberty to offer reasons of fact contrary to the truth of the case, there would be no end of the embarrassment. At the last sittings there were two actions brought by Armenian merchants, for assaults and trespasses in the East Indies, and they are very strong authorities.

Serjeant Glynn said, that the defendant, Mr. Verelst, was very ably assisted : so he was, and by men who would have taken the objection, if they had thought it maintainable, and the action came on to be tried after this case had been argued once ; yet the counsel did not think it could be supported. Mr. Verelst would have been glad to make the objection ; he would not have left it to a jury, if he could have stopped them short, and said, You shall not try the action at all. I have had some actions before me, rather going further than these transitory actions ; that is, going to cases which in England would be local actions. I remember one, I think it was an action brought against Captain Gambier, who by order of Admiral Boscawen had pulled down the houses of some sutlers who supplied the navy and sailors with spirituous liquors ; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the sailors was affected by frequenting them. They were pulled down : the captain was inattentive enough to bring the sutler over in his own ship, who would never have got to England otherwise ; and as soon as he came here he was advised that he should bring an action against the captain. He brought his action, and one of the counts in the declaration was for pulling down the houses. The objection was taken to the count for pulling down the houses ; and the cases of Skinner and the East India Company was cited in support of the objection. On the other side, they produced from a manuscript note, a case before Lord Chief Justice Eyre, where he overruled the objection ; and I overruled the objection upon this principle, namely, that the reparation here was personal, and for damages, and that otherwise there would be a failure of justice ; for it was upon the coast of Nova Scotia where there were no regular courts of *judicature : but if there had been, Captain Gambier might never go [*362] there again ; and therefore the reason of locality in such an action in England did not hold. I quoted a case of an injury of that sort in the East Indies, where even in a court of equity Lord Hardwicke had directed satisfaction to be made in damages : that case before Lord Hardwicke was not much contested, but this case before me was fully and seriously argued, and a thousand pounds damages given against Captain Gambier. I do not quote this for the authority of my opinion, because that opinion is very likely to be erroneous, but I quote it for this reason—A thousand pounds damages and the costs were a considerable sum. As the captain had acted by the orders of Admiral Boscawen, the representatives of the admiral defended the cause, and paid the damages and costs recovered. The case was favourable ; for what the admiral did was certainly well intended ; and yet there was no motion for a new trial.

I recollect another cause that came on before me : which was the case of Admiral Palliser. There the very gist of the action was local : it was for destroying fishing-huts upon the Labrador coast. After the treaty of Paris, the Canadians early in the season erected huts for fishing ; and by that means got an advantage, by beginning earlier, of the fishermen who came from England. It was a nice question upon the right of the Canadians. However, the admiral, from general principles of policy, ordered these huts to be destroyed. The cause went on a great way. The defendant would have stopped it short at once, if he could have made such an objection, but it was not made. There are no local courts among the Esquimaux Indians upon

that part of the Labrador coast; and therefore whatever injury had been done there by any of the king's officers would have been altogether without redress, if the objection of locality would have held. The consequence of that circumstance shows, that where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the king's dominions. Admiral Palliser's case went off upon a proposal of a reference, and ended by an award. But as to transitory actions there is not a colour of doubt, that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas; [*363] and when it is absolutely *necessary to lay the truth of the case in the declaration, there is a fiction of law to assist you, and you shall not make use of the truth of the case against that fiction, but you may make use of it to every other purpose. I am clearly of opinion not only against the objections made, but that there does not appear a question upon which the objections could arise.

The three other judges concurred.

Per Cur. Judgment affirmed.

It is very curious and instructive to trace the progress of the English law, respecting the locality of actions. During the earliest ages of our judicial history, juries were selected for the very reasons which would now argue their unfitness, *videlicet*, their personal acquaintance with the parties and the merits of the cause; and few rules of law were enforced with greater strictness than those which required that the *venue*, *visne*, or *vicinetum*, in other words the neighbourhood whence the juries were to be summoned, should be also that in which the cause of action had arisen; in order that the jury who were to determine it principally from their own private knowledge, and who were liable to be *attainted* if they delivered a wrong verdict, might be persons likely to be acquainted with the nature of the transaction which they were called upon to try. *Peregrina judicia*, says a law of Henry the First, *modis omnibus submovemus*. In order to effect this end, the parties litigant were required to state in their pleadings with the utmost certainty, not merely the county, but the very *venue*, *i. e.*, the very district, *hundred*, or *vill*, within that county, where the facts that they alleged had taken place, in order that the sheriff might be directed to summon the jury from the proper neighbourhood, in case issue should be taken on any of such allegations. It followed, of course,

that a new *venue* was designated as often as the allegations of the parties litigant shifted the scene of the transaction from one part of the country to another. This was, however, soon found to produce great inconveniences; for in mixed transactions, which may happen partly in one place, and partly in another, it was extremely difficult to ascertain the right *venue*; and as the number of these transactions increased with increasing civilization, these difficulties about determining the place of trial became of constant occurrence, and soon induced the courts, in order to relieve themselves, to take a distinction between *transitory* matters, such as a contract, which might happen any where, and *local* ones, such as a trespass to the realty, which could only happen in one particular place; and they established as a rule, that in *transitory* matters the plaintiff should have a right to lay the *venue* where he pleased, and the defendant should be bound to follow it, unless indeed his defence consisted of some matter in its nature *local*, and which must therefore, *ex neccssitate rei*, be alleged to have taken place where it really happened. However, this distinction was soon abused by litigious plaintiffs, who, by laying the *venue* in a county distant from the defendant's residence, obliged him to come thither with his witnesses; Gilb. C. P. 89; and this occasioned a return to the ancient strictness

with regard to *venues* expressed in the above law of Henry the First. Accordingly by St. 6 Richard 2, cap. 2, it was enacted that, "to the intent that writs of debt, and account, and all other such actions be from henceforth taken in their counties, and directed to the sheriffs of the counties where the contracts of the same actions did arise, that if, from henceforth, in pleas upon the same writs it shall be declared that the contract thereof was in another county than is [*364] contained in the original *writ, that then the said writ shall be utterly abated:" and, as the words of this statute were found not quite sufficient to effect the object, statute 4 Henry the Fourth, c. 18, directed that attorneys should be sworn "that they would make no suit in a foreign county."

After these statutes the judges adopted various means of enforcing their provisions. At first they examined the plaintiff on oath, as to the truth of his *venue*; afterwards they allowed the defendant to traverse it and try it in an issue, Rastell, *Debt*, 184, b. Fitz. Abr., Brief 8, and still later they made a rule of court, rendering it highly penal on attorneys to transgress the act of Hen. 4; R. M. 1654, pl. 5, K. B.; M. 1654, pl. 8, C. P.; but finding that the mode of traversing the *venue* produced great delay, they at last adopted the mode now in use of changing it on motion, which will presently be described more at length.

But all these alterations in the law applied, it must be borne in mind, only to *transitory matters*, for where a matter alleged in pleading was of a *local* description, whether the allegation happened in a declaration or in any subsequent pleading, the *venue* for the trial of such matter could be nowhere but at the very place where it was alleged in pleading to have happened, and therefore, as is observed in the text, "even in cases the most transitory, if the cause of action was laid in London, and there was a *local* justification as at Oxford, the cause must have been tried in Oxford, not in London." Acc. Ford v. Brooke, Cro. Eliz. 261: Bowyer's case, Moor, 410. And it was probably this strictness of the law with regard to *venue* which rendered it necessary to confine the defendant so long to a single plea, since had he pleaded several pleas on which issues had been taken triable by different *venues*, there could have been no single

trial of the action; and accordingly we find that it was not till after the effect of the statute of Charles the Second, on *venues*, had become well settled that the very same year which put an end to the last remnant of the old severity, by abolishing the necessity of summoning hundreders, also endowed the defendant with a right which he ought in justice always to have possessed, of stating every thing in his defence which can by law be made available to exonerate him; the right corresponding to which, that, namely, of replying to the defence every thing which has a direct tendency to rebut it, is, even in our more advanced times, denied the plaintiff.

It may not be inapposite here to observe that the stat. 34 Hen. 8, c. 34, had in comparatively early times created a remarkable anomaly in the then law of *venue*, by rendering certain actions transitory which are unquestionably in their nature *local*. That act, the words of which are set out, ante, p. 28, gave assignees of the reversion "*the like advantages*" against the lessee, and the lessee the "*like action and remedy*" against the assignee of the reversion, as the lessor and lessee had before that act respectively possessed against each other. Now the remedy of these latter personages against each other was by an action founded upon the contract into which they had reciprocally entered: it was therefore transitory according to the maxim *debitum et contractus sunt nullius loci*, and existed independent of the relation in which they stood to each other in respect of their several interests in the same land: whereas the rights of the assignee of the reversion against the lessee, and of the lessee against the assignee of the reversion, issue entirely out of that relation, and depend on no mutual contract, so that their actions against each other would have been *local*, as those of the assignee of the term against the lessor and his assigns, and of the lessor and his assigns against the assignee of the term still are, had not the statute intervened, and by the use of the word *like* rendered those actions transitory, which otherwise would have been local. The result therefore of the statute of Hen. 8, coupled with the common law, is, that the following actions, viz. lessor against lessee, lessee against lessor, assignee of reversion against lessee, lessee against assignee of reversion, are transitory;

while the following, viz. lessor against assignee of lessee, assignee of lessee against lessor, assignee of lessee against assignee of lessor, and assignee of lessor against assignee of lessee, *are [*365] local. See *Thursby v. Plant*, 1 Saund. 237; *Stevenson v. Lambard*, 2 East, 575; *Barker v. Damer*, Carth. 182, Salk. 80; [*Grogan v. Magan*, 1 Alc. & N. 366.]

But to return to the progress of the law of *venue*, stat. 16 & 17 Car. 2, c. 8, (one of the statutes of Jeofails) enacted, "that after judgment no verdict shall be arrested or reversed, for that there is no right *venue*, so as the cause of action were tried by a jury of the proper county or place *where the action was laid*."

Considerable difficulty arose on the construction of this statute, many lawyers contending that the words "the proper county or place where the action is laid," must be understood to mean the proper county or place where the issue arises, so that if the issue arose at Dale in Oxfordshire, and the *venue* was *Salé* in the same county, here they said was a case within the statute, there being a right county but a wrong *venue*. However it was at length decided in *Craft v. Boite*, 1 Saund. 246, b, contrary to the opinion of Twysden, J., and was settled by many subsequent cases, that the words "*where the action was laid*," mean, where it was laid in the declaration, not in any subsequent pleading. And accordingly it has ever since been held that it is sufficient if the jury be summoned from the *venue* laid in the declaration. This *venue* indeed was at that time the *vill* or *hundred* where the cause of action was stated in the declaration to have arisen: and anciently the jury, in order that they might be persons well acquainted with the controversy, were summoned out of the very *hundred* designated for the *venue*. Afterwards the rule was relaxed, and in the reign of Edward the Third it was sufficient if the jury contained six hundreders. Gilb. C. P. c. 8. This number was in Henry the Sixth's reign reduced to four, *Fortescue de Laud*. c. 25; it was afterwards, by stat. 35 Hen. 8, c. 6, restored to six; stat. 27 Eliz. c. 6, reduced it to two; and so the law remained till long after the stat. 16 & 17 Car. 2, c. 8, after which act it was still necessary that two at least of the jurors should be summoned from the *hundred* laid in the declaration; and if there were not so many, it

was cause of challenge. But this last remnant of the ancient strictness was abolished by 4 & 5 Anne, c. 6, except so far as concerned actions founded upon penal statutes, to which the abolition was extended by 24 G. 2, c. 18. So that now it is in all cases sufficient if the jury be summoned *de corpore comitatus*, i. e. from the body of the county in which the *venue* is laid by the declaration.

It will, however, be remembered that the statute of Charles the Second did not enact positively that the *venue* in the declaration should be adopted, but only prevented the judgment from being arrested or reversed in consequence of its adoption. So that, even now, if a local justification were to be stated in the plea, there seems no reason why the plaintiff should not, if he pleased, sue out the jury process, and carry the cause down to trial to the county mentioned in the plea, as at common law, before the statute of Charles the Second, he *must* have done. Nor does there seem any reason to prevent the defendant from doing so, when he has a right to try the cause by *proviso*; so that a curious question might arise, if the plaintiff were to carry the cause down for trial to the county named in the declaration, and the defendant to that laid in his *local* justification.

It has been already mentioned that in transitory actions the judges adopted various modes of enforcing the policy of the statute of Richard the Second, and obliging the plaintiff to lay his *venue* where the transaction in dispute had really occurred. At last, they had recourse to a practice, which seems to have been first introduced in the reign of James the First, (per Holt, C. J., 2 Salk. 670; the first case in the books is *Lord Gerrard v. Floyd*, 1 Sid. 185, E., 16 Car. 2,) founded upon the equity of that enactment, by which they held themselves authorised, upon affidavit made that the cause of action, if any, arose in the county of A., and not in the county of B., in which the *venue* was laid, or elsewhere out of the county of A., to change the *venue* to the county of A., and the motion for so doing is of course, only requiring counsel's signature. R. H. 2 W. 4, pl. 103. But as it would be hard to conclude the plaintiff on the single affidavit of the defendant, it is further held, that the *venue* may be brought back, if the *plaintiff [*366]

undertake to give material evidence in the county in which the action is brought, failing which he must be nonsuited, which is equivalent to an abatement of the writ, according to the statute. *Gilb. C. P.* 90. *Santler v. Heard*, 2 Bl. 1032, 1033; *Bruckshaw v. Hopkins*, Cowp. 410; *Watkins v. Towers*, 2 T. R. 275. See [on the question what evidence satisfies such an undertaking] *Curtis v. Drinkwater*, 2 B. & Ad. 169; *Collins v. Jenkins*, 4 Bing. N. C. 225; [Greenway v. Titchmarsh, 7 Mee. & W. 221; *Brune v. Thompson*, 2 Q. B. 789; *Clarke v. Dunsford*, 3 Dowl. & L. 618; *Gilling v. Dugan*, 1 C. B. 8.] But there are many cases of transitory actions, in which the defendant cannot by possibility make the above affidavit, in order to procure a change of venue. He cannot, for instance, do so where the cause of action has arisen partly in one county and partly in another. *Pinkney v. Collins*, 1 T. R. 571; *Clissold v. Clissold*, 1 T. R. 647. So too, if the action be upon a specialty, because the cause of action follows the instrument, which falls under the class of *bona notabilia* wherever it happens to be, *Foster v. Taylor*, 1 T. R. 781; *Watt v. Daniel*, 1 B. & P. 425; or where a promissory note, or bill of exchange, *Smith v. Elkins*, 1 Dowl. 426; *Dawson v. Bowman*, 3 Dowl. 161, [is the cause of action, the same rule is enforced, seemingly from an idea that those instruments would, like specialties, be *bona notabilia* wherever they chanced to be (see *Mondell v. Steele*, 8 Mee. & W. 641.) It was applied also to the case of a] charter-party, *Morrice v. Hurry*, 7 Taunt. 306; or award, *Stanway v. Hilslop*, 3 B. & C. 9; [Martin v. Daws, 11 Mee. & W. 734], specially declared on, the reason for which was said to be, that the written instrument declared on was the cause of action; and that as *contractus est nullius loci*, the cause of action cannot be said to arise more in one county than another; but this principle, which, if universally true, would prevent the venue from being changed on the common rule in any case where the declaration is special on a written instrument, (see *Morrice v. Hurry*, 7 Taunt. 306,) has, however, been in some instances departed from, see *Roberts v. Wright*, 1 Tyrw. 532; *Watkins v. Towers*, 2 T. R. 275; *Kirk v. Broad*, Say. 7; *Howarth v. Willett*, 2 Stra. 1180, [even prior to the case of

Mondell v. Steele, 8 Mee. & W. 641, where the Court of Exchequer, after an elaborate discussion of the subject, held that, at all events, the venue might be changed on the common rule in an action upon a contract to be performed in a particular place, and for the breach of which the cause of action arose wholly in one county; and they expressed an opinion that there is no rule against changing the venue in actions on written instruments not under seal, other than bills of exchange and promissory notes. That opinion, however, though acted on in *Nash v. Breeze*, Exch., 13th Jan. 1843, 12 L. J. 162, may perhaps be considered as subject to the limitation pointed out by the subsequent decision in *Martin v. Daws*, 11 Mee. & W. 734, to cases in which there is no express authority or settled practice to the contrary, as there is in that of an action founded on an award. The general rule laid in *Mondell v. Steele*, governs all cases not so preoccupied; and wherever the written contract is not the cause of action declared on, it appears to be no objection to changing the venue, that probably a written instrument will be given in evidence to support the declaration. See *Picard v. Featherstone*, 4 Bing. 39. And even in the other cases above mentioned, in which the Court refuses to change the venue upon the common affidavit, it will do so upon a special one showing that the alteration is for the interests of justice; as, for instance, where all the witnesses are resident in the county into which it is proposed to change the venue; or an impartial trial cannot be had in the county in which it is originally laid. See *Tidd's Prac.* 605. And there is this difference between the common and special application to change the venue, viz., that the former cannot be made in any of the courts after plea pleaded; see *Tidd*, 608; nor in the Exchequer after an order for time to plead "on the usual terms." *Notts v. Curtis*, 2 Tyrw. 307. Whereas, if the application be on special grounds, it must not be made till issue joined; or, at least, not till after a plea clearly showing what will be the nature of the issue has been pleaded. *Dowler v. Collis*, 4 Mee. & W. 531; since the Court cannot till then know what is the question intended to be tried, and, of course, can form no opinion on the propriety of changing the place of trial. *Tidd*, 614. *Rohrs v. Sessions*, 4 Tyrw.

275; *Cotteril v. Dixon*, 3 Tyrw. 705; *Youde v. Youde*, 4 Dowl. 32.

The above rules, however, are only to be taken to refer to transitory actions; for where the *venue* was local the courts did not consider themselves empowered to change it, unless by consent of both parties, or on a suggestion that a fair and impartial trial could not be had in the county where the *venue* was laid. See *Tidd*, 605. But now, by 3 & 4 W. 4, c. 42, s. 23, reciting "that unnecessary delay and expense is sometimes occasioned by the trial of *local actions* in the county where the cause of action has arisen," it is enacted, "that in any action depending in any of the said superior courts, the *venue* of which is, by law, local, the court in which such action shall be depending, or a judge of any of the said courts, may, on the application of either party, order the issue to be tried, or a writ of inquiry to be executed, in any other county or place than that in which the *venue* is laid; and for that purpose any such court or judge may order a suggestion to be entered upon the record, that the trial may be more conveniently had or a writ of inquiry executed in the county or place where the same is ordered to take place." The application under this section must be made *after* issue joined. *Bell v. Harrison*, 4 Dowl. 181.

*[367] With respect to transitory causes of actions which have accrued abroad, like that in the principal case of *Fabrigas v. Mostyn*, it must be remarked that although the courts of this country will entertain them, still they will, in adjudicating on them, be governed by the laws of the country in which they arose. The distinction laid down in all cases of this description is between the cause of action, which is to be judged of with reference to the law of the country where it originated, and the mode of procedure, which must be adopted as it happens to exist in the country where the action is brought. Thus, in *Trimby v. Vignier*, 1 Bing. N. C. 151, it was held that as, by the law of France, an indorsement in blank does not transfer any property in a bill of exchange, the holder of a bill drawn in France, and *there* indorsed in blank, cannot recover upon it in this country against the acceptor. "The rule," said Tindal, C. J., delivering judgment, "which applies to the case of contracts made in one country, and put in suit in

the courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made: the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought. This distinction was acted on in *The British Linen Company v. Drummond*, 10 B. & C. 903, where it was held that the English statute of limitations was a good plea to an action in a Scotch contract, which might in Scotland have been put in suit at any time within forty years; in *De la Vega v. Vianna*, 1 B. & Ad. 284, where the defendant was allowed to be arrested for a debt contracted in Portugal, and for which he could not have been arrested there; in *Alivon* and another, provisional syndics of the estate of Beauvain, a bankrupt *v. Furnival*, 4 Tyrw. 751, where the Court of Exchequer acted on the French law of bankruptcy; and in that of *Huber v. Steiner*, 2 Bing. N. C. 202, in which the whole difficulty was in ascertaining whether the rule of foreign law applied *ad valorem contractus* or *ad nodum actionis instituendæ*. It was an action on a promissory note; and the question was, whether the French law of prescription formed a defence thereto, the action being brought within the English period of limitation. In behalf of the defendant it was contended that laws for the limitation of suits were of two kinds, those which bar the remedy, and those which extinguish the debt; and the following passage was cited from Story's *Commentaries on the Conflict of Laws*, p. 457:—"Where the statutes of limitation of a particular country not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, in such a case the statute may be set up, in any other country to which the parties remove, by way of extinguishment." "This distinction," said Tindal, C. J., delivering judgment, "when taken with the qualification annexed to it by the author himself, appears to be well founded." That qualification is, "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case;" and, with such restriction, it does indeed appear but reasonable that the part of the *lex loci contractus*, which declares

the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally regarded in the foreign country, as the part of the *lex loci contractus*, which gives life to and regulates the construction of the contract; both parts go equally *ad valorem contractus*, both *ad decisionem litis*." However, the Court, upon examination of the French law of prescription, thought that its effect was not to extinguish the right, but, as in England, only to bar the remedy, and therefore that the defence was in that case unavailable.

Supposing the law of a foreign country to be, that a contract is, after a certain time, to be deemed absolutely extinguished, it seems not quite reasonable to say that the removal of the parties out of the jurisdiction, while that time is running, should authorise the courts of this country to consider it in esse after the period prefixed. The authorities establish, that the law of the country where the contract is made must govern it, and must be looked on as impliedly incorporated with it. Now, if the contract had contained a proviso that it should be absolutely void, if not enforced within a certain time, no doubt the English courts would hold it void after the expiration of that time. But what difference can it make that such proviso is implied from the law of the country where the contract was made, instead of being expressed in terms? Is it not in both cases equally part of the contract? If, indeed, the rule of the foreign law be, that the contract shall, after the lapse of a certain time, become void, provided that the parties to it continue to reside all that time in the same country, the arrival of the period prefixed or its avoidance will depend on the contingency of their abstaining from absents themselves; and if they leave the country, never will arrive at all; and this is, perhaps, what Judge Story intends by the words "that the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case." For if the law be so framed as to operate upon the case without such residence, the qualification appears to be inapplicable.

[Another application of the rule that procedure is to be governed by the law of the country in which the action is brought, may be found in the judgment of the Court of Exchequer, in the case of

the General Steam Navigation Company v. Guillon, 11 Mec. & W. 877. The action was on the case for running down a ship at sea; one of the defendant's pleas stated that he was a Frenchman, and that the injury complained of was committed on the high seas, out of the jurisdiction of the Queen of England, not by the defendant personally, but by the master of a French vessel in the employ of a French company, of which the defendant was a shareholder and acting director; that the defendant never was possessed of, or interested in, the vessel which did the injury, otherwise than as such shareholder, and that by the law of France he was not responsible for or liable to be sued or impleaded individually, or in his own name or person in any manner whatsoever, but that [*363a] by that law the company alone, by their style or title, or the master or person in command for the time being of the vessel, was responsible for and liable to be sued or impleaded, and that the defendant was not the master or person in command. Upon the grammatical construction of that plea, the Court of Exchequer were divided in opinion, but they agreed that if the plea were taken (according to the construction put upon it by Parke, B., and Gurney, B.) to aver that by the law of France the defendant was "not liable for the acts of the master; but that a body established by the French law, and analogous to an English corporation, were the proprietors of the vessel, and alone liable for the acts of the master, who was their servant, and not the servant of the individuals composing that body;" there was (as they were all strongly inclined to think) a good defence to the action; but that if, on the other hand, the plea were taken (according to the view of Lord Abinger and Alderson, B.) to mean, "that in the French courts the mode of proceeding would be to sue the defendant jointly with the other shareholders under the name of their association;" then that it was bad on the ground that "the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted, the *lex fori*; and it is no objection to a suit instituted in proper form here, that it would have been instituted in a different form in the court of the country where the cause of action arose, or to which the defendant belongs."

In *Lopez v. Burslem*, 4 Moore (Privy

Council), 300, the same law was laid down with reference to the limitation of time prescribed for bringing an appeal after condemnation by a vice-admiralty court under the Slave Abolition Act, 5 G. 4, c. 113. It was contended in that case, that the owners of the cargo were not bound by the enactment, being foreigners; but the Court, admitting that the British parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown, declared that a British statute may fix a time within which application must be made for redress to the tribunals of the empire: "on matter of procedure," they said, "all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum," and, "*if a law were made upon this subject, working oppression and injustice to the subjects of a foreign state*, that state might make representations and remonstrances against this law to our government; but while it remains in force, judges have no choice but to give it effect." See further, *Heriz v. Riera*, 11 Sim. 318; *Cooper v. [*368b]* *Lord Waldegrave, 2 Beav. 282; *Beaucé v. Muter*, 5 Moore (Privy Council), 69; *Ferguson v. Fyffe*, 8 Cl. & Fin. 121; *Leslie v. Baillie*, 2 You. & Coll., C. C. 91.]

In *Brown v. Thornton*, 6 Ad. & Ell. 185, a charter-party was entered into at Batavia. According to the law prevailing there, such instruments are entered in a public book, which is the only evidence of their contents in that colony; a public notary makes two copies from the book, and delivers one to each party, and these are evidence of the original in all Dutch courts except Batavia. Held, that such copies are not evidence of the original in this country. The courts here will not adopt rules of evidence from foreign courts. *Appleton v. Lord Braybrooke*, 2 Stark. 6, 6 M. & S. 34; *Black v. Lord Braybrooke*, 2 Stark. 7, 6 M. & S. 39. [In the case of *Tulloch v. Hartley*, 1 You. & Coll., C. C. 114, the Vice Chancellor, Knight Bruce is supposed to have departed from this rule, on the ground that the property in litigation was *real* property; but his honour does not appear to have intended to lay down any exception to the rule so wide as the alleged ground of his decision might suggest.

The dictum attributed to Lord Mans-

field (in *Mostyn v. Fabrigas*, ante, 353), viz., "The governor is in the nature of a viceroy, and therefore locally during his government no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment," was dissented from by the Judicial Committee of the Privy Council in the case of *Hill v. Bigge*, 3 Moore (Privy Council), 465; and Lord Brougham suggested, that the expressions used by Lord Mansfield may have been somewhat altered in the report. In *Hill v. Bigge*, to an action of debt brought in a colonial court against the Governor, a plea stating his viceroyal character was held to afford no defence; but Lord Brougham, adverting to the inconvenience suggested by Lord Mansfield, said in giving the judgment of the Court, "It is not at all necessary that in holding a Governor liable to be sued we should hold his person liable to arrest while on service; that is, while resident in his government. It is not even necessary that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is liable to a different consideration." The liability of sovereign princes themselves to be sued in the courts of foreign countries, has lately undergone a full discussion in the very remarkable case of the Duke of Brunswick v. The King of Hanover, 6 Beav. 1, where the defendant was at once a king of one country and a subject of that in which he was sued. Lord Langdale, M. R., in a judgment which exhausts the subject, stated his opinion: 1. That the king of Hanover was "exempt from all [*368c] liability of being sued in the courts of this country for any acts done by him as king of Hanover, or in his character of sovereign prince;" but that, "being a subject of the queen," he was "liable to be sued in the courts of this country in respect of any acts and transactions done by him, or in which he may have been engaged, as such subject." 2. That "in respect of any act done out of this realm, or any act as to which it may be doubtful whether it ought to be attributed to the character of sovereign or to the character of subject, it ought to be presumed to be attributable rather to the character of sovereign than to the character of subject." 3. That in a suit in the Court of Chancery against a sovereign prince who

is also a subject, "the bill ought upon the face of it to shew that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject." And the decree of the Master of the Rolls, allowing the demurrer in that case to a bill seeking an account against the king of Hanover as guardian of the plaintiff, to which office the king, upon his attaining the throne of Hanover, had been appointed under an arrangement springing out of the deposition of the duke pursuant to a decree of the Germanic Diet in 1830, was affirmed by the House of Lords on appeal (31 July, 1848), on the ground that a sovereign is not liable to be sued in respect of matters of state, {The Duke of Brunswick v. The King of Hanover, 2 House of Lords' Cases, 1, 17.} In *Munden v. The Duke of Brunswick*, 4 C. B. 321, it was considered to be no plea to an action on an annuity deed, that the defendant was a sovereign prince at the time it was made, without showing either that it was an act of state, or that the defend-

ant retained his sovereign character at the time of action brought.

On the same principle which exempts sovereigns from liability to be sued in respect of acts of state, seems to rest the immunity of a soldier against actions by foreigners for acts done by him in a hostile manner, in the name of the government to which he belongs, provided those acts be either authorised by an actual command, or ratified by a subsequent approval of the government: to such acts the maxim *respondet superior* seems to apply in its strictest sense, and for any injury inflicted by them, if redress be denied by the government, there is no remedy but an appeal to arms. See *Vin. Abr. Prærogative* (L. a.); *Elphinstone v. Bedreechund*, 1 Knapp (Privy Council), 316; *Dobree v. Napier*, 2 N. C. 781; *Buron v. Denman*, 2 Exch. 167.

As to the liability of judges for judicial acts, see further, *Calder v. Hackett*, 3 Moore (Privy Council), 28; *Graham v. Lafitte*, *ibid.* 382.]

INDEPENDENTLY of some legal fiction, the jurisdiction of a common law court, could never extend to a cause of action, accruing beyond the limits assigned to the running of its writs. This will be sufficiently evident, when we reflect that while the common law required, that the truth of every material fact traversed, should be tried by a jury of the place where it is alleged to have happened, the rules of pleading equally demand, that such an allegation of place, should accompany every material averment. In order to obviate this difficulty, the English courts permitted the plaintiff, in certain actions which were regarded as transitory in their character, to allege a fictitious place, as the one where the cause of action accrued, and obliged the defendant, unless when justice might be promoted through a change, to follow the place thus assigned, through all succeeding averments of a similar nature. In this way, the courts obtained the power of considering transitory actions, even where their cause happened beyond the limits of the kingdom. But when the action was local in its nature, it still remained necessary to aver all material facts as happening where they actually occurred; and thus no venire could be issued, and no trial had, when the venue thus laid, was beyond the reach of the process of the court. In this manner, jurisdiction was acquired over all transitory actions, wherever the cause which gave them birth happened; while no cognizance could be taken of local actions, save when a jury of the county could be summoned to try them.

The same rule is recognised and applied by the courts of this country;

Hale v. Lawrence, 1 Zabriskie, 714. Thus, in *Henwood v. Cheeseman*, 3 S. & R. 501, an action was sustained in Pennsylvania, for the use and occupation of land in New Jersey, on the ground that as the action was founded on contract, it was transitory in its nature, although the contract related to real estate. It was, however, admitted, that when the cause of action is transitory in its own nature, it may be made local by the form of the remedy, and that no recovery can be had for rent, in debt on the reddendum, out of the county in which the lands are situated, because that form of action is local, and the venue must be laid according to the reality. In like manner, an action of covenant by the assignee of a reversion under the statute 32 Henry 8, is transitory, and the venue may be laid at the will of the pleader; but covenant against an assignee of the land is local and cannot be sustained unless the land is within the jurisdiction of the court, in which the action is brought. When, however, the cause of action, and the action itself are transitory in their character, the plaintiff may depart as widely from the fact in laying the venue, as he thinks fit, and is necessary, to give the court in which he sues jurisdiction, without causing a discrepancy between the allegations in the declaration, and the proof. The usual way of doing this is by stating the injury complained of, as occurring at the place where it really happened, and then laying this place with a *videlicet*, as within the jurisdiction of the court; *Wills v. Church*, 5 S. & R. 190. But in *Lister v. Wright*, 2 Hill, 320, words spoken in Canada were admitted in evidence, under a venue laid absolutely in New York, and not with a *videlicet*. The same point was decided in *McKenna v. Fisk*, 1 Howard, 241. But the fiction by which matters happening out of the jurisdiction, are laid as happening within it, cannot be used even in transitory actions, to give a court jurisdiction in matters which are essentially beyond its cognizance, and, a suit cannot be maintained against a foreign executor or administrator, by the aid of an allegation, that the source whence he derives his authority, is in the state, when it is really without it; *Vermilye v. Beatty*, 6 Barbour, 429.

Trespass for injuries to the land is local, and cannot be brought out of the jurisdiction where the land is situated; *Roach v. Damron*, 2 Humphreys, 425; *Champion v. Doughty*, 3 Harrison, 3; *Hern v. Rogers*, 6 Blackford, 559. Thus, Lord KENYON decided, in *Doulson v. Mathews*, 4 Term, 503, that an action could not be maintained against the defendant in England, for an injury done to the plaintiff's dwelling-house in Canada. The law was held the same way in *Livingston v. Jefferson*, 1 Brock. 203, where it was decided, that no recovery could be had in Virginia, for a trespass to real estate at New Orleans, and that the difficulty or uncertainty of the plaintiff's remedy in one forum, could not confer jurisdiction upon another. This decision was followed by the Supreme Court, and Court of Errors, of New York, in *Watts v. Kenney*, 23 Wend. 484; 6 Hill, 82; who held that case for injuries to the realty obeyed the same rule as trespass, and could not be sustained in New York for an injury to a right of way in New Jersey. But as the injury complained of in all these instances was committed within the jurisdiction of other and regular tribunals, they cannot be regarded as overruling the suggestion of Lord MANSFIELD, in the principal case, that where a wrong is done to real property, in a country which possesses no

established means of judicature, it may be regarded as transitory, and redressed by any court which has jurisdiction over the parties.

Where a mistake committed in laying the venue, appears on the face of the declaration, it will be a good cause of demurrer; and where it does not, it may be pleaded in bar of the action, or taken advantage of at the trial, by a motion for a non-suit, on the ground of variance; *Roach v. Damron*, 2 Humphreys, 420; *Black v. Freeman*, 1 Shepley, 130; *Brackett v. Alvord*, 5 Cowen, 18; *Rightmyer v. Raybold*, 12 Wend. 51; *Chapman v. Wilbur*, 6 Hill, 475.

Notwithstanding the doubt thrown out by Lord MANSFIELD, in the principal case, it seems to be well settled, that a recovery may be had in a transitory action for a tort committed not only beyond the jurisdiction of the court where the suit is brought, but within that of another state or country, and although one or both the parties may be aliens; *Barrill v. Benjamin*, 15 Mass. 355; *Smith v. Bull*, 17 Wend. 325; *Hale v. Lawrence*. And it necessarily follows, that such an action may be sustained, where the wrong complained of, took place on the high seas, where the courts of all nations have an equal claim to jurisdiction; *Hallett v. Novion*, 14 Johnson, 273; 16 id. 327; *Percival v. Hickey*, 18 id. 257; *Johnston v. Dalton*, 5 Cowen, 543. Thus, in *Percival v. Hickey*, an action was sustained against the captain of an English man-of-war, for running down the ship of the plaintiffs, although the injury was committed while exercising the belligerent right of search. But redress for torts committed beyond the actual jurisdiction of a court, is, notwithstanding, a matter of sound discretion, and will be refused, when it cannot be afforded without inconvenient or injurious consequences. Thus, it was decided in *Gardner v. Thomas*, 14 Johnson, 136, that no cognisance would be taken of a wrong committed on board a foreign vessel on the high seas, where the parties were foreigners, and had shipped on board the vessel for a voyage which was not yet terminated. But in the subsequent case of *Johnson v. Dalton*, it was decided, that where the contract under which the plaintiff shipped on board the vessel, has been dissolved by the tortious conduct of the master, the latter may be made answerable in trespass in the Courts of New York, for an injury done beyond their jurisdiction and on the high seas.

There is another and more general exception, to the right of common law tribunals to take cognizance of torts committed on the high seas. If the cause of action be a question of prize, there is no common law jurisdiction; *Penhallow v. Doane*, 1 Dallas, 220. In order, however, to bring a trespass committed at sea, within this exception, there must be an express design to capture as prize. The mere fact of pursuing a vessel under the impression that she belongs to a belligerent, without an intention of capture applicable to her real character as a neutral, will not render her destruction by a collision occurring through the negligence of the pursuing vessel, a question of prize, or a matter of exclusive admiralty jurisdiction; *Percival v. Hickey*, 18 Johns. 257. But where a real intention to capture as prize exists, formed with full reference to the prima facie character of the vessel, as apparent on her papers, a previous defect or subsequent abuse of authority on the part of the captors, will not prevent the jurisdiction of the admiralty from vesting, to the exclusion of the courts of common law; *Hallett v. Novion*, 16 Johns. 327.

And it has been decided by the courts of the United States, that their admiralty jurisdiction extends to cases occurring between the vessels and persons of aliens; at all events, where the parties do not object, on first appearing in the cause; *Mason v. The Ship Blaireau*, 2 Cranch, 240.

H.

[*369]

*TRUEMAN v. FENTON.

HILARY.—17 G. 3, B. R.

[REPORTED COWP. 544.]

A bankrupt, after a commission of bankruptcy sued out, may, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such a creditor a satisfaction in part or for the whole of his debt, by a new undertaking or agreement.—And assumpsit will lie upon such new promise or undertaking.

THIS was an action on a promissory note bearing date the 11th February, 1775, payable to one Joseph Trueman (the plaintiff's brother), three months after date, for 67*l.*, and indorsed by him to the plaintiff.

The declaration contained other counts for goods sold, money had and received, and on an account stated.—The defendant pleaded, 1st. *non assumpsit*; 2ndly, “that on the 19th January, 1775, he became bankrupt, and that the debt for which the said note was given was due to the plaintiff before such time as he, the defendant, became bankrupt; and that the note was given to Joseph Trueman for the use of, and for securing to the said plaintiff his debt so due.” The cause was tried before Lord Mansfield at the sitting after Michaelmas term, 1776, when the jury found a verdict for the plaintiff, damages 72*l.* 12*s.*, costs 40*s.*, subject to the opinion of the Court upon a special case, stating the answer of the plaintiff in this action, to a bill filed against him in the Exchequer by the present defendant for a discovery of [*370] the consideration of the note; the substance of which was as follows: “that on the 15th of December, 1774, the defendant Fenton purchased a *quantity of linen of the plaintiff Trueman; and it being usual to abate 5*l.* per cent., to persons of the defendant's trade, the price, after such abatement made, amounted to 126*l.* 18*s.* That at the time of the sale it was agreed, that one half of the purchase-money should be paid at the end of six weeks, and the other half at the end of two months; and in consideration thereof, the plaintiff Trueman drew two notes on the defendant for 63*l.* 9*s.* each, payable to his own order, at six weeks and two months respectively. That the defendant accepted the notes, and thereupon the plaintiff

gave him a discharge for the sum." He then denied that he had proved or claimed any debt or sum of money under the commission; but set forth, that he acquainted the defendant he was surprised at his ungenerous behaviour in purchasing so large a quantity of linen of him at the eve of his bankruptcy, and informed him he had paid away the above two notes: upon which the defendant pressed him to take up the two notes, and proposed to give him a security for part of the debt. That afterwards, on the 11th of February, 1775, the defendant called upon the plaintiff, and voluntarily proposed to secure to him the payment of 67*l.*, in satisfaction of his debt, if he would take up the two notes, and cancel or deliver them up to the defendant. That the plaintiff agreed to accept this proposal with the approbation of his attorney, and desired the note to be made payable to his brother Joseph Trueman or order, three months after date. That he took up the two acceptances and delivered them to the defendant to be cancelled, and accepted the above note for 67*l.*, in satisfaction and discharge thereof. That a commission of bankruptcy issued against the defendant on the 19th of January, 1775, and that the bankrupt obtained his certificate on the 17th of April following." The question referred was, whether the facts above stated supported the merits of the defendant's plea? If they did not, then a verdict was to be entered for the plaintiff on the general issue. But if the merits of the second plea supported the defendant's case, then a verdict was to be entered for the defendant on that plea.

Mr. *Buller* for the plaintiff argued, that the note, though *given after the bankruptcy, was in this case binding upon the defendant, [*371] and therefore the certificate was no bar to the present action. 1st. Because the goods, though sold before the bankruptcy, were sold on credit, and not to be paid for till a future day: therefore, if no security at all had been given, the debt could not have been proved under the commission; because such a case does not fall within the provisions of stat. 7 G. 1, c. 31.† If not, this is simply the case of a sale of goods on future credit, for which the vendor receives a note after the vendee is become bankrupt: because the two drafts drawn by the plaintiff on the defendant, at the time of the sale, and accepted by the defendant, could not vary the agreement: it was still a sale on future credit, and no debt due till after the bankruptcy. Besides, they were afterwards delivered up. If no debt was due at the time of the bankruptcy, the merits of the plea are clearly not proved: for the merits are, that the debt was then due. Now it clearly was not due, and therefore the certificate was no bar to the demand. 2ndly. Supposing it could be contended, that there was any thing like a debt due before the bankruptcy, yet the plaintiff upon the facts stated is still entitled to recover upon the note in question. The consideration was for a fair bona fide debt, without any mixture of fraud or pretence of undue advantage by the plaintiff. On the contrary, there was a gross fraud on the part of the defendant, in obtaining the goods upon the eve of his becoming bankrupt; and the conviction of such his misconduct was the inducement with him to offer the security now in dispute. If he were to discharge the whole original debt, it would not be more than was due, and what in conscience he ought to pay. But here the plaintiff has agreed to accept much less than in conscience was

(†) See now 6 G. 4, c. 16, sect. 51.

due to him. If so, like every other debt which a man is bound in conscience to discharge, it is a good ground for raising an assumpsit. The slightest acknowledgment is sufficient to revive a debt barred by the statute of limitations. So, where a man, after he comes of age, promises to pay a debt contracted during his minority, assumpsit lies. As to the case of a promise by a bankrupt to pay a debt in consideration of a creditor's signing his certificate, that is made void by the *stat. 5 G. 2, c. 30, st. 11. [*372] But even that would have been a ground of action before the statute; and it is the only exception made. The certificate, no doubt, is a provision for the benefit of the bankrupt. But he may waive it; and here he has waived it for a good and valuable consideration. If so, he is bound by the contract. In addition to this general reasoning, he cited the case of *Lewis v. Chase*, 2 P. Wms. 620; and *Barnardiston v. Copeland*, argued in the Common Pleas, in Hilary and Easter terms, 1761, MSS.

Mr. *Davenport* contra, for the defendant, contended that the plaintiff had no other remedy for his debt, but by resorting with the rest of the creditors to the commission. That the transaction, though coloured over, was clearly intended as an evasion of the bankrupt laws, and therefore manifestly illegal. That the plaintiff's taking up the two drafts, and accepting another security short of his real debt, could in no respect be a new consideration to the defendant; because he was at all events discharged from them, by his certificate: and as to the objection that the original debt itself was not within the stat. 7 G. 1, c. 31, and therefore could not have been proved under the commission, it clearly might, allowing a rebate of interest for the time of the credit given. That the question depended solely upon the construction of the bankrupt laws, and particularly the stat. 5 G. 2, c. 30; by which it was clear, that where such a promise or undertaking is made by a bankrupt before his certificate obtained, it is void. That any other construction would open a door to that collusion respecting the certificate which the statute meant to avoid, and at the same time be highly injurious to the bankrupt. Therefore he prayed judgment might be entered for the defendant.

Lord *Mansfield*.—The plea put in, in this case, is, that the debt was due at the time of the act of bankruptcy committed; and on that plea, in point of form, there was a strong objection made at the trial, that the allegation was not strictly true: because, at the time of the sale, credit was given to a future day; which day, as it appeared in evidence, was subsequent to the act of bankruptcy committed. To be sure, on the form of the plea, the [*373] *defendant must fail. But I never like to entangle justice in matters of form, and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both. I put it, therefore, to the counsel on the part of the plaintiff to give up the objection in point of form, and to take the opinion of the court, whether according to the facts and truth of the case, the defendant could have pleaded his certificate in bar of the debt in question. And in case they had refused to do so, I should have left it to the jury upon the merits. The counsel for the plaintiff very properly gave up the point of form. The question, therefore, upon the case reserved, is worded thus: Whether the facts support the merits of the defendant's plea? That is, whether on the merits of the case, properly pleaded, the certificate of the defendant would have been a bar to the plaintiff's action?—Now, in this case, there is no

fraud, no oppression, no scheme whatsoever, on the part of the plaintiff to deceive or impose on the defendant; and as to collusion with respect to the certificate, where a creditor exacts terms of his debtor as the consideration for signing his certificate, and obtains money or a part of his debt for so doing, the assignees may recover it back in an action. But that is not the case here. So far from it, the transaction itself excluded the plaintiff from having any thing to do with the certificate. No man can vote for or against the certificate till he has proved his debt. Here the plaintiff delivers up the two drafts bearing date prior to the act of bankruptcy, and by agreement accepts one for little more than half their amount, bearing date after the commission of bankruptcy sued out. Most clearly, therefore, he could not have proved that note under the commission; and if not, he could have nothing to do with the certificate.—That brings it to the general question, whether a bankrupt, after a commission of bankruptcy sued out, may not, in consideration of a debt due before the bankruptcy, and for which the creditor agrees to accept no dividend or benefit under the commission, make such creditor a satisfaction in part or for the whole of his debt, by a new undertaking and agreement? A bankrupt may undoubtedly contract new debts; therefore, if there is an objection to his reviving an old debt [*374] by a new promise, it must be founded upon the *ground of its being *nudum pactum*. As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience. How far have the courts of equity gone upon these principles? Where a man devises his estate for payment of his debts, a court of equity says (and a court of law in a case properly before them would say the same), all debts barred by the statute of limitations shall come in and share the benefit of the devise; because they are due in conscience: therefore, though barred by law, they shall be held to be revived, and charged by the bequest. What was said in the argument relative to the reviving a promise at law, so as to take it out of the statute of limitations, is very true. The slightest acknowledgment has been held sufficient; as saying, “prove your debt and I will pay you;”—“I am ready to account, but nothing is due to you;” and much slighter acknowledgments than these will take a debt out of the statute. So in the case of a man who, after he comes of age, promises to pay for goods or other things, which, during his minority, one cannot say he has contracted for, because the law disables him from making any such contract; but which he has been fairly and honestly supplied with, and which were not merely to feed his extravagance, but reasonable for him (under his circumstances) to have; such promise shall be binding upon him, and make his former undertaking good.—Let us see then what the transaction is in the present case. The bankrupt appears to me to have defrauded the plaintiff, by drawing him in, on the eve of a bankruptcy, to sell him such a quantity of goods on credit. It was grossly dishonest in him to contract such a debt at a time when he must have known of his own insolvency, and which it is clear the plaintiff had not the smallest suspicion of, or he would not have given credit, and a day of payment *in futuro*. On the other hand, what is the conduct of the plaintiff? He relinquishes all hope or chance of benefit, from a dividend under the com-

[*375] mission, by forbearing to prove his debt; gives up the securities he had received *from the bankrupt, and accepts of a note, amounting to little more than half the real debt, in full satisfaction of his whole demand. Is that against conscience? Is it not, on the contrary, a fair consideration for the note in question? He might foresee prospects from the way of life the bankrupt was in, which might enable him to recover this part of his debt, and he takes his chance; for till then he could get nothing by the mere imprisonment of his person. He uses no threats, no menace, no oppression, no undue influence; but the proposal first moves from, and is the bankrupt's own voluntary request. The single question then is, whether it is possible for the bankrupt, in part or for the whole, to revive the old debt? As to that, Mr. Justice Aston has suggested to me the authority of *Dillon v. Bailey*, where the Court would not hold to special bail, but thought reviving the old debt was a good consideration. The two cases cited by Mr. Buller are very material. *Lewis v. Chase*, 1 P. Wms. 620, is much stronger than this; for that smelt of the certificate; and the Lord Chancellor's reasoning goes fully to the present question. Then the case of *Barnardiston v. Coupland*, in C. B., is in point. Lord Chief Justice Willes there says, "that the revival of an old debt is a sufficient consideration." That determines the whole case. Therefore, I am of opinion, that if the plea put in had been formally pleaded, the merits of the case would not have been sufficient to bar the plaintiff's demand.

Aston, Justice.—As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waives his right to come in under the commission, it is a benefit to the rest of the creditors. In the case of *Dillon v. Bailey*, the Court on the last day of the term were of opinion, "that the defendant could not be held to special bail; yet they would not say that he might not revive the old debt, which was clearly due in conscience." A bankrupt may be, and is, held to be discharged by his certificate from all debts due at the time of the commission; but still he may make himself liable by a new promise. If he could not, the provision in the stat. 5 G. 2, c. 30, sect. 11, by which every security for the payment of any debt due before the party became bankrupt, as a consideration to a creditor to sign his certificate, *is made void, would be totally nugatory.—Lord [*376] *Mansfield* added that this observation was extremely forcible and strong.

Per Cur. Judgment for the plaintiff.

On the same ground stands a promise to pay a debt barred by the statute of limitations, *Heyling v. Hastings*, Lord Raym. 389; or by the provisions of an insolvent act, *Best v. Barber*, Selw., N. P. 59; or contracted during infancy, *Southerton v. Whitlocke*, 1 Str. 690. But in all these cases the legislature has intervened. In the case of bank-

ruptcy, stat. 6 G. 4, c. 16, s. 131, enacts, "that no bankrupt, after his certificate shall have been allowed, shall be liable to pay or satisfy any debt, claim, or demand, from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made, or to be made, after

the suing out of the commission, unless such promise, contract, or agreement be made *in writing, signed by the bankrupt, or by some person thereto lawfully authorised in writing by such bankrupt.* [Such a promise need not state the amount of the debt: that may be supplied by parol evidence, *Lobb v. Stanley*, 5 Q. B. 574. It may be made before certificate; but in that case it ought distinctly to appear that the bankrupt meant to pay personally, notwithstanding his certificate, and not merely that his estate should pay, *Kirkpatrick v. Tattersall*, 13 *Mec. & W.* 766. And such a promise may be founded on a contingent liability, for instance that of a security for his principal debtor before payment of the debt: and it may be framed so as to preserve the right of action which may accrue in respect of such liability, notwithstanding that the 52nd section of the bankrupt act gives the surety a right of proof upon payment of the debt, *Earle v. Oliver*, 2 *Exch.* 71; in which case the whole subject underwent a full discussion.] In the case of the statute of limitations, stat. 9 G. 4, c. 14, requires that the acknowledgment which is to take a case out of its operation shall be *in writing signed by the party to be charged thereby*; leaving, however, the effect of part payment as it stood before the act. See *Whitcomb v. Whiting*, ante, et notas. [See as to the effect and construction of such a promise, *Gardner v. McMahon*, 3 Q. B. 56, 2 G. & D. 593, S. C.; *Humphreys v. Jones*, 14 *Mec. & W.* 1; *Hart v. Prendergast*, 14 *Mec. & W.* 741; *Chealy v. Dalby*, 4 *You. & Coll.* 228; *Phillips v. Phillips*, 3 *Hare*, 299; *Cripps v. Davis*, 12 *Mec. & W.* 159; *Irving v. Veitch*, 3 *Mec. & W.* 90.] In the case of the insolvent, stat. 7 G. 4, c. 57, s. 61, directed, and 1 & 2 *Vict. c.* 110, s. 91, now directs, that, after any person shall have become entitled to the benefit of that act, by any such adjudication as therein aforesaid, no writ of *fi. fa.* or *elegit* shall issue on any judgment obtained against him for any debt or sum of money with respect to which he shall have so become entitled, *nor in any action or any new contract or security for payment thereof*, except upon the judgment entered up against such prisoner, according to that act; and if any suit or action be brought, or any *scire facias* issued against any such person, his heirs, executors, administrators, or assigns, for any such debt or sum of money, or on

any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognisance acknowledged by such person for the same, except as aforesaid, it shall be lawful for such person, his heirs, executors, or administrators, to plead generally, that such person was duly discharged according to this act, by the order of adjudication made in that behalf; and that such order remains in force, without pleading any other matter specially, whereto the plaintiff may reply generally, and deny the matter pleaded as aforesaid, or reply any other matter or thing, which may show the defendant not to be entitled to the benefit of this act, or that such person was not duly discharged, according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied in case the defendant had pleaded this act, and a discharge by virtue thereof, specially. The defendant must take advantage of this act by pleading at the proper time, for the Court will not relieve him in a summary way, as by setting aside a judgment signed on a warrant of attorney to confess judgment in an action on a bill given for the old debt. *Philpott v. Aslett*, 4 *Tyrw.* 729; [*Denne v. Knott*, 7 *Mec. & W.* 144; and see a similar point upon the gaming acts, *Lane v. Chapman*, 11 *Ad. & Ell.* 966.] *Sed vide Smith v. Alexander*, 5 *Dowl.* 13, where *Williams, J.*, set aside a warrant of attorney; but there no action had been brought, so that defendant had had no opportunity of pleading. If properly taken advantage of, the act is a defence, even though there be a new consideration for the insolvent's promise to discharge the old debt. *Evans v. Williams*, 3 *Tyrw.* 226; [*Ashley v. Killick*, 5 *Mec. & W.* 509; *sed vide Denne v. Knott*, 7 *Mec. & W.* 144, where the bond was for the old debt, and 220*l.* more; and *Steerman v. Thompson*, 11 *Ad. & Ell.* 1027, in which a bill for the old debt and a new one was held valid *pro tanto*; and a warrant of attorney under similar circumstances was sanctioned *pro tanto* in *Collins v. Benton*, 2 *Man. & Gr.* 868. No similar provision has been found in 5 & 6 *Vict. c.* 116, or 7 & 8 *Vict. c.* 96; which, indeed, seem to have been framed upon the model of the bankrupt acts, and to admit some other provisions essential to an insolvent code, such, for instance, as those relating to the ecclesiastical property of clergymen.] Lastly, the case of the infant is provided

for by stat. 9 G. 4, c. 14, s. 5, which enacts that "no action shall be maintained whereby to charge any [*377] *person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing, signed by the party to be charged therewith." [In *Hartley v. Wharton*, 11 Ad. & Ell. 934, a paper in these words, "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time;" signed by the debtor, though without address, and naming no sum, was held a sufficient ratification of a contract made during his infancy, and it was further held, that it was for the defendant to prove that he

was under age when it was written, if he so asserted. In *Thornton v. Illingworth*, 2 B. & C. 824, it was decided that a ratification by an infant after action brought is not sufficient. The subject of ratification of contracts made by infants, and the proper mode of pleading it, was much considered in *Williams v. Moore*, 11 Mec. & W. 195].

Notwithstanding the above enactments, the principles laid down in the text continue in full force, and apply to contracts entered into in writing, according to the directions of the respective acts prescribing that ceremony, exactly as they would have applied to parol contracts conceived in similar terms before those statutes. In the case of the insolvent, indeed, such a contract is now prohibited.

See the American cases of *Mills v. Wyman*, *Snevely v. Reed*, &c. cited in the note to *Lampleigh v. Brathwaite*.

In "The case of *Field's Estate*," 2 Rawle, 351, it was said by GIBSON, C. J., to be "settled by a train of decisions not now to be questioned,"—though, how this opinion came to be adopted, he said, that he was at a loss to imagine—"that a debt discharged by a certificate of bankruptcy, is an available consideration for a new promise:" but it was decided that where the original obligation is by specialty, the subsequent re-assumption of the debt does not revive the *specialty*, but creates only a simple contract liability.

H. B. W.

[*378] *CREPPS v. DURDEN ET ALIOS.

TRINITY.—17 Geo. 3. B. R.

[REPORTED COWP. 640.]

A person can commit but one offence on the same day, by "exercising his ordinary calling on a Sunday," contrary to the statute 29 Car. 2, c. 7. And, if a justice of peace proceed to convict him in more than one penalty for the same day, it is

an excess of jurisdiction for which an action will lie, before the convictions are quashed.(a)

THIS was an action of trespass brought by the plaintiff against the defendant, for breaking into his house and taking away his goods, and converting them to his own use: to this the general issue was pleaded, and the cause came on to be tried at Westminster, before Lord Mansfield, at the sittings after Easter term, 1777; when a verdict was found for the plaintiff, for three several sums of five shillings each, and costs 40s., subject to the opinion of the court upon the following case:—"That the plaintiff was convicted of selling small hot loaves of bread, the same not being any work of charity, on the same day (being Sunday) by four separate convictions, which were as follow: 'Westminster, to wit. Be it remembered, that on the 10th of November, 1776, Peter Crepps, of, &c., baker and salter of bread, is lawfully convicted before me, Jonathan Durden, one of his Majesty's justices of the peace for the said city and liberty of Westminster, for unlawfully doing and exercising certain worldly labour, business and work of his ordinary calling of a baker in the parish aforesaid, by selling of small hot loaves of bread, commonly called rolls, the same not being any work of necessity or charity, on the said 10th of November, being the Lord's day, commonly called Sunday, contrary to *the statute in that case made and pro- [*379] vided; for which offence I, the said Jonathan Durden, have adjudged, and do hereby adjudge, the said Peter Crepps to have forfeited the sum of five shillings.'"

The three other convictions were verbatim the same, without any variation. The case then proceeded to state, that the defendant Durden issued the four warrants, afterwards stated, to the other defendants, who by virtue of those warrants levied the four penalties of five shillings each, and the expenses. The first of these four warrants ran thus: "Westminster to wit. To the constables of St. James's, in the city and liberty of Westminster. Whereas information has been made before me, Jonathan Durden, one of his Majesty's justices of the peace for the city and liberty of Westminster, that Peter Crepps, baker, of &c., did on the 10th day of November, 1776, being the Lord's day, commonly called Sunday, exercise his trade and ordinary calling of a baker, by selling hot loaves of bread, contrary to the statute in that case made and provided; and whereas the said Peter Crepps has been duly summoned to appear before me, to answer to the said information, but has contemptuously refused to appear to answer the contents thereof; and whereas, upon full examination, and upon the oath of J. H., the said Peter Crepps was lawfully convicted before me of the offence aforesaid, whereby he has incurred the penalty of five shillings, pursuant to the statute in that case made and provided; therefore," &c. &c. The words of the other three warrants were verbatim the same.

The first question reserved was, whether in this action, and before the convictions were quashed, an objection could be made to their legality? If no objection could be made, then a nonsuit was to be entered. But in case

(a) See an analogous case, *Brooks and another v. Glencross*, 2 M. & Rob. 62; [and see *R. v. Eastern Counties Railway*, 10 Mee. & W. 58. As to the effect of two orders or convictions for the same offence, see *Wilkins v. Hemsworth*, 7 Ad. & Ell. 807; *Wilkins v. Wright*, 3 Tyrw. 830, 2 C. & M. 193.]

an objection to their legality might be made, then the question was, whether the levy under the three last warrants could be justified? If not justifiable, a verdict was to be entered for the plaintiff, with 15s. damages and 40s. costs; if justifiable, then a verdict was to be entered for the defendants.

Mr. *Buller* for the plaintiff, as to the first point, insisted, that wherever a conviction is in itself clearly bad, it is open to the party to take objection [*380] to it in an action against the *justice; and it is no answer on his part to say, that the conviction is not quashed, or in force; because it is incumbent upon him to show the regularity of his own proceedings. That there were several cases to this purpose; and though they were decisions at *Nisi Prius*, yet, as they were uniform in laying down the same doctrine, they ought to have considerable weight in this case. The first he should mention was *Hill v. Bateman*, 1 Str. 711; not for the principal matter adjudged, but because it was agreed on all hands, in that case, as a settled point, "that in all actions against justices of peace, they must show the regularity of their proceedings." He added, that he had a manuscript note of the same case, to the same purport. In a case of *Moult v. Jennings*, coram *Eyre*, C. J., upon trespass and false imprisonment against the defendant, and the general issue pleaded, it appeared that the plaintiff had been convicted of swearing; and *Eyre* said, if the nature of the oaths had not been specified in the conviction, so that they might appear to the court, the conviction would have been void. In *Stanbury v. Bolt*, coram *Fortescue*, J., Trin. 11 G. 1, upon trespass for taking a brass pan, and false imprisonment, it did not appear that the plaintiff had been summoned; and the conviction was adjudged void for that reason only. In *Coles's case*, Sir William Jones, 170, it was held by the whole Court, "that if a justice does not pursue the form prescribed by the statute, the party need not bring error, but all is void, and *coram non iudice*." There are other authorities in which it has been held, that an action will lie, even though the conviction is good in point of form, if it is not supported by the truth and justice of the case. There was one in *Shropshire*, before *Gould*, J., where the plaintiff had been convicted upon the game laws, and the conviction itself good in point of form: but the party was not, in truth, an object of the game laws; whereupon *Gould* directed the jury to find for the plaintiff, which they accordingly did. There was another case in *Lancashire*, before Mr. Justice *Gould*, to the same effect. In criminal cases it is clear, that the conviction being good in point of form is no protection to the justice; and, if not, why should [*381] it be so in a civil action? If he convict illegally, he ought not to be sheltered, and an action is the *only mode of redress to the party injured. But, if the formality of the conviction is to be an answer to the action, the party injured would be without redress, where he would be most entitled to it; because the caution of the justice, to be correct in form, would increase in proportion to his intention to act illegally. In *Brucklesbury v. Smith*, 2 Bur. 656, every act previous to the conviction is set out, as well as the conviction itself. If this case had happened before the stat. 7 Jac. 1, c. 5, which enables justices of peace to plead the general issue, and give the special matter in evidence, the defendant must have specially set forth every stage of the proceedings upon the record, and the omission of any one fact would have been fatal; or, if upon the face of the record it had appeared the conviction was illegal, it would have been a good cause

of demurrer. Since the statute, his defence must be equally good in evidence: for the statute does not vary the law; it only meant to ease the justice from the difficulty and risk of special pleading. Even in cases where the legislature gives a summary form of conviction, and where no summons is necessary, the justices must pursue the form prescribed, or it will be fatal. Secondly, upon the merits: the words of the stat. 29 Car. 2, c. 7, are, "that no tradesman or other person shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's day, works of necessity and charity only excepted." In *Rex v. Cox*, 2 Bur. 786, the court held, "that baking puddings and pies was within the exception;" and, if so, why should not the baking rolls be so too? But what is decisive is, that the stat. 29 Car. 2, c. 7, gives no summary form of conviction; whereas the convictions produced barely state that the plaintiff was convicted, without any information, summons, appearance, or evidence being stated. In point of form, therefore, all four are bad. Lastly, supposing they were good in form, the three last are an excess of the justice's jurisdiction; for the offence created by the statute is "exercising his calling on the Lord's day." If the plaintiff, therefore, had continued baking from morning till night, it would still be but one offence. Here there are four convictions for one and the same offence; consequently, as to three, there is an excess of jurisdiction: and if so, all is void, and *coram non judice*; *and an action will lie, not only against the justice, but likewise against the officers. To this [*382] point he cited *Hardres*, 484, and concluded by praying judgment for the plaintiff.

Mr. T. *Cowper*, contra, for the defendant, contended, 1. That by the bare production of the conviction at the trial the cause was at an end, and the Court estopped from any further inquiry. That it was the general apprehension and prevailing opinion of the profession, founded in constant practice, that a conviction in a matter of which the justice had jurisdiction, must be removed by certiorari and quashed, before it can be questioned at *Nisi Prius*. If he has no jurisdiction, no doubt but all is *coram non judice*, and void. But here the justice had jurisdiction; and if so, with deference to the opinion of Mr. Justice *Gould*, in the cause tried before him in Shropshire, the conviction, as to the matter of fact contained in it, is conclusive in favour of the justice in an action, though it is not so in an information. If it were not, instead of the mischief to be apprehended from the oppression of the justice, no one would act in the commission. 2. As to the objections which have been taken to the convictions in point of form, he said, it would be time enough to answer them when the convictions were removed and stood in the paper for argument. At present it was sufficient to observe that they continued as so many judgments on record, and, as such, conclusive, till reversed by appeal, or quashed by this Court. He agreed the stat. 7 Jac. 1, c. 5, did not vary the law: but insisted, that before that statute, it would have been a good plea for the defendant to have stated, that the plaintiff was convicted, &c., as in this case; and if the plaintiff had traversed the conviction, the defendant might have demurred. The sole ground and object of taking away the certiorari in the several acts of parliament for that purpose, was to prevent vexatious suits against justices for mere informalities in their proceedings. But they still remain liable to an information if they wilfully act wrong.

This Court has often lamented, when obliged to quash a conviction for want of form, because it opens a door to an action.

As to this being but one continued offence, it might be, that it was carried on at four different places; for there is *evidence of four different acts, and the Court will not presume the contrary against the justice. But, if the nature of the offence is such, that it could only be committed once in the same day, still the plaintiff has no remedy, while the convictions are in force, but by removing them into this court to be quashed for illegality.

Lord *Mansfield*.—May there not be this point, that the justice had no jurisdiction, after convicting the plaintiff in the first penalty? The act of parliament gives authority to punish a man for exercising his ordinary calling on Sunday. The justice exercises his jurisdiction, by convicting him in the penalty for so doing. But then, he has proceeded to convict him for three other offences in the same day.

Mr. *Cowper*.—If he has done so, it is only a ground for quashing the convictions: but no priority appears to give legality to one in preference to the other.

Lord *Mansfield*.—This point you agree in; that if the justice had no jurisdiction, it is open to inquiry in an action. Now, if there are four convictions, for one and the same offence committed on one and the same day, three of them must necessarily be bad; and, if so, it does not signify as to the merits of the action which of the four is legal, or which illegal.

I do not remember that at the trial it was contended the plaintiff would be entitled to recover if the convictions were informal: or that any objection was taken to their formality there. The single question intended to be tried was, whether there could be more than one penalty incurred for exercising a man's ordinary calling on one and the same Sunday? As to that there can be no doubt: the only doubt was, whether that objection could be taken at the trial before the convictions were quashed. In the extent in which the argument upon that point has proceeded, it is a matter of considerable consequence; and, as a general question, I should be glad to think of it.

Aston, J.—The Court will never grant an information unless the conviction is quashed. *Rex v. Heber*, 2 Str. 915. As to the general question before the Court, suppose the justice were to convict for a single offence, where no offence at all had been committed; would not an action lie in that case? If it would, why not in this, where *there are four convictions [*384] for one and the same offence? It seems to me that the baking every roll might as well have been charged as a separate offence.

Cur. adv. vult.

Afterwards, on Wednesday, June 18th in this term, Lord *Mansfield*, after stating the case at large, delivered the unanimous opinion of the Court as follows:—Upon the trial of this cause, no objection was made to the formality of the convictions: I doubt whether they were read, and for this reason; because, by the state I have of them, they appear different from the warrants; for the convictions take no notice of any summons, (†) nor of any

(†) Nor that the defendant made default. See *R. v. Allington*, 2 Str. 678; *R. v. Venables*, ib. 630; *R. v. Stone*, 1 East, 649.

informations, nor of any evidence(†) upon oath given; though the warrants take notice of a summons, of the defendant's not appearing to that summons, of an information laid, and evidence given upon oath. This objection would have gone to all the four cases equally, but at the trial, no objection whatever was made to the first conviction or warrant. But the objection made was this; that, allowing the first conviction and warrant to be good, the three others were an excess of the jurisdiction of the justice, and beyond it; for that on the true construction of the stat. 29 Car. 2, c. 7, there can be but one offence, attended with one single penalty, on the same day.

In answer to this it was objected, on the part of the defendants, that no such objection could be taken to the convictions till after they had been quashed in this Court; and that if a case were to be made with regard to that, it must be taken upon the question, whether, according to the true construction and meaning of the act, the party could be guilty of repeated offences on one and the same day? Therefore, the questions stated for the opinion of the Court on the present case are, first, "whether, in this action, and before the convictions were quashed, an objection could be made to their legality? If the Court should be of opinion no objection could be made, then a nonsuit to be entered up: but in case the objection might be made, then 2ndly: Whether the levy made under the three last warrants could be justified?" The first question is, "whether any objection can be made to the legality of the convictions *before they were quashed." [*385] In order to see whether it can, we will state the objection: it is this; that here are three convictions of a baker, for exercising his trade on one and the same day; he having been before convicted for exercising his ordinary calling on that identical day. If the act of parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law. On the construction of the act of parliament, the offence is, "exercising his ordinary trade upon the Lord's day;" and that, without any fractions of a day, hours, or minutes. It is but one entire offence, whether longer or shorter in point of duration; so, whether it consist of one, or a number of particular acts. The penalty incurred by this offence is, five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offences. There can be but one entire offence, on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day: killing a single hare is an offence; but the killing ten more in the same day will not multiply the offence, or the penalty imposed by the statute for killing one. Here, repeated offences are not the object which the legislature has in view in making the statute: but singly to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the three last convictions. How then can there be a doubt, but that the plaintiff might take this objection at the trial? 2ndly. With regard to the form of the defence, though the stat. 7 Jac. 1, c. 5, enables justices of peace to plead the general issue, and give the special matter in evidence;

(†) See *R. v. Lovett*, 7 T. R. 152; *R. v. Theed*, 2 Str. 919; *R. v. Smith*, 8 T. R. 588.

in doing so, it only allows them to give that in evidence, which they must before have pleaded; and, therefore, they must still justify. But what could the justification have been in this case, if any had been attempted to be set up? It could only have been this: that, because the plaintiff had been [*386] convicted of one offence on that day, therefore the justice had convicted him *in three other offences for the same act. By law that is no justification: *it is illegal on the face of it*; and, therefore, as was very rightly admitted by the counsel for the defendant in the argument, if put upon the record by way of plea, would have been bad, and on demurrer must have been so adjudged. Most clearly, then, it was open to the plaintiff upon the general issue, to take advantage of it at the trial. The question does not turn upon niceties; upon a computation how many hours distant the several bakings happened; or upon the fact of which conviction was prior in point of time; or that for uncertainty in that respect, they should all four be held bad: but it goes upon the ground, that the offence itself can be committed only once in the same day. We are, therefore, all clearly of opinion, that if there was no jurisdiction in the justice, the same might have appeared at the trial: of course, we are of opinion that this objection might have been made, and that the objection itself, in point of law, is well founded.

Per Cur. Postea to be delivered to the plaintiff.

[*386a] *According to Griffith v. Harries, 2 Mee. & W. 335, the rule is the same whether the conviction appear on the face of it to be for an offence not within the magistrate's jurisdiction, or to be for an offence within the magistrate's jurisdiction, but defective for want of the circumstances necessary to a conviction for that offence; see Lancaster v. Greaves, 9 B. & C. 628; Morgan v. Hughes, 2 T. R. 225; [Fearnley v. Worthington, 1 Man. & Gr. 491]; Hardy v. Ryle, 9 B. & C. 603; Groome v. Forrester, 5 M. & S. 320; or of a sufficiently specific statement of them, Newman v. Earl of Hardwicke, 8 Ad. & Ell. 127; [R. v. Read, 9 Ad. & Ell. 619]; for, as was observed in Lancaster v. Greaves, though the conviction is conclusive upon matter of fact, and, if the defendant mean to rely on matter of fact, he should make his defence at the time, the rule is not so as to matter of law. So if the conviction of two persons be joint for offences *ex necessitate rei* several, it will be void, and [subject now to the provisions of the 11 & 12 Vict. c. 41, s. 2] they may sue in trespass if it be acted upon. Morgan v. Brown, 4 Ad. & Ell. 515. [And the rule is the same in the case of a single conviction of one

person for two distinct offences, Newman v. Bendyshe, 10 Ad. & Ell. 11.] But, "a conviction by a magistrate who has jurisdiction over the subject-matter is, if no defects appear on the face of it, *conclusive evidence of the facts* stated in it;" Brittain v. Kinnaird et al., 1 B. & B. 482; per Dallas, C. J. In that case, trespass was brought against justices for taking a boat; in their defence they relied on a conviction which warranted them in doing so. The plaintiff offered evidence to controvert the facts stated in the conviction, but it was held not to be admissible. Accord. Basten v. Carew, 3 B. & C. 649; Fawcett v. Fowles, 7 B. & C. 394; Gray v. Cookson, 16 East, 13; Lowther v. Earl Radnor, 8 East, 113; Ashcroft v. Bourne, 3 B. & Ad. 684; and the same attribute, viz., that of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent tribunal; Aldridge v. Haines, 2 B. & Ad. 395; and the cases cited by Coleridge *arguendo*.

Even when the conviction has been quashed, the party convicted, in an action against the justices, which must be on the case, will only obtain two pence

damages, besides the amount of the penalty if levied, and no costs of suit, unless he expressly aver malice and want of probable cause; nor will he recover the amount of the penalty if the defendant prove him to have been guilty of the offence of which he has been convicted, and that he has undergone no greater punishment than is by law assigned [*356b] thereto, stat. 43 G. 3, c. 141. *And he must at the trial prove not merely his own innocence of the offence of which he was convicted, but also what took place before the justice at the time of conviction, in order that it may appear whether there was probable cause or no. *Burley v. Bethune*, 5 Taunt. 580.

[See *Baylis v. Strickland*, 1 Man. & Gr. 591. But the stat. 43 G. 3, c. 141, is now repealed by the 11 & 12 Vict., c. 41, entitled "An Act to protect Justices of the Peace from vexatious actions for acts done by them in the execution of their office," the first section of which provides that *every action* to be brought against any justice after the 2nd of October, 1848, for any act done by him in the execution of his duty as such justice, as to any matter *within his jurisdiction*, shall be *on the case*, and the declaration shall allege the act to have been done maliciously and without reasonable and probable cause, and if such allegation be not proved upon the plea of the general issue, the plaintiff shall be nonsuit, or a verdict shall be given for the defendant. But when the act is done by the justice in a matter of which he has *no jurisdiction* or where he *exceeds his jurisdiction*, he may by sect. 2 be sued as before the statute, except where the act complained of has been done under a conviction *or order*, in which case "the conviction" (*sic* in statute) must be first quashed, or if done under a warrant for appearance followed by a conviction or order, the conviction or order must be first quashed, but if not followed by conviction or order, and granted after information for an indictable offence, or after service of summons and non-attendance, no action can be maintained. Sect. 3 protects a justice bona fide granting a warrant upon the conviction of another justice, which is defective for want of jurisdiction, and makes the convicting justice alone liable. Sect. 4 prohibits actions by parties rated to the poor, though not liable to be rated, or in respect of any defect in such rate, against

the parties issuing a distress warrant thereon, and further provides that the exercise of discretionary powers vested in a justice by statute, shall not furnish ground of action. By sect. 5, a justice obeying a rule of the Court of Queen's Bench is not liable to be sued in respect of such obedience. Sect. 6 makes the confirmation of a conviction or order on appeal a protection to a justice who issues a warrant upon them either before or after such confirmation, and sect. 7 empowers a judge to set aside the proceedings in any action brought against a justice contrary to the provisions of this act; so every action against justices must be brought within six months after the act complained of, (sect. 8,) but not until after a month's notice in writing, &c. (sect. 9); sect. 10 makes the venue in the action *local, [*387a] with an option to the defendant to plead the general issue, and under it to prove the special facts; also, if he pleases, he has the privilege of exemption from the jurisdiction of the county court. By sect 11 a recovery of less than the amount tendered or paid into court, gives the defendant a verdict, with the security of the sum paid into court for his costs; and by sect 12 the plaintiff will have a verdict against him, or be nonsuit, for a non-compliance with the above-mentioned preliminaries. Sect. 13 provides that the plaintiff shall not in any case recover more than two pence damages where it appears that he was guilty of the offence of which he was convicted, or liable by law to pay the sum ordered to be paid, and that he has undergone no greater punishment than that assigned by law to the offence of which he was convicted, or for non-payment of the money ordered. By sect. 14 the plaintiff is to have costs, as before the act, and where the act complained of is stated to have been done maliciously, &c., they are to be taxed as between attorney and client, and in all cases where there is judgment against him, he is to pay costs as between attorney and client.

Such is a short summary of the provisions of this important statute, which seems to afford complete protection to justices acting bona fide in the execution of their office.]

The conviction may be drawn up at any time before it is returned to the quarter-sessions, so that, though it may be informal at first, the magistrate has

an opportunity of amending it; and it has been declared to be not only legal but laudable so to do, *R. v. Barker*, 1 East, 186. [Unless, indeed, it have been quashed or its invalidity otherwise ascertained by the decision of a superior court, as for instance, by the Queen's Bench on Habeas Corpus, *Chaney v. Payne*, 1 Q. B. 725. But it would seem that after an invalid conviction has been filed at sessions, another might be substituted, *Re Richards*, 13 L. J. 5 Q. B. 926. See 11 & 12 Vict. c. 43, s. 14.] But the rule is different in case of an order; *R. v. Justices of Cheshire*, 5 B. & Ad. 439; [but see now the stat. 11 & 12 Vict. c. 43, s. 14.]

In *Griffith v. Harries*, 2 Mee. & W. 335, it was stated by Baron Parke, that in a case of *Dimsdale v. Clarke*, A. D. 1829, he and Mr. J. Littledale differed from Mr. J. Bayley on the question whether it be necessary that the magistrate's jurisdiction should appear *affirmatively* on the conviction, Mr. J. Bayley thinking that it need not; but see *Day v. King*, 5 Ad. & Ell. 359; [*R. v. Lewis*, 8 Ad. & Ell. 885.]

As the law regarding summary convictions before justices is of great and daily-increasing importance, on account of the immense variety of subjects which fall within this sort of jurisdiction, it [*387b] seems *advisable to add a few general remarks on it to the notes which were appended to this case in the former edition.

A conviction before a justice or justices of the peace without the intervention of a jury is always under some statute; the common law knows of no such proceeding. It is regarded by the courts with no particular favour, and it is necessary that the justice should, on the record of it, shew that he has proceeded *recto ordine*; for there are certain things which every conviction must contain, unless some Act of Parliament have expressly dispensed with them.

These are: 1. *The information*, which is absolutely essential in all cases, excepting where the justice is empowered to convict on view (see 1 Wm. Saund. 262, note, *Jones v. Owen*, 2 D. & R. 600). [It is the foundation of his jurisdiction over the case, without which his proceeding would be void (see *R. v. Bolton*, 1 Q. B. 66,) and the same principle applies to other limited jurisdictions created by statute: thus, a presentment is the foundation of the jurisdiction of commissioners of sewers, and if there

be not one their rate is void, *Wingate v. Waite*, 6 Mee. & W. 739; and see judgment in *Doe v. Bristol and Exeter Railway Co.*, 6 Mee. & W. 320; *R. v. Croke*, Cowp. 26; and *Christie v. Unwin*, 11 Ad. & Ell. 373, where the same principle was held to apply even to exercise of an authority conferred by statute on the chancellor; see also *R. v. Guardians of Hartley Union*, 1 Q. B. 677.] The information need not have been in writing or even on oath, unless expressly directed by an Act of Parliament to be so, *Basten v. Carew*, 3 B. & C. 649. [By the 11 & 12 Vict. c. 43, s. 10, whenever the justice issues a warrant in the first instance without summons, the information must be upon oath.] Great care, must, however, be taken in framing it, for it is the foundation of the magistrate's jurisdiction; [*Cave v. Mountain*, 1 Man. & Gr. 257; *Carpenter v. Mason*, 12 Ad. & Ell. 629. But when the act gives no particular form, it is sufficient if the jurisdiction is substantially made apparent in the documents, or can be inferred therefrom, *Taylor v. Clemson*, per Tindal, L. C. J., 2 Q. B. 1036.] Nor will the evidence supply omissions in it, for the office of the evidence is to *prove*, not to *supply* a legal charge (*R. v. Wheatmain*, Dougl. 232; *Wiles v. Cooper*, 3 Ad. & Ell. 525). It must state the day on which it is exhibited; and if that day be inconsistent with, or insufficient to warrant the conviction, it will vitiate, *R. v. Kent*, 2 Lord Raym. 1546. It must state the place of exhibiting, that the magistrate may appear to have been acting within his jurisdiction; see *R. v. Kite*, 1 B. & C. 101; [and *R. v. Martin*, 2 Q. B. 1037; *Re Peerless*, 1 Q. B. 143.] The name of *the informer should, [*387c] it seems, be set forth, that the defendant may know who is accusing him (see, however, *Paley*, 80, note); in some cases, at all events, it is necessary, see *R. v. Stone*, 2 Lord Raym. 1545. It must state the name and style of the convicting justice or justices, and show that he is acting within his jurisdiction. See *Kite's case*, 1 B. & C. 101; [*R. v. Martin*, 2 Q. B. 1036; *Re Peerless*, 2 Q. B. 1037.] Thus it will not be enough to state that he is a justice *in* the county, without stating that he is *of* or *for* the county, *R. v. Dobbyn*, Salk. 473; the name of the offender or offenders, *R. v. Harrison*, 8 T. R. 508; the time of the offence, so that the information may appear to have been laid in due time, *R. v.*

Pullen, Salk. 369; R. v. Chandler, Salk. 378; R. v. Crisp, 7 East, 389; the *place*, that it may appear to have been within the justice's jurisdiction, Kite's case, 1 B. & C. 101, et notam. [The serious consequences of an error in framing the information seems much diminished, if not entirely done away with, by 11 & 12 Vict. c. 43. See proviso to sect. 1, also sect. 9.] Lastly, the charge must set forth with proper and sufficient certainty, and must contain every ingredient necessary to constitute the offence, leaving nothing to mere inference or intendment. "A conviction," to use the words of Lord Holt, "must be certain, and not taken by collection." R. v. Fuller, 1 Lord Raym. 509; R. v. Trelawney, 1 T. R. 222. Generally speaking, it is sufficient to state the offence in the words of the act creating it; see R. v. Speed, 1 Lord Raym. 583; Davis v. Nest, 6 C. & P. 167; Ex parte Pain, 5 B. & C. 251. Cases, however, may occur in which the words of the statute are so general as to render some more certainty in the conviction necessary; per Denison, J., R. v. Jarvis, 1 Burr. 154; Ex parte Hawkins, 2 B. & C. 31; R. v. Perrott, 3 M. & S. 379. Exceptions in the statute creating the offence should be negatived where they appear in the clause creating the offence; R. v. Clarke, 1 Cowp. 35; R. v. Jukes, 8 T. R. 542; though it is otherwise when they occur by way of proviso in subsequent clauses or statutes; Cathcart v. Hardy, 2 M. & S. 534; Spieries v. Parker, 1 T. R. 141; R. v. Hall, 1 T. R. 320; [see now 11 & 12 Vict. c. 43, proviso to sect. 14.] In analogy to indictments, it appears right that the information should conclude *contra formam statuti*. However, there are many cases where technical words, that would be necessary in an indictment for the same offence, are unnecessary in a conviction; see R. v. Chandler, 1 Lord Raym. 581; R. v. Marsh, 2 B. & C. 717. [Although the information must, in order to give the magistrate jurisdiction, state an offence of which he has a right to take cognizance, it need not state evidence sufficient to support such [*387d] a *charge, for it is the *charge*, Cave v. Mountain, 1 Man. & Gr. 261; R. v. Bolton, 1 Q. B. 66.]

2. It must appear that the defendant was *summoned* or brought up by warrant, for it would be contrary to natural

justice to convict without giving him an opportunity of being heard, Painter v. Liverpool Gas Co., 3 Ad. & Ell. 433; [and see R. v. Totness, 7 Q. B. 690. In some cases the act requires a summons of a particular kind, and in those the justices have no jurisdiction if it be omitted; thus, where the summons was to be *ten days at least* before conviction, and it was served on the 20th to appear on the 30th, the conviction was held void, Mitchell v. Foster, 9 Dowl. 527; 12 Ad. & Ell. 472. Where there is no statutable provision] the summons should give him reasonable time, R. v. Mallinson, 2 Burr. 679; R. v. Johnson, 1 Str. 261. If, indeed, he appear of his own accord, that will dispense with a summons, R. v. Stone, 1 East, 649. See R. v. Justices of Wiltshire, Mich. 1840, B. R. If a summons be ineffectual, a warrant may, at least in some cases, be issued; see Bane v. Methuen, 2 Bing. 63; but then the information ought to have been upon oath; see R. v. Payne, Comberb. 359; per Holt, Barnard, 34; and it is the opinion of Mr. Paley that a warrant (in the absence of express enactment) lies only when the offence involves some breach of peace, Paley, 37; [see now 11 & 12 Vict. c. 43, ss. 1, 2, 13.]

3. The appearance or non-appearance of the defendant should be stated. If, being summoned, he do not appear, he may nevertheless be convicted, for otherwise any defendant might escape merely by not appearing, R. v. Simpson, 1 Str. 44; [and see 11 & 12 Vict. c. 43, ss. 2, 13.]

4. If the defendant confess, that should be stated, and there is then no necessity for evidence, R. v. Hall, 1 T. R. 320; R. v. Clarke, Cowp. 35; even though the statute direct the conviction to be "on the oath of one or two credible witnesses:" see R. v. Hall, ubi supra; R. v. Gage, Str. 546, and 1 Wm. Saund. 262, N. 1; [see 11 & 12 Vict. c. 43, s. 14.]

5. If the defendant do not confess, the evidence must be set forth. It should be given in his presence; but if the evidence and appearance be stated as on the same day, that will be presumed, R. v. Swallow, 8 T. R. 284. There is a distinction in this respect between *orders* and *convictions*. On a *conviction* the evidence must be set out, in order that the superior court may judge of it, R. v. Vipont, Burr. 1163: to state that the offence was fully and duly proved is in-

sufficient, *R. v. Baker*, Str. 316. In an order it is sufficient to state the result of it; see *R. v. Lovat*, 7 T. R. 152; *R. v. Justices of Cheshire*, 5 B. & Ad. 439; [*387e] *R. v. Green*, 10 *Mod. 212; *R. v. Marsh*, 2 B. & C. 717. It is true that a conviction is good if it purports to set out the evidence, although in the very words of a statute; but if the magistrate so framing his conviction alter its effect and state it as proving more than it really did, he subjects himself to a criminal information, *R. v. Pearce*, 9 East, 358; and it is said that in a case of *R. v. Allen* cited in Paley on Convictions, the magistrate was advised in such case to draw up a fresh conviction; see 5 D. & R. 490, and see *Re Rix*, 4 D. & R. 352. However, it is not necessary that every word used by the witnesses should be stated, *R. v. Warneford*, 5 D. & R. 490. As the reason for setting out the evidence is that the superior court may judge of it, it follows that, if the evidence do not warrant the conviction, the latter will be bad. *R. v. Ransley*, 3 D. & R. 572; *R. v. Smith*, 8 T. R. 558. But it is not necessary, in order to warrant the conviction, that the justices should clearly have come to a right decision in point of fact. If there was evidence from which any reasonable person might have drawn the same inference as they did, that will do, *R. v. Glossop*, 4 B. & Ad. 616; *Anon.* 1 B. & Ad. 382. Indeed, the magistrate being substituted for a jury, his decision cannot be said to be wrong if the evidence was such as might have been left to a jury, and from which they might have drawn the same conclusion, *R. v. Davis*, 6 T. R. 178.

6. There must be a judgment and an adjudication of the proper forfeiture; see *R. v. Harris*, 7 T. R. 238; *R. v. Salomons*, 1 T. R. 251; *R. v. Hawkes*, Str. 858. There is, however, no particular form of judgment, *R. v. Thompson*, 2 T. R. 18. And the adjudication may be good in part though it exceed the jurisdiction of the justices, provided the excess be severable, *R. v. Justices of Wiltshire*, Mich. 1840, B. R.; *R. v. St. Nicholas*, 3 Ad. & Ell. 79. The application of the penalty, where the act directs any mode of applying it, is a necessary part of the judgment, [*Chaddock v. Wilbraham*, 9 Feb. 1848, 17 L. J. C. B. M. C. 79.] It is sufficient in most cases to state that it is to be distributed or paid according to the form of the sta-

tute in such case made and provided. But, when the statute leaves the application discretionary, the mode in which the discretion was exercised ought to be stated, *R. v. Dempsey*, 2 T. R. 96. Where the justice is to give costs or charges, he must ascertain their amount in the conviction, *R. v. Symons*, 1 East, 189; *R. v. St. Mary*, 13 East, 57; [and as to costs see now 11 & 12 Vict. c. 43, s. 18.]

Lastly, the conviction must be subscribed, dated, and sealed; see *R. v. Elwell*, Str. 794; *Basten v. Carew*, 3 B. & C. 649; [and see 11 & 12 Vict. c. 43, s. 14.] The reason of dating [*387f] it is, that it may appear when it was made; and if that do appear, that is enough, and an impossible date might be rejected, *R. v. Picton*, 2 East, 198; see *R. v. Bellamy*, 1 B. & C. 500.

The above observations apply to convictions in general; but a conviction is the creature of the statute law; and, if the statute prescribe any particular form for it, no matter what, that form must be strictly pursued, *Daivson v. Gill*, 1 East, 72; *Goss v. Jackson*, 3 Esp. 198. [See 11 & 12 Vict. c. 43, s. 17.]

It is obvious that, as so much precision is required in drawing up a conviction, magistrates and their clerks must have been under considerable difficulty, and must have run considerable risk in framing it. For their ease and protection, stat. 3 G. 4, c. 23, has provided a general form, in which, sec. 1 enacts that it may be drawn up where no particular form has been directed.

[The mode of proceeding before Justices of the Peace in cases of summary convictions is now regulated by the recent statute 11 & 12 Vict. c. 43, entitled "An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales, with respect to summary convictions and orders," which came into operation on the 2nd of October, 1848, and clearly defines, by positive enactment, the duties of justices in such proceedings, whilst by giving short forms applicable to all stages of these proceedings including convictions, and doing away with the effect of variances and defects both in substance and form in the proceedings themselves, it greatly facilitates the discharge of those duties. A short summary of the statute will enable the reader to judge how far the former state of the law has been affected by its provisions. The act

repeals amongst other statutes the above act 3 G. 4, c. 23, and by section 17, provides that the forms of convictions and orders in the schedule may be used in all cases of convictions and orders under the authority of statutes hitherto passed, whether any particular form may have been therein given or not, and under all future statutes not giving a particular form of conviction or order. The first section directs that in all cases where an information (which need not be on oath unless a warrant issues in the first instance, sect. 10,) is laid before a justice or justices, or complaint made (which need not be in writing unless the statute require it, sect. 8,) he may issue a summons according to the form in the schedule, and by sect. 2, in case of non-appearance, upon proof on oath of due service of the summons, *what shall be deemed by the justice* a reasonable time before the appointed day, he may, upon the information or complaint being sub- [*357g] stantiated on oath, issue his warrant *according to the form in the schedule; or in cases of convictions, where the original information is upon oath, he may issue such warrant in the first instance, or in cases where a summons issues without appearance, upon proof on oath of due service, a reasonable time (not as in case of issuing a warrant what *shall be deemed by the justice* a reasonable time) before the day appointed; he may proceed *ex parte*, and adjudicate, and it is provided by sect. 1, that no objection shall be allowed to any information, complaint, or summons for any alleged defect therein "in substance or in form,"—or for any variance in the evidence; but if considered by the justice prejudicial to the defendant, the case may be adjourned. Sect. 3 contains a similar provision as to warrants, with a similar power of postponement, and in the meanwhile commitment or enlargement upon recognizances according to forms in the schedule. Sect. 4 directs the mode in which the ownership of property is in certain cases to be stated. Sect. 5 makes aiders and abettors in the commission of offences punishable by summary conviction, liable to the same punishment as principals. Sect. 6 extends the provisions of 11 & 12 Vict. c. 42, (ante, 386-387) to this act. Sect. 7 gives the justice power to enforce the attendance of any material witness within his jurisdiction, in the same manner as a defendant, and to commit for seven

days any witness refusing to be sworn or to answer. Sect. 11 gives six months after the cause has arisen, in the absence of special enactment, as the time for complaint or information. Sects. 12, 13, 14, & 16 contain precise directions as to the mode in which the hearing upon complaint and information is to be conducted. Sect. 15 makes prosecutors and complainants, not having a pecuniary interest in the result, competent witnesses. The 18th sect. enables the justice to order costs either to the prosecutor or complainant, or to the defendant. Sects. 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, relate to the mode in which penalties imposed, and costs ordered by justices are, under various circumstances, to be recovered and paid. Sect. 32 enacts that the forms in the schedule shall be deemed good, valid, and sufficient in law. Sects. 33, 34 regulate jurisdictions of metropolitan police, and stipendiary magistrates; also of the Lord Mayor and Aldermen of London. Sect. 35 provides that the act shall not extend to orders of removal, orders as to lunatics, nor to informations concerning the Excise, Customs, Stamps, Taxes, or Post Office, nor to orders, &c. in matters of bastardy, nor to proceedings under acts regulating the labour of children in factories, &c.]

If a conviction be void on the face of it, it follows, as of course, that no act done in pursuance of it can be justified, and that any *seizure of per- [*397h] son or property under it will form the subject-matter of an action, as will be seen in the principal case; [subject, however, now to the provisions of 11 & 12 Vict. c. 42, ante, 386-387.] But besides this, there are two modes of impeaching it, first by *appeal*, secondly by *certiorari*.

An *appeal*, like a *conviction*, is the creature of the statute law, and never lies unless where it is given by express terms, *R. v. The Recorder of Ipswich*, 8 Dowl. 103; *R. v. Hanson*, 4 B. & Ad. 521. The rule with regard to a *certiorari* is the very converse. It always lies unless *expressly* taken away, *R. v. Abbot*, Dougl. 553; and it requires very strong words to do so; for even where a statute gave an appeal to the sessions, and directed that it should be *finally* determined there, and no other court should intermeddle with the causes of appeal, it was held that a *certiorari* lay after the appeal. *R. v. Moreley*, 1 W. Bl. 231;

R. v. Jukes, 3 T. R. 442; see *R. v. Justices of West Riding, Yorkshire*, 1 Ad. & Ell. 575; where it was taken away, *R. v. Fell*, 1 B. & Ad. 380. [*R. v. Justices of Lancashire*, 11 Ad. & Ell. 144, where an order in pursuance of a statute leaving the *certiorari*, but made by a town council empowered by 5 & 6 W. 4, c. 76, which takes it away, was held removable by *certiorari*]. The reason of this is, that it is an extremely beneficial writ, being the medium through which the Court of Queen's Bench exercises its corrective jurisdiction over the summary proceedings of inferior courts. Even where it is taken away in express terms, they do not include the crown unless named, *R. v. Davies*, 5 T. R. 626; *R. v. Allen*, 15 East, 333; *R. v. Boulbee*, 4 Ad. & Ell. 498. Nay it is said that the Attorney-general, on behalf of the Crown, might in such case obtain the writ for a defendant; see 1 East, 303, note, and the authorities there cited.

A *certiorari* is a writ, issuing out of the Court of Chancery, or the Court of Queen's Bench, commanding the judges or officers of an inferior court to certify and return the record of a matter before them. It is used for a great variety of purposes; but we are at present looking only at its applicability to the case of a conviction. No writ of error lies upon a conviction; so that a *certiorari* is the only mode of bringing it into the Queen's Bench, in order to reverse it. It is not, however, like a writ of error, granted *ex debito justitiæ*; but "application is made to the sound discretion of the Court," *R. v. Bass*, 5 T. R. 252; *R. v. Manchester and Leeds Railway Co.*, 1 P. & D. 164; *R. v. South Holland Drainage Committeemen*, 1 P. & D. 79. This application is by way of motion, and by 13 G. 2, c. 18, s. 5, "no *certiorari* shall be granted to remove any order, conviction, or other proceeding, [*387i] before a justice or at the *sessions, unless it be applied for in *six calendar months*, and upon oath made that the party has given six days' notice in writing to the justice or justices, or two of them, if so many there be;" see *R. v. Boughey*, 4 T. R. 281; *R. v. Bloxam*, 1 Ad. & Ell. 386. [*R. v. Inhabitants of Sevenoaks*, 7 Q. B. 136.] The notice to the justices must be six days before the rule *nisi* is moved for, one day inclusive, the others exclusive, *R. v. Goodenough*, 2 Ad. & Ell. 463;

R. v. Flounders, 4 B. & Ad. 865. It must be by or on behalf of the party intending to move, and must appear to be so, *R. v. Justices of Lancashire*, 4 B. & Ad. 289; *R. v. Justices of Cambridgeshire*, 3 B. & Ad. 837; *R. v. Justices of Kent*, 3 B. & Ad. 250; *R. v. Justices of Lancashire*, 3 Perr. & D. 86; [11 Ad. & Ell. 144, where the notice was held sufficient]; *R. v. Justices of Shrewsbury*, Mich. 1840, B. R.; *R. v. How*, 11 Ad. & Ell. 159. But the Crown seems not to be bound by this even where it espouses the defendant's side, *R. v. James*, 1 East, 303, note; *R. v. Berkeley*, 1 Keny. 80; *R. v. Battams*, 1 East, 298. If, upon the discussion of the rule, the writ be granted, it removes the conviction into the court above, where it is quashed if bad; if good, it remains in the Queen's Bench, unless, indeed, to keep it there would occasion a defect of justice, in which case it may be sent back again by writ of *procedendo*, *R. v. Nevile*, 2 B. & Ad. 299. [The person prosecuting the *certiorari* must by 5 G. 2, c. 19, enter into recognizance for 50*l.*, with competent sureties to prosecute it with effect and pay costs if unsuccessful. This act does not, however, apply to the case of a prosecutor obtaining the writ, *R. v. Spencer*, 9 Ad. & Ell. 485.]

The Court of Queen's Bench, exercising its appellate power over a conviction removed into it by *certiorari*, will not allow the merits of the case to be again litigated upon affidavit; for the justices are the proper persons to determine upon those. [*R. v. Bolton*, 1 Q. B. 66; *R. v. Justices of Buckinghamshire*, 3 Q. B. 800.] But a question has occasionally arisen whether, in cases where the justices have proceeded *without jurisdiction*, and have nevertheless stated upon the face of the conviction matter showing a jurisdiction, it be competent to the defendant to prove the want of jurisdiction by affidavit. It certainly appears desirable that the court should have power to entertain the question of jurisdiction. Some cases might easily be suggested, in which not only great private but great public inconvenience might arise from leaving an invalid order or conviction unreversed, and great injustice might be caused by allowing justices out of or in sessions, by making their order or conviction good upon the face of it, to give themselves a jurisdiction over matters not entrusted

[*387j] to them by the law. *Whether a *mandamus* would lie in such a case to oblige them to make a correct statement, is a question which the Court of Queen's Bench would, at least in the majority of instances, probably answer in the negative; for though it is true that in some cases, where there has been a clear omission of some material ingredient in a conviction, the court has by *mandamus* ordered it to be supplied; as in *Re Rix*, 4 D. & R. 352; *R. v. Marsh*, 4 D. & R. 260; *R. v. Warneford*, 5 D. & R. 459; *R. v. Allen*, 5 D. & R. 490; yet this has been done after the order or conviction had been returned upon a *certiorari*; and it either clearly appeared, or was shown by affidavit, to the court, that the whole or some material portions of the evidence had been omitted; (see the observations of the court on these cases in *R. v. Wilson*, 1 Ad. & Ell. 627;) and the *mandamus* went not to compel the court below to insert a *particular thing*, or raise a *particular question*, upon their return, but merely to oblige them to set out an integral part of the case, which *must have existed*, and had been omitted. I say *must have existed*, because in *R. v. Wilson*, where evidence might or might not have been acted on, the court would not send the *mandamus*. And there are cases in which the court has refused to interfere by *mandamus* to compel the courts below to raise a *particular question*; for instance, in *R. v. Hewes*, 3 Ad. & Ell. 725, the jury had returned a verdict, *guilty by mischance*; the chairman of the sessions told them they *must* find a general verdict; and they then found a verdict of *guilty*, and recommended to mercy on the ground that the act was not done with a malicious intent. The motion was for a *mandamus* to set the clerk of the peace's minute right according to the facts, in order that a writ of error might be sued out. The rule was discharged. Mr. J. Patteson said, "The case of a *mandamus* to enter continuances and hear is not like this. There the justices are ordered merely to hear an appeal, and to enter continuances because those are necessary in order to enable them to hear; so, in the present case, if it were necessary for the defendant to have a record made up, and the officer refused to do it, the party having a right to avail himself of the record might apply for a *mandamus*, as in *R. v. Justices of Middlesex*, 5 B. & Ad. 1113.

I have always understood that this court might send a *mandamus* to an inferior court to do its duty *in general terms*, but *not to do a particular thing*, as to make an alteration here or there in the clerk of the peace's minutes;" [see *R. v. Justices of Middlesex*, 9 Ad. & Ell. 546, judgment of Littledale and Coleridge, JJ., and per curiam, in *R. v. Lords of the Treasury*, 10 Ad. & Ell. 179; *R. v. Lords of the Treasury*, 10 Ad. & Ell. 374, and per Lord Denman in [*387k] **R. v. Eastern Counties Railway*, 10 Ad. & Ell. 547; *R. v. Justices of Buckinghamshire*, 3 Q. B. 800.]

Supposing that the court below cannot be compelled by *mandamus* to show the defect of jurisdiction upon the record, the next question is, will the court above allow evidence of such defect of jurisdiction to be laid before it by way of affidavit, on the record being brought before it by a writ of *certiorari*? In *R. v. St. James's, Westminster*, 2 Ad. & Ell. 211, it was remarked by Mr. J. Taunton (a judge whose *obiter dicta* are always worthy of the greatest attention,) that this had been constantly done. In *R. v. Inhabitants of Great Marlow*, 2 East, 214, an appointment of overseers, good on the face of it, was allowed to be questioned by affidavit on the ground of a defect of jurisdiction, and was finally quashed. The Court in that case had taken time to consider as to the practice with regard to receiving the affidavit; and Mr. J. Lawrence mentioned several similar cases in which that course had been pursued. A similar course seems to have been pursued with an order of the quarter sessions in *R. v. Justices of the West Riding of Yorkshire*, 5 T. R. 629. In the late case of *R. v. Justices of Cheshire*, 1 Perr. & Dav. 93, 8 Ad. & Ell. 400, the question was a good deal discussed; and it seems to have been admitted that affidavits might be looked at for the purpose of showing a defect of jurisdiction. "It cannot be disputed," says Mr. J. Coleridge in that case, "that there are many cases in which affidavits may be looked at in order to ascertain whether there was jurisdiction or not; for suppose an order made, which was good on the face of it, but which was not made by a magistrate, it is clear that this fact may be shown to the court." Accord. *R. v. Sheffield and Manchester Railway Co.*, Mich. 1839, B. R.; [and it seems to be settled by the later cases that a defect of jurisdiction may be

shown by affidavit, though the proceeding is so drawn up as to appear valid on the face of it, *R. v. Bolton*, 1 Q. B. 66; and *R. v. Cheltenham Paving Commissioners*, 1 Q. B. 467, where the defect consisted in the presence on the bench of interested parties as justices; on the other hand, nothing can be more common than to find it laid down that a conviction or order is conclusive of the matter stated in it for the purpose of showing a jurisdiction. See judgment of Mr. J. Patteson in *Re Clarke*, 2 Q. B. 634. Possibly the distinction may be between cases in which the conviction or order is made by persons who are admitted to constitute a legal court, and who have stated facts which, on information being laid, or a case coming before them, would be matter to be proved, and adjudicated upon by them, and cases in which the objection is, that they are not a court at all, because not in fact magistrates, or because interested, because [*357] they *sat out of the limit of their jurisdiction, or for some other reason, striking at their existence as a court, so that the objection is not that the statement of a court is erroneous, but that the source of the statement is not a court at all.]

Assuming this to be so, every case, or almost every case, of a defect of jurisdiction in the convicting magistrate or magistrates would be reviewable by certiorari; for though it is now usual for the statute creating the offence to contain a clause taking away the certiorari, yet such clauses do not, generally speaking, apply to cases where there was no jurisdiction to convict, such cases not falling within the act of parliament at all. *R. v. Justices of Somersetshire*, 5 B. & C. 816; *R. v. Justices of the West Riding of Yorkshire*, 5 T. R. 629; *R. v. Inhabitants of Great Marlow*, 2 East, 244; [nor do they apply to cases where the conviction has been obtained *by fraud*, as when a maltster had by collusion, and for the purpose of exonerating himself from penalties, under 7 & 8 G. 4, c. 53, procured the conviction of his servant, *R. v. Gillyard*, 14 June, 1848, 17 L. J. M. C. 153.] But there is a distinction between cases of a *want of jurisdiction* and an *irregularity in exercising it*: in the former case the certiorari lies notwithstanding the privative clause, in the latter it is taken away. *R. v. Bristol and Exeter Railway Co.*, 1 P. & D. 170, note, 11 Ad. & Ell. 202; *R. v. Sheffield and*

Manchester Railway Co., Mich. 1839, B. R.; [11 Ad. & Ell. 194. In the former case, indeed, the court went to an extent which seemed likely very much to confine the applicability of the writ of certiorari; they threw out the opinion that in cases where the proceeding was merely irregular, the clause taking away the certiorari applied, and that where it was void, there was no occasion for it, and that the Court would not grant it. However, in the latter case, they appear disposed to repudiate the application of this dilemma; at all events, in cases in which the proceeding sought to be removed is not void on the face of it, but it is impugned by affidavit. And in *R. v. Cheltenham Paving Commissioners*, 1 Q. B. 467, it was distinctly held that in a case of malversation such a clause would not operate.]

However, where the justice or justices had jurisdiction, the court will not grant a certiorari to remove the conviction or order, upon a suggestion made by affidavit that they have exercised the jurisdiction wrongly; *R. v. Justices of Cheshire*, 1 Perr. & Dav. 88, 8 Ad. & Ell. 400; *R. v. St. James's, Westminster*, 2 B. & Ad. 241; for that would be to substitute the court above for the tribunal to which the statute has committed the inquiry. And though it has been endeavoured to show that the Queen's Bench has a right in cases of defect of jurisdiction to entertain the [*357m] *objection founded upon such defect on affidavit, yet it must be observed that the Court is not *bound* to do so upon certiorari; for a certiorari, as has been already pointed out, is a writ not of right, but in the discretion of the court to grant or to refuse; [but see the judgment in *Symonds v. Dimsdale*, 14 Jan. 1848, 17 L. J., Exch. 217.] And cases may occur in which, though there may have been a defect of jurisdiction, still the Court may conceive that the interests of justice would be rather impeded than advanced by any summary interference on their part. In *R. v. Justices of Cambridgeshire*, 4 B. & Ad. 122, Mr. J. Patteson said, "With regard to the objections in point of jurisdiction, I protest against its being understood that we can on every occasion look into extrinsic matter on motions to bring up orders by certiorari." "We must be cautious," said Mr. J. Coleridge, "not to exceed our jurisdiction; and when we find there is a court of appeal below, to which the mat-

ter brought before us on affidavit, might have been carried, I think we are confined to objections appearing on the face of the order." I do not understand these observations of the learned judges as importing that there are cases of a total defect of jurisdiction which the Court of Queen's Bench has no power to entertain on affidavit, but that the leaning of the court is against doing so, except where public justice would be thereby furthered. See *R. v. Justices of Denbighshire*, 1 B. & Ad. 616. See *R. v. South Holland Drainage Committee-men*, 1 P. & D. 79; *R. v. Manhattan and Leeds Railway Company*, 4 P. & D. 164. And that its disinclination to interfere is strong and uniform in cases where the legislature has provided another competent tribunal of appeal to which the question might be carried. [See *R. v. Justices of Middlesex*, 9 Ad. & Ell. 548, last point. In *Ex parte Lord Gifford*, Carrow's Sess. Cas., Mr. Justice Williams refused a certiorari on the ground that if the recognizance sought to be removed were *void*, the applicant might treat it accordingly. It has not, however, been usual to refuse the writ for this reason, which, since the 11 & 12 Vict. c. 44, s. 2, prohibiting actions against justices, &c., for anything done under convictions or orders made without jurisdiction, until they have been quashed, would scarcely be given in answer to an application to bring up a con-

viction or order to have them quashed for a defect of jurisdiction.]

In *R. v. Just. of Cambridgeshire*, Lord Denman, in his judgment, suggested another ground on which an application upon affidavit might possibly be entertained. "I do not say," said his lordship, "that even on *certiorari* the court would not set aside an order if *manifest fraud* were shown. That may be so. In *R. v. The Justices of Somersetshire*, [*37*n*] *where a certiorari was applied for to remove an appointment of overseers, on a suggestion of corrupt motives in the appointing magistrates, the court refused a rule, saying that the parties complaining might appeal to the sessions, or move for a criminal information. Notwithstanding that refusal, however, I do not say that if corruption were clearly made out, the Court would not, upon an application like this, declare the order invalidated by the fraud." This observation of his lordship is consistent with the principle laid down by De Grey, C. J., in the *Duchess of Kingston's case*, post, volume 2, 431, where his lordship observed that "fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." Lord Coke says, "it avoids all judicial acts, ecclesiastical or temporal." [And see *R. v. Gillyard*, ante, 387 *l*; where fraud being shown, a conviction obtained by means thereof, was brought up by certiorari and quashed.]

Superior courts are presumed to act by right, and not by wrong, and their acts and judgments are consequently conclusive in themselves, unless plainly beyond the jurisdiction of the tribunals whence they emanate: *Peacock v. Bell*, 1 Saunders, 73; *Grignon's Lessee v. Astor*, 2 Howard, 319; *Briggs v. Clark*, 7 Howard's Miss. R. 457; *Penkor v. Felts*, 2 Smedes & Marshall, 535; *Venable v. McDowell*, 4 Dana, 336; *Huntington v. Charlotte*, 15 Vermont, 46; *Wells v. Mason*, 4 Scammon, 84; *The State v. Kimborough*, 2 Dev. 431; *The State v. Seaborn*, 4 id. 305.

But the jurisdiction of limited and inferior tribunals cannot be presumed, and must be shown affirmatively to confer validity on their acts. Hence when the facts necessary to give to such a tribunal jurisdiction, do not appear on the face of its proceedings, and are not proved aliunde, the whole will be void, and may be set aside as a nullity, when called in question in the course of any collateral controversy; *Wise v. Withers*, 3 Cranch, 331; *Walker v. Turner*, 9 Wheaton, 549; *Suydam v. Keys*, 13 Johnson, 444; *Harriot v. Van Cott*, 5 Hill, 285; *Bridge v. Ford*, 14 Massachusetts, 461;

Smith v. Rice, 11 Mass. 307; Brooks v. Altemus, 11 Pickering, 441; Clapp v. Beardsley, 1 Aiken, 168; Barrett v. Crane, 16 Vermont, 246; Green v. Haskill, 24 Maine, 186; Hall v. Howell, 10 Conn. 526; Starr v. Scott, 8 id. 480; Taft v. Griffin, 5 Georgia, 185; Hill v. Robertson, 1 Strobbart, 1; Wright v. Warner, 1 Douglass, 384; Clark v. Holmes, id. 390; Snediker v. Quick, 1 Green, 306; The State v. Shreeve, 3 id. 57; Perrine v. Farr, 2 Zabriskie, 356; Peirce v. Bray, 1 id. 13; Pendleton v. Fowler, 1 English, 41; Latham v. Jones, ib. 372. And in Perrine v. Farr, it was said on the authority of Turner v. Beale, 2 Salkeld, 522, that unless a particular jurisdiction shows the matter to be within its jurisdiction, it must be presumed to be without it. But the strictness with which the proceedings of inferior tribunals are scrutinized, only applies to the question of jurisdiction, and when the existence of jurisdiction is proved or conceded, the maxim, *omnia rite acta*, applies to them, as well as to courts of general jurisdiction; Reeves v. Townsend, 2 Zabriskie, 396; Wright v. Warren, 1 Douglass, 384.

It necessarily results from the rule, that the jurisdiction of inferior courts must appear affirmatively, and cannot be presumed, that all the facts requisite to confer jurisdiction, must be averred and proved whenever the proceedings of such tribunals are relied on, either as a defence, or cause of action; Mills v. Martin, 19 Johnson, 34; Morgan v. Dyer, 10 id. 163; Frary v. Dakin, 7 id. 73; Service v. Heermance, 1 id. 91; Wyman v. Mitchell, 1 Cowen, 316; Dakin v. Hudson, 6 id. 21; Latham v. Edgerton, 9 id. 227; Wheeler v. Townsend, 3 Wendell, 247; Otis v. Hitchcock, 6 id. 433; Wood v. Babcock, 1 Denio, 158; Bennett v. Burch, ib. 141; Stephens v. Ely, 6 Hill, 607; Corwin v. Merritt, 3 Barbour, 341; Broadhurst v. McConnell, ib. 175; Harrington v. The People, 6 id. 607. Thus in Bowman v. Russ, 6 Cowen, 234, where the defendant pleaded a judgment against the plaintiff in a proceeding before two justices of the peace, for deserting his wife and children, as a justification for entering the plaintiff's house and arresting him; a replication, that no such desertion had taken place, was held good, as denying a material fact, on which the jurisdiction of the justices was founded, and it was said, that the plea would have been bad on demurrer, for want of a positive allegation of the fact thus denied. It was held in like manner, in Mills v. Martin, 19 Johnson, 34, that an avowry under the authority of a court martial, to a declaration in trespass for taking the plaintiff's oxen, was defective for not setting forth sufficient matter to show, that the jurisdiction of the court martial existed and had attached. And in Stephens v. Ely, 6 Hill, 607, where the defendant pleaded, that he had been declared a bankrupt by the District Court of the United States, and that he had been discharged, by a decree of that court, from his debts, the plea was adjudged ill for not showing, that the bankrupt court had jurisdiction, although it was admitted not to be necessary to plead the particular acts of bankruptcy, on which that jurisdiction was founded. The same point was decided in Maples v. Burnside, 1 Denio, 332, while it was held in Coates v. Simmons, 4 Barbour, 403, and Sackett v. Andross, 5 Hill, 327, that to render the discharge of a bankrupt valid, in pleading, it must be not only averred, that the case was of such a nature as to be within the act, but that it did not come within any of its exceptions. The same principles were applied in Ford v. Babcock, 1 Denio, 158, to a plea of justi-

fication under a judgment in the Marine Court of New York, which did not contain the averments necessary to show, that the court had jurisdiction over the subject-matter of the plea, or that it had taken the proper steps to make that jurisdiction effectual.

The soundness of the general principle laid down in these cases is undoubted, but a doubt may be entertained as to the propriety of its application, to the decrees of the District Courts of the United States, when sitting in bankruptcy. It is well settled, that the powers of those courts are limited, but not inferior, and that their jurisdiction, like that of all superior courts, must be presumed, unless its absence is manifest, (*infra*.) And it would seem to follow, that as they have full power to direct the discharge of a bankrupt, it cannot be requisite to show, that this power has been properly exercised, when the discharge is brought in question in any subsequent or collateral proceeding, either in the State courts, or those of the United States. The law was so held in *Rowan v. Holcomb*, 16 Ohio, 463, and *Reed v. Vaughan*, 10 Missouri, 467. And in *Richman v. Cowell*, 1 Comstock, 305, it was admitted, that such a discharge is valid *per se*, when produced in evidence, which would seem to imply, that no averments are necessary when the question arises in pleading.

It seems to be well settled on the one hand, that where the proceedings of inferior tribunals set forth the facts necessary to give jurisdiction, it will be held to exist without proof aliunde; *Jenks v. Stebbins*, 11 Johnson, 224; *Barber v. Winslow*, 12 Wendell, 102, and on the other, that the facts thus set forth, may be disproved and the proceedings avoided, by parol evidence; *Clark v. Holmes*, 1 Douglass's Michigan, 390; *Denning v. Corwin*, 11 Wendell, 648; *Borden v. Fitch*, 15 Johnson, 121; *Harrington v. The People*, 6 Barbour, 607, *Noyes v. Butler*, *ib.* 613; *The People v. Cassels*, 5 Hill, 164. But this rule only applies to those facts and averments, on which the jurisdiction of the court depends, for as to all else, the records of inferior, as well as superior tribunals import absolute verity, and cannot be contradicted; *McLean v. Hayes*, 13 Johnson, 184; *Cunningham v. Bucklin*, 8 Cowen, 187; *Hard v. Shipman*, 6 Barbour, 621; *Clark v. Holmes*, 1 Douglass's Michigan, 390; *Reeves v. Townsend*, 2 Zabriskie, 396.

Few rules are supported by a greater weight of authority and reason, or have been longer, or more generally regarded as established law, than that which holds that the proceedings of superior tribunals must be presumed to be correct, unless manifestly erroneous, and cannot be contradicted, or convicted of error by extrinsic evidence. It was notwithstanding declared in *Denning v. Corwin*, and *The People v. Cassels*, on the authority of *Borden v. Fitch*, that no court can require jurisdiction by a false recital of the facts necessary to give jurisdiction, and that every such recital is consequently open to contradiction. The doctrine thus laid down, was cited with approbation in *Harrington v. The People* and *Noyes v. Butler*, and said to apply to superior, as well as to inferior tribunals. This doctrine rests on dicta rather than on absolute decision, for the cases of *Borden v. Fitch* and *Denning v. Corwin* fall under the principles which regulate the jurisdiction of inferior courts, and courts of other states, and are not in point in questions arising with reference to the superior courts of the same state. The same remark applies to *Harrington v. The People* and *Noyes v. Butler*, and the decision in both cases was, moreover, in favour of the validity of the

record, not against it. It is notwithstanding proper to inquire, how far the doctrine in question, whether dictum or decision, is to be regarded as law.

There are undoubtedly a great number of cases in this country, which give colour to the assertion, that the jurisdiction of superior, as well as of inferior tribunals, may be attacked and set aside in the course of subsequent and collateral proceedings. Thus it has been said by the highest judicial tribunal in the Union, that every court which is called on to recognize or enforce the proceedings of another, is entitled to examine into the jurisdiction on which they are founded, and to disregard them as nullities, when without jurisdiction; *Williamson v. Berry*, 8 Howard, 497; and a number of authorities may be cited as supporting this proposition; *Campbell v. Brown*, 6 Howard's Mississippi, 106; *Given v. McCarroll*, 1 Smedes & Marshall, 354; *Enos v. Smith*, 7 id. 85; *Schaffer v. Yates*, 2 B. Monroe, 453; *Bloom v. Burdick*, 1 Hill, 140; *Hollingsworth v. Barbour*, 4 Peters, 466; *Elliott v. Pursell*, 1 id. 340; *Wilcox v. Jackson*, 13 id. 48; *Shriver's Lessee v. Lynn*, 2 Howard, 43; *The Lessee of Hickey v. Stewart*, 3 id. 750; *Williamson v. Ball*, 8 id. 566. But these cases will be found, when examined, not to go beyond one of these two propositions, that the acts of inferior courts are not good, unless *prima facie* within their jurisdiction, the acts of superior courts void, when manifestly beyond their jurisdiction. Thus it was held in *Elliott v. Piersoll*, and again, in *Wilcox v. Jackson*, *Shriver's Lessee v. Lynn*, *The Lessee of Hickey v. Stewart*, and *Williamson v. Berry*, that although when a court has jurisdiction, its acts and judgments will be binding in every other, yet that when it has not, they must be regarded as nullities; not as voidable only, but simply as void. But the acts set aside under this general rule, in each of these instances, were without the jurisdiction of the court, from whence they emanated, either on their face, or by necessary intendment. Neither the rule itself, therefore, nor its application, goes beyond the propositions above stated, or sustains the doctrine, that the judgments of superior courts are invalid, unless the record shows the existence of jurisdiction in the cause, and that proper steps have been taken to make it effectual as against the parties, and still less that when jurisdiction is shown of record, it may be disproved by parol. The same thing is true of most if not of all, the cases above cited. Thus in *Campbell v. Brown*, *Gwin v. McCarroll*, and *Enos v. Smith*, the decrees set aside were founded on a special statutory power, which had not been pursued. In *Hollingsworth v. Barbour*, the decree in question had been made in a suit in equity, instituted to obtain a sale of the land of a deceased debtor, without describing the defendants otherwise than as his unknown heirs, and without other notice to them than by an unauthorized publication in a newspaper. And as this was set forth of record, and excluded the presumption which would have existed, had the record been silent, that the defendants were duly served, the want of jurisdiction was apparent on the face of the proceedings, and was necessarily fatal to their validity. The same explanation applies to the case of *Schaffer v. Yates*, 2 B. Monroe, 453, and neither decision is an authority for holding, that the presumption in favour of the validity of the judgments of superior courts, is otherwise than conclusive, where nothing appears on the record to rebut it. The order of sale set aside in *Williamson v. Berry*, was beyond the general powers of the court, from which it emanated, and was held not to be within the provi-

sions of the act of assembly, on which it professed to be founded. The decision, therefore, has no bearing in any case, where the judgment in question has been entered under a general, and not under a special statutory jurisdiction. The true rule with regard to the jurisdiction of superior tribunals, and the distinction between them and inferior tribunals, was laid down with great clearness in the case of *Grignon's Lessee v. Astor*, 2 Howard, 319. The question was as to the validity of a decree of a county court in Michigan, authorising a sale of the land of a deceased debtor by his administrator, which was sustained on the ground, that the county court was a court of superior, although of limited, jurisdiction, and that full faith was due to all its proceedings, unless manifestly beyond, or without its jurisdiction. "The decree," said BALDWIN, J., who delivered the opinion of the court, "is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial as no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 6 Peters, 729. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction;" that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. 3 Peters, 205. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revived on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requi-

site for either must appear on the face of their proceedings, or they are nullities."

Whatever may be the rule with regard to courts of general powers, when acting within the scope of those powers, it is well settled, that when they do not, and exercise a special and statutory authority, their proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, and will be invalid, unless the authority on which they are founded, has been strictly pursued; *Denning v. Corwin*, 11 Wendell, 647; *Sharp v. Speir*, 4 Hill, 76; *Striker v. Kelly*, 7 id. 11; *The Matter of Mount Morris Square*, 2 id. 142; *Williamson v. Berry*, 8 Howard, 494; *Williamson v. Ball*, ib. 566. "In exercising the powers given by these statutes," said BEARDSLEY, J., in delivering the opinion of the court in *Striker v. Kelly*, "we exercise powers which do not belong to us as a court of general jurisdiction, and our proceedings are, therefore, to be treated like those of courts of special and limited jurisdiction." It was held in like manner, in *Denning v. Corwin*, that where the court was authorised by statute to proceed in partition without service on the parties, where their names were unknown, the power thus given, was in derogation of the common law, and that the proceedings under it might be set aside collaterally, unless the record showed, that it had been properly pursued, and that the owners of the property were not known at the time when the action was brought. It was held in like manner, in *Williamson v. Berry*, and *Williamson v. Ball*, that as the general jurisdiction of chancery does not extend to decreeing a sale of the real estate of a minor, such a decree will be invalid, when made under an authority given by a special enactment, unless the authority given by the act is pursued, and a sale made under it will pass no title, either to the vendee, or to a subsequent bona fide purchaser. Little doubt can exist as to the soundness of this doctrine. It is universally admitted, that vested rights cannot be divested by the acts of commissioners proceeding under a legislative authority, and not according to the course of the common law, unless the commission is strictly pursued; and this just and salutary rule, should not be evaded, by converting courts of record into boards of commissioners, and thus doing that, under the cover of judicial forms, which is not judicial in its nature, and would not be permitted, if done openly. The inconveniences which may occasionally result from this course of decision, are more than compensated by the lesson which it teaches, that from whatever source power may come, it will fail of effect, when unaccompanied by right.

It is held in general, that those who rely on the proceedings of an inferior tribunal, must show not only, that it had jurisdiction of the cause, but that it took the steps necessary to make its jurisdiction effectual. But the distinction has been taken, that where the person who justifies under the authority of such a tribunal, is an officer bound to execute its mandates, he will not be liable for obeying them, if they fall within the general scope of its powers, although those powers may not have been pursued in the particular instance; *Warner v. Shed*, 10 Johnson, 138; *Lavacool v. Boughton*, 5 Wendell, 570; *Ford v. Babcock*, 1 Denio, 158; *Darling v. Bowen*, 10 Vermont, 153; *Barrett v. Crane*, 16 id. 246. This results from the injustice of making one who is charged with the execution of process, and who is punishable, if he does not execute it, liable for omissions which he has no means

of knowing, although he may well be made responsible, where the defect consists in a total want of authority, and not in the manner in which it has been exercised. It was held, notwithstanding, in *Etting v. Hurst*, 6 Hill, 141, that an officer cannot justify under process issued on a void judgment, when the judgment itself must be given in evidence, to prove the right under which the process was issued, as in the case of a levy on goods by a debtor, in the hands of a vendee, on the ground, that the sale is fraudulent as against creditors.

It is sometimes difficult to determine whether a court is to be considered as a court of inferior or of superior jurisdiction; but it is well settled that limitation of jurisdiction does not necessarily imply inferiority. This distinction was taken in *Peacock v. Bell*, 1 Saunders, 15, and has been frequently applied in this country. Thus, the Circuit and District courts of the United States are courts of limited, but not of inferior jurisdiction. Their judgments are binding, until reversed by regular proceedings in error, and cannot be treated as nullities, or set aside collaterally, for a failure to set forth the facts necessary to give jurisdiction; *Wood v. Mann*, 1 Sumner, 580; *Skillern's ex'ors v. Hay*, 6 Cranch, 267; *Ex parte Watkins*, 3 Peters, 103; *McCormick v. Sullivant*, 10 Wheaton, 199; *Belwin v. Hale*, 17 Johnson, 272; *Griswold v. Sedgwick*, 1 Wendell, 131; and the same rule applies to many of the local and county courts in the different states; *Kemper's Lessee v. Kennedy*, 5 Cranch, 173; *Hart v. Seixas*, 21 Wendell, 40; *The Commonwealth v. The Willow Grove Turnpike*, 2 Binney, 255. The courts, which under the name of orphan's court, courts of probate, and other appellations, are entrusted with the settlement of the personal estate of decedents, and in subordination to this, with the power to sell real estate when the personal estate is insufficient to meet the charges upon it, are treated in some of the states as inferior tribunals, and their decrees may be avoided collaterally, by showing a want of jurisdiction, either in the cause itself, or over the parties. *Chase v. Hathaway*, 14 Mass. 222; *Hathaway v. Clarke*, 5 Pick. 490; *Heath v. Wells*, *ib.* 140; *Conkey v. Kingman*, 24 *id.* 114; *Wattles v. Hyde*, 9 Conn. 10; *Dakin v. Hudson*, 6 Cowen, 221; *Ford v. Walworth*, 15 Wend. 449; 19 *Id.* 334; *Clapp v. Beardsley*, 1 Aiken, 174; *Hendrick v. Cleveland*, 2 Vermont, 337; *Waldridge v. Hall*, 3 *Id.* 129; *White v. Riggs*, 27 Maine, 114; *Brodess v. Thompson*, 2 Harr. & Gill, 120; *Bloom v. Burdick*, 1 Hill, 130; *The People v. Corlies*, 1 Sandford Sup. Court R., 228; *Erwin v. Lowry*, 5 Alabama, 117. This rule applies still more strongly, to those acts of such tribunals which are ministerial in their nature, as well as judicial, as for instance, the grant of letters testamentary and of administration. *Cottle v. Appellant*, 5 Pick. 483; *Holyoke v. Hoskins*, *ib.* 20; *Coffin v. Cattle*, 9 *Id.* 287; *Sigourney v. Sibley*, 21 *id.* 101; *Gay v. Minot*, 3 Cushing, 352; *Creath v. Brint*, 3 Dana, 129; *Slade v. Washburn*, 3 Iredell, 557; *Johnson v. Corpenning*, 4 Iredell's Eq. 216; *Flinn v. Chase*, 4 Denio, 85; *Dole v. Irish*, 2 Barbour, 639. And there can be no doubt that as the powers of these courts are essentially limited, if not inferior, their acts will be void wherever they transcend the limits of their powers. *Gwin v. McCarroll*, 1 Smedes & Marshall, 354; *Enos v. Smith*, 7 *Id.* 85. But when this is not the case, and their jurisdiction has actually attached, it will not be lost by an irregularity in the mode of exercising it, and every intendment will be made in

aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction; *Brown v. Wood*, 17 Mass. 68; *Grignon's Lessee v. Astor*, 2 Howard, 319; *McPherson v. Cunliff*, 11 Serg. & Rawle, 422; *Reaves v. Townsend*, 2 Zabriskie, 396; *Wyman v. Porter*, 6 Porter, 219; *Samuels v. Findley*, 7 Alabama, 615; *Small v. Hampstead*, 7 Missouri, 373; *Pendleton v. Pendleton*, 12 S. & M. 302; *Administrators of Tryon v. Tryon*, 16 Vermont, 313; *McFarlin v. Stone*, 17 Id. 165; *Clark v. Holmes*, 1 Douglass, 390. These distinctions are illustrated by the decisions in Pennsylvania, which recognise the general rule with regard to courts of inferior jurisdiction, but hold it inapplicable to most, if not all the tribunals in that state, although fully admitting that all judicial proceedings are void, when manifestly beyond or without jurisdiction. Thus it was held in *Messinger v. Kirtner*, 4 Binney, 105, and *Snider v. Snider*, 6 Id. 497, that the decrees of the Orphan's court of that state are void when beyond its jurisdiction, and may be set aside in the course of collateral proceedings, while it has since been decided that the presumption is in favour of the proceedings of these courts, although like those of all tribunals, they will be mere nullities when manifestly without the scope of the powers under which they take place; *McPherson v. Canliff*, 11 S. & R. 422; *Franklin v. Goff*, 14 Id. 181; *Herr v. Herr*, 5 Barr, 428; *Pawter v. Henderson*, 7 Id. 48; *Lockhart v. Johns*, Ib. 136. In like manner, the judgments of justices of the peace stand on the same footing under the Pennsylvania decisions, with those of courts of record; *Clarke v. McCowan*, 7 W. & S. 469; *Harlett v. Ford*, 10 Watts, 101; and while void, when plainly beyond their jurisdiction; *Camp v. Wood*, 10 Watts, 121; cannot be disproved, or set aside collaterally by parol evidence, showing a want of jurisdiction. Thus in *Baird v. Campbell*, 4 W. & S. 191, it was held that when such a judgment is good on its face, it cannot be invalidated by proving that no writ or notice has been served upon the defendant.

The result of the whole matter seems to be, that the judgments of all courts are void in the absence of jurisdiction; but that while the jurisdiction of superior courts will be presumed, unless manifestly wanting, no such intendment can be made in the case of inferior courts; and their proceedings are nullities, unless they show jurisdiction. *Bloom v. Burdick*, 1 Hill. 130. When, however, the existence of jurisdiction is once shown or admitted, the judgments of superior and inferior tribunals stand on the same footing, and are equally and absolutely conclusive. *Heard v. Shipman*, 6 Barbour, 445.

*LICKBARROW v. MASON. [*388]

IN B. R. CAM. SCACC. ET DOM PROC.

[REPORTED 2 T. R. 63; 1 H. BL. 357; AND 6 EAST, 21.]

The vendee of goods may, by assignment of the bills of lading to a bona fide transferee, defeat the vendor's right to stop them in transitu, in case of the vendee's insolvency.

The consignor may stop goods in transitu before they get into the hands of the consignee, in case of the insolvency of the consignee: but, if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor, as against such assignee, is divested. There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person.

TROVER for a cargo of corn. Plea, the general issue. The plaintiffs, at the trial before Buller, J., at the Guildhall sittings after last Easter Term, gave in evidence that Turing and Son, merchants at Middleburg, in the province of Zealand, on the 22nd of July, 1786, shipped the goods in question on board the Endeavour for Liverpool, by the order and directions, and on the account of Freeman, of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form *unto order or assigns*: two of which were indorsed by Turing and Son in blank, and sent, on the 22nd July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son; and the remaining one was kept by Holmes. On the 25th of July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to 477*l.* in respect of the price of the goods, which were afterwards accepted *by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs [*389] the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of 520*l.* on the plaintiffs, who accepted them, and have since duly paid them. The plaintiffs are creditors of Freeman to the amount of 542*l.* On the 15th of August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son, hearing of Freeman's bankruptcy on the 21st of August, 1786, indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorising them to obtain possession of the goods on account of, and for the use and benefit of, Turing and Son,

which the defendants received on the 28th of August, 1786. On the arrival of the vessel with the goods at Liverpool, on the 28th of August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of, and to and for the use and benefit of, Turing and Son. The defendants sold the goods on account of Turing and Son, the proceeds whereof amounted to 557*l*. Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs nor Freeman have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

This was argued in last Trinity Term by Erskine in support of the demurrer, and Manly against it; and again, on this day, by Shepherd in support of the demurrer, and Bearcroft, *contra*.

Shepherd, (a) after observing that, as the defendants were the agents of Turing and Son, the general question was to be considered as between the [*390] consignor and the indorsee of the bill of lading, contended, first, that, as between the vendor and vendee of goods, the former has a right to stop the goods in transitu, if the latter become insolvent before the delivery of them. And, secondly, that such right cannot be divested by the act of the vendee's indorsing over the bill of lading to a third person. The first question has been so repeatedly determined, that it is scarcely necessary to cite any authorities in support of it. [The plaintiff's counsel admitted the position.] Then, in order to determine the second, it is material to consider the nature of a bill of lading. A bill of lading cannot by any means be construed into a contract on the part of the consignor to deliver the goods mentioned in it to the consignee; it is only an undertaking by the captain to deliver the goods to the order of the shipper. As between the consignor and consignee, it is a bare authority to the captain to deliver, and to the consignee to receive them. That this is the true nature of a bill of lading appears from all the writers upon mercantile law, as Molloy, Postlethwayte, and Beawes. If it be any other sort of instrument, it must be contended to amount to a contract by the consignor to deliver the goods to the consignee; but no such contract arises upon it, because the consignor is not even a party to it; and no action could be framed upon it against the consignor. Then, if it be only a bare authority to the one to carry, and to the other to receive the goods, the consignee cannot transfer a greater right than he has; neither can the right of the consignor be divested by the act of the consignee. If a bill of lading be a negotiable instrument, and convey an indefeasible property in the goods, it must be so by the custom of merchants; but such custom is not to be found in any of the books treating upon the subject. There are cases which establish a contrary doctrine, in which the courts have held that the rights of the assignees are the same as the rights of the original consignees. It cannot, indeed, be disputed but that, as between the consignee and the indorsee, the indorsement of a bill of lading is a complete transfer of the property which the consignee has in

(a) As the second argument, with the judgment of the court, comprehended every thing that was said upon the subject, the former argument is omitted.

it; but the cases go no further. The case of *Snee and Prescott*(b) is precisely similar to the present. There the bill of lading was indorsed in blank, and afterwards indorsed over by the consignee to his assignees: those assignees were some of *the defendants in that suit, and they stood [*391] in the same situation with the present plaintiffs. In that case, before the goods arrived, and after the indorsement of the bill of lading by the consignee, the consignee having become a bankrupt, the goods were stopped in transitu by order of the consignor, by an indorsement of the bill of lading, which was left with him, to another of the defendants: there Lord Hardwicke decreed that the indorsement did not absolutely transfer the property in the goods, in the event of the consignee's becoming a bankrupt before the arrival of the goods; that as the goods had been stopped in transitu, by order of the consignor, he had a right to detain them till the sum which he was in advance to the consignee on account of them was paid; and that the surplus arising from the produce of the goods should be paid to the indorseees of the consignees. Now, unless Lord Hardwicke had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods, he would have decreed that the indorseees should have been first paid the money which they had advanced upon the credit of the bill of lading, and then that the surplus should have been paid to the consignor; but instead of that, he gave a priority to the consignor. This doctrine is not only laid down in a court of equity, but confirmed in a court of law in the case of *Savignac and Cuff*,(c) where the same question was tried between the same parties as at present. There *Salvetti*, a merchant in Italy, consigned a quantity of skins to *Lingham*, residing in London, and sent him a bill of lading indorsed in blank. *Lingham*, the consignee, indorsed it to *Savignac* for a valuable consideration, at the invoice price, shewing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to *Cuff*, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did; and the action was brought against him by the indorsee of the consignee to recover the value of the goods. *Wallace*, Solicitor-General, there argued that by the indorsement of the bill of lading the property was transferred. But Lord Mansfield was of opinion, that the consignor had a right to stop the goods in transitu in case of the *insolvency of the consignee, [*392] and that the plaintiff, standing in the same situation with the original consignee, had lost his lien. Lord Mansfield was first of opinion, that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground. But in that case, as the consignor had in point of fact received 150*l.* from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled, under those circumstances, to retain all the goods consigned, deducting only the sum which he had actually received for part. Both these cases establish the construction of the bill of lading contended for: and it is to be observed that the verdict in the latter

(b) 1 Atk. 245.

(c) *Sittings at Guildhall*, cor. Lord Mansfield, Tr. 1778.

one was acquiesced in. And indeed to construe it otherwise would be opening a great door to fraud, and would be placing the indorsee of a consignee of a bill of lading in a better situation than the consignee himself in case of his insolvency. Suppose the consignee assign over to a third person, who becomes insolvent before the delivery of the goods, such assignee would then, notwithstanding his insolvency, have a right to get the goods into his possession; for if the act of indorsement absolutely divests the property out of the consignor, he can never afterwards get possession of the goods again; or else this consequence would follow, that vendor would have a right to seize the goods in transitu till the indorsement, by which his right would be divested, and that by the act of insolvency of the indorsee it would be re-vested. This has never been considered to be the same sort of instrument as a bill of exchange; they are not assimilated to each other in any treatise upon the subject: nay, bills of exchange are said to be *sui juris*. In their nature they are different; a bill of exchange always imports to be for value received; but the very reverse is the case with a bill of lading. For in few, if any, instances, is the consignor paid for his goods till delivery; and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading. As to the case of *Wright v. Campbell*,^(d) which may be cited on the other side, it will perhaps be said that the Court awarded a new trial only on the ground [*393] of fraud: but *non constat* that, if there had been no suspicion of fraud, a new trial would not have been *granted. So that the law cannot be considered to have been decided in that case; for when a new trial is moved for, if the facts warrant it, the Court awards a new trial without going into the law arising upon those facts. In such cases the law is still left open to be considered on a different finding; since it would be nugatory to determine the point of law, which may not perhaps be applicable to the facts when found. At the most, there is only an inference of law to be drawn from that case, which is not sufficient to overturn established principles. Besides, this case is distinguishable from that; for there it appeared that the consignee was the factor of the consignor, and as such might bind his principal by a sale.

Bearcroft, contra.—The question is, whether the bona fide indorsement for a valuable consideration of a bill of lading to a third person is not an absolute transfer of the whole property? This question is of infinite importance to the mercantile world, and has never yet been put in a way to receive a solemn decision in a court of law. For at most it has only been considered in a court of equity upon equitable principles, or at *Nisi Prius* in a case the correct state of which is to be doubted. The form of the bill of lading is material to be attended to in determining this case; it is, that the goods are to be delivered "*to order or to assigns*;" therefore, on the very face of the instrument, there is an authority to the captain to deliver them to the consignee *or to his assigns*; and the question here is, who are his *assigns*? As between the consignor and consignee the rule contended for is not now to be disputed, since it has been confirmed by so many authorities; though, perhaps, it were much to be wished that it had never been established; but there will be danger in extending it farther. With

respect to the case of Snee and Prescott, when it is considered who were the parties to the cause, in what court, and upon what principles, it was decided, it will not be found sufficient to determine the present case. The actors, the plaintiffs, were not the innocent purchasers of a bill of lading; they were the assignees of a bankrupt, and prayed by their bill to get possession of the goods, notwithstanding they had not paid for them. But this is a case between the consignor and third persons who have paid a valuable consideration for the goods; that case was likewise *in a court of [*394] equity, where the leading principle is, that he who seeks equity, must first do what is equitable; there too the decision was founded, in some measure, on the custom of the Leghorn trade, and the construction of the statute relating to mutual credit; so that there were united a number of circumstances which, taken all together, induced Lord Hardwicke's decree, and which do not exist in the present case. And it is to be remarked that Lord Hardwicke, thinking it a harsh demand against the consignors, said "he would lay hold on any thing to save the advantage" which the consignors had, by regaining the possession of the goods before they got into the hands of the indorsees of the consignee. Then, as to the case of *Savignac v. Cuff*, that had not even the authority of a *nisi prius* determination; Lord Mansfield gave no opinion upon this question; for though he said there was no doubt but that, as between the vendor and the vendee, the former might seize the goods in transitu, if the latter became insolvent before they were delivered, yet there he stopped; so that the inclination of his mind may be presumed to have been against extending the rule. And, after all, the whole circumstances of that case were left to the consideration of a jury. Since Lord Raymond's time(e) it has been taken to be clear and established law that a general indorsement of a bill of lading does transfer the property. And Holt, C. J., then said "that a consignee of a bill of lading has such a property as that he may assign it over." It has now been contended that the right of the consignor ought not to be divested by the act of the consignee: but it is not by the act of the consignee alone; for the consignor has by his own act enabled the consignee to defeat his right. If he had been desirous of restraining the negotiability of the bill of lading, instead of making a general indorsement, he should have made a special indorsement to his own use. And then the holder of the bill of lading would have been considered as a trustee for the consignor. The custom of merchants has established that the delivery of a bill of lading transfers the whole property. *Evans v. Martlett*, 1 Lord Raym. 271; *Wright v. Campbell*, 4 Burr. 2046; and *Caldwell v. Ball*, ante, 1 vol. [T. R.], 205.(f) Then it has been said, that a bill of lading is not transferable like a bill of exchange: but the custom of merchants has made that transferable [*395] *which in its nature perhaps is not so; and the cases above referred to decide that point. Though a new trial in the case of *Wright v. Campbell* was granted on a suspicion of fraud, and the law was not expressly adjudged; yet from what was said by the Court it may be collected that no new trial would have been awarded, if no fraud had existed; and the opinion of Lord Mansfield, as far as it goes, is expressly in point. But, above all arguments, public convenience ought to have a considerable influence in the

(e) 1 Lord Raym. 271.

(f) Vide *Hibbert v. Carter*, 1 T. R. 745.

decision of this question. By the constant course and the universal consent and opinion of merchants, bills of lading are negotiable; it is highly convenient to trade that they should be so; and if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped: besides, it will be a hardship on an innocent vendee.

Shepherd, in reply.—Though there may be some hardship on the vendee if he be to suffer, yet the hardship would be equally great on the vendor, who would by a decision against him be compelled to deliver up the possession of his goods, though at the time of the delivery he knew that he should not receive any consideration for them. But convenience requires that, if one of these two innocent persons must suffer, the loss should be sustained by the consignee. For when a vendor consigns his goods, he knows that by the general law he has a right to stop them in transitu, if the consignee become insolvent before delivery. But when an indorsee takes an assignment of a bill of lading, he takes it with a knowledge of, and subject to, that general right which the vendor has. Though the case of *Snee v. Prescott* was determined in a court of equity, yet that court could not alter the effect and nature of a legal instrument; which it must have done in that case if the right of an indorsee is to be preferred to the consignor. Suppose A. sends a bill of lading of goods to B., and the goods themselves are in fact never sent out of his possession; if the indorsement of the bill of lading can be said to transfer the property, the indorsee would have a right to recover the goods as against the original consignor, who had never parted with the possession of them. So that the rule contended for would not only divest the right which the consignor has to seize the goods in transitu, but [*396] would also compel him to part with his goods, without receiving any consideration, although he had never relinquished the possession. The meaning of the dictum of Lord Holt, in *Evans v. Martlett*, is only that the consignee may assign over that right which he has. The case of *Caldwell v. Ball* was merely a question between two solvent indorsees, both of whom had an equitable title; and that case only decided that he who first got possession of one of the bills of lading was entitled to the goods; and there, too, the Court determined in favour of him who had the possession.

Ashhurst, J.—As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. If that be so, it will be a strong and leading clue to the decision of the present case. It has been argued, that it would be very hard on a consignor, who had received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true: but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant

place, as between the vendor and the vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*. But as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect, therefore, this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has *made it an indorsable instrument. So it is like a bill of exchange: [*397] in which case, as between the drawer and the payee, the consideration may be gone into, yet it cannot between the drawer and the indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into; though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person; for when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord Mansfield in the case of *Wright v. Campbell* goes the full length of this doctrine: "If the goods be bona fide sold by the factor at sea, (as they may be where no other delivery can be given,) it will be good notwithstanding the statute 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold bona fide, and by the owner's own authority." Now in this case the goods were transferred by the authority of the vendor, because he gave the vendor a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be divested by any subsequent circumstances.

Butler, J.—This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the several authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding my judgment upon, but because I would not have it supposed in any future case that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of *lading: it appears by the books [*398] treating on this subject, that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself, as a testimony against the captain in case of any loose dealing. Now if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth

in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, "in witness the master hath affirmed to four bills of lading, all of this tenour and date." But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? He had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question: and I make the question even more general than was made at the bar, namely, whether a bill of lading is by law a transfer of the property? This question has been argued upon authorities; and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is that of *Snee v. Prescott*. Now, sitting in a court of law, I should think it quite sufficient to say, that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who seeks equity must first do equity. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord Hardwicke has, with his usual caution, enumerated every circumstance which existed in the case: and, indeed, he has been so particular, that if the printed note of it

[*399] be *accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord Hardwicke thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee v. Prescott* that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were generally left to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country. I hope to show, before I have finished my judgment, that there has been no inconsistency in any of his determinations; but if there had, if I could not reconcile an opinion which he had delivered at *Nisi Prius*

with his judgment in this court, I should not hesitate to adopt the latter in preference to the former: and it is but just to say, that no Judge ever sat here more ready than he was to correct an opinion suddenly given at Nisi Prius. First as to the case of *Wright v. Campbell*, that was a very solemn opinion delivered in this court. In my opinion that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord Mansfield has stated so extremely clear that they cannot be mistaken: The first is, what is the case as between the owner of the goods and the factor: the second, *as between the consignor and the assignee of the factor with notice; thirdly, as between the same [*400] parties without notice; and fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that the case of *Wright v. Campbell* was decided by the Judge at Nisi Prius upon the ground that the bill of lading transferred the whole property at law; and when it came before this Court on a motion for a new trial, Lord Mansfield confirmed that opinion; but a new trial was granted on a suspicion of fraud: therefore it is fair to infer, that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of *Wright v. Campbell*, which I took in court, Lord Mansfield said, that since the case in *Lord Raymond*, it had always been held that the delivery of a bill of lading transferred the property at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is that of *Savignac v. Cuff*, the note of which is too loose to be depended upon: but there is a circumstance in that case which might afford ample ground for the decision; for I cannot suppose that Lord Mansfield had forgotten the doctrine which he laid down in this court in *Wright v. Campbell*. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods: but in *Savignac v. Cuff*, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and if it appeared to him that *Selvetti* had not been paid for the goods, that might have been a ground for the determination. The case of *Hunter v. Beal*(a) does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With respect to the case of *Stokes v. La Riviere*,(b) perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case, therefore, does not impeach the doctrine laid down in *Wright v. Campbell*. It has been argued at the bar, that it is impossible for the *holder of a bill of lading to bring [*401] an action on it against the consignor: perhaps that argument is well founded: no special action on the bill of lading has ever been brought; for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action be brought by a vendor against

(a) *Sittings after Trin. 1785*, at Guildhall, before Lord Mansfield, C. J.

(b) *11il. 25 G. 3.*

a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed, that all the cases upon the subject—*Evans v. Martlett*, *Wright v. Campbell*, and *Caldwell v. Ball*, and the universal understanding of mankind—preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of *Snee v. Prescott*; for if a man has bought goods and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that is a bad argument in a court of law; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain, of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the Court.

Grose, J.—After this case has been so elaborately spoken to by my brethren, it is not necessary for me to enter fully into the question, [*402] as I am of the same opinion with them. *But I think that the importance of the subject requires me to state the general grounds of my opinion. I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does. With respect to the question as between the original consignor and consignee, it is now the clear, known, and established law that the consignor may seize the goods in transitu, if the consignee become insolvent before the delivery of them. But that was not always the law. The first case of that sort was that of *Wiseman v. Vandeputt* in Chancery, (a) when, on the first hearing, the Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees; and it was then determined in a court of law that it did: but the Court of Equity thought it right to interpose and give relief; and since that time it has always been considered, as between the original parties, that the consignor may seize the goods before they are actually delivered to the consignee, in case of the insolvency of the consignee. But this is a question between the consignor and the assignee of the consignee, who do not stand in the same situation as the original parties. A bill of lading carries credit with it; the consignor by his indorsement gives credit to the bill of lading, and on the faith of that, money is advanced. The first

case that I find where an attempt was made to introduce the same law between the consignor and the indorsee of the consignee, is that of Snee v. Prescott; but as my brother Buller has already made so many observations on that case, it would be but repetition in me to go over them again, as I entirely agree with him in them all, as well as in those which he made on the other cases. Therefore I am of opinion that there should be judgment for the plaintiff.

Judgment for the plaintiff.(a)

MASON AND OTHERS V. LICKBARROW AND OTHERS, IN THE EXCHEQUER CHAMBER, IN ERROR.

Held in Cam. Scacc. that where the consignee of goods becomes insolvent, the consignor may stop them in transitu before the consignee gains possession. In such cases also the consignor may stop the goods in transitu, though the consignee assign the bills of lading to a third person for a valuable consideration; the right of the consignor not being divested by the assignment. But this judgment was reversed, and the latter point is now settled otherwise.

The defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that Court was there delivered by

Lord Loughborough.—This case comes before the court on a demurrer to the evidence; the general question, *therefore, is, whether the facts offered in evidence by the plaintiffs in the action are sufficient to [*403] warrant a verdict in their favour?

The facts are shortly these: On the 22nd of July, 1786, Messrs. Turings shipped on board the ship Endeavour, of which Holmes was master, at Middleburgh, to be carried to Liverpool, a cargo of goods by the order and directions and on the account of Freeman of Rotterdam, for which, of the same date, bills of lading were signed on behalf of the master, to deliver the goods at Liverpool, specified to be shipped by Turings to order or to assigns. On the same 22d of July, two of the bills of lading indorsed in blank by Turings, were transmitted by them, together with an invoice of the goods, to Freeman at Rotterdam, and were duly received by him, that is, in the course of post, one of the bills being retained by Turings. I take no notice of there being four bills of lading, because on that circumstance I lay no stress. On the 25th of July, bills of exchange for a sum of 477*l.*, being the price of the goods, were drawn by Turings, and accepted by Freeman at Rotterdam; and Freeman on the same day transmitted to the plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received from Turings, in order that the goods might be sold by them on his account; and of the same date drew upon them bills to the amount of 520*l.*, which were duly accepted, and have since been paid by them; and for

(a) This judgment was afterwards reversed in the Exchequer Chamber. Vide Mason v. Lickbarrow, *infra*. But the record being afterwards removed into the House of Lords a venire de novo was awarded in June, 1793. Vide Post, p. 414.

which they have never been reimbursed by Freeman, who became a bankrupt on the 15th of August following. The bills accepted by Freeman, for the price of the goods shipped by Turings, had not become due on the 15th of August, but on notice of his bankruptcy, they sent the bill of lading which remained in their custody to the defendants at Liverpool, with a special indorsement to deliver to them and no other; which the defendants received on the 28th of August, 1786, together with the invoice of the goods and a power of attorney. The ship arrived at Liverpool on the 28th of August, and the goods were delivered by the master, on account of Turings, to the defendants, who, on demand and tender of freight, refused to deliver the same to the plaintiffs.

The defendants, in this case, are not stake-holders, but they are in effect [404] the same as Turings, and the possession *they have got is the possession of Turings. The plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claim of him or of his assignees. If they have acquired a legal right, they have acquired it honestly; and if they have trusted to a bad title, they are innocent sufferers. The question then is, whether the plaintiffs have a superior legal title to that right which, on principles of natural justice, the original holder of goods not paid for has to maintain that possession of them, which he actually holds at the time of the demand?

The argument, on the part of the plaintiffs, asserts that the indorsement of the bill of lading by the Turings is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt: that Freeman could assign over that property, and that, by delivery of the bill of lading to the plaintiffs for a valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the defendant it is argued, that the bill of lading is not in its nature a negotiable instrument; that it more resembles a *chose in action*; that the indorsement of it is not an assignment that conveys an interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and, therefore, it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading should be clearly defined, I think it necessary to state my ideas of its nature and effect:—

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment; 2 Lord Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the ship-master acquires a special property to support that possession which *he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the

bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank, the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master; and, in this respect, I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the ship-master, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or a factor. Mere possession, without a just title, gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. The indorsement of a bill of lading differs from the assignment of a *chose in action*, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on ship-board, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue, if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271 was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract: and I assent to the *dictum*, that he might assign over his right. But the question remains, What right passes by the first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to *take the one without redemption, and [*406] the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration without notice, is not affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt, which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules

as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases, ^(a) that the received opinion of merchants was against their being so negotiable. And unless there was a clear, established, general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law would lose its credit with the rest of the commercial world. For the immediate consequence would be to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion ^{*}of collusion, and leads to a dangerous and false credit, at [*407] the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which goods are sold or assigned? In the case of *Hartop v. Hoare*, ^(b) jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn, the goods of his consignor. *Patterson v. Tash*, 2 Str. 1178. The person, therefore, who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet, in this case, the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing, that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him; a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others.

The conclusions which follow from this reasoning, if it be just, are—1st. That an order to direct the delivery of goods indorsed on a bill of lading is not equivalent, nor even analogous, to the assignment of an order to pay money by the indorsement of a bill of exchange. 2ndly. That the negotiability of bills, and promissory notes, is founded on the custom of merchants, and positive law; but, as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3rdly. That [*+08] it is, therefore, not negotiable as a bill, but assignable; and ^{*}passes such right, and no better, as the person assigning had in it.

This last proposition I confirm by the consideration, that actual deli-

(a) *Snee v. Prescott*, 1 Atk. 245: *Fearon v. Bowers*, post.

(b) 2 Str. 1187. 1 Wils. 8.

very of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer, that the mere indorsement can in no case convey an absolute property. It may, however, be said, that admitting an indorsement of a bill of lading does not in all cases import a transfer of the property of the goods consigned, yet where the goods, when delivered, would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of a man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for may retain the possession against the vendee; not by aid of any equity, but on grounds of law. Our oldest books^(a) consider the payment of the price (day not being given) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he *had brought an action on the contract, for the non-delivery. *Snee v. Prescott*, 1 Atk. 245. The sale is not executed [*409] before delivery: and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*. The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at Guildhall, after the last Trinity Term, it appeared in evidence, that one Bowering had bought a cask of indigo of Ver-

(a) See Hob. 41, and the year-book there cited.

rulez and Co. at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez having information of Bowering's insolvency before the ship sailed from the Texel summoned Tulloh the ship-master before the court at Amsterdam, who ordered him to sign other bills of lading, to the order of Verrulez. Upon the arrival of the ship in London, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves particular attention, for the judges of the court at Amsterdam are merchants, of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. *Snee v. Prescott*, though in a court of equity, is professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of [*410] law; and it is an authority, not only in support of the right of the owner unpaid to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of *Fearon v. Bowers*,^(a) tried before Lord

(a) *Fearon v. Bowers*, Guildhall, March 28, 1753, coram Lee, C. J.

Detinue against the master or captain of a ship. On the general issue pleaded, the case appeared to be, that one Hall, of Salisbury, had written to Askell & Co., merchants at Malaga, to send him 20 butts of olive oil, which Askell accordingly bought, and shipped on board the ship *Tavistock*, of which the defendant was commander, who signed three bills of lading acknowledging the receipt of the goods, to be delivered to the order of the shipper. In the bills was the usual clause—that one being performed, the other two should be void.

The goods being thus shipped, Askell sent an invoice thereof, and also one of the bills of lading, to Hall, indorsed by Askell, to deliver the contents to Hall; and Askell at the same time sent to Jones, his partner in England, a bill of exchange drawn on Hall for the amount of the price of the oil: and also another of the bills of lading indorsed by Askell to deliver the contents to Jones. The bill of exchange was presented to Hall, but not being paid by him it was returned protested; whereupon Jones, on the 1st of September, 1752 (a day or two after the ship arrived,) applied to the defendant to deliver the oils to him, and having produced his bill of lading, the defendant promised to deliver them accordingly. But the ship not being reported to the custom-house, the oils could not be then delivered; and before they were delivered, the plaintiff, on the 3rd of September, produced the bill of lading sent to Hall, with an indorsement thereon by Hall to deliver the contents to the plaintiff, and also the invoice, upon the credit of which he had advanced to Hall 200*l*. Notwithstanding this, the defendant afterwards delivered the oils to Jones, and took his receipt for them on the back of the bill of lading.

For the plaintiff it was contended, that the bill of lading indorsed to Hall, and by him to the plaintiff, had fixed the property of the goods in the plaintiff. That the consignee of a bill of lading has such a property that he may assign it over; *Evans v. Martlett*, 1 Lord Raym. 271. There it is laid down, if goods are by bill of lading consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special to deliver to A. for the use of B., B. ought to bring the action; but if the bill be general, and the invoice only shows they are upon the account of B., A. ought to bring the action, for the property is in him, and B. has only a trust; *per totam curiam*. Holt, C. J., said the consignee of a bill of lading has such a property that he may assign it over; and Shower said, it had been adjudged so in the Exchequer. It has been further insisted, that the plaintiff had advanced the 200*l*. on the credit of the bill of lading, in the course of trade, and no objection was made that the oils had been paid for; for that would prove too much, namely, that the bill of lading was not negotiable. And the indorsement was compared to the indorsement of a bill of exchange, which is good, though the bill originally was obtained by fraud. Merchants were examined on both sides, and seemed to agree that the indorsement of a bill of lading vests the property; but that the original consignor, if not paid for the goods, had a right, by any means that he could, to

Chief Justice Lee, is a case at law, and it is to the same effect as *Snee v. Prescott*. So also is the case of the Assignees of *Burgall v. Howard*,^(b) before Lord Mansfield. The right of the consignor to stop the goods is here considered as a legal right. It will make no difference in the case whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended that the right ceases as against a person claiming under the consignee for a valuable consideration, and without notice that the price is unpaid. To support this position, it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith, and unconscionable. If the consignor had no legal title, the question between him and the bona fide purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods in transitu as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determina-

stop their coming to the hands of the consignee till paid for. One of the witnesses said, he had a like case before the Chancellor, who upon that occasion said, he thought the consignor had a right to get the goods in such a case back into his hands in any way, so as he did not steal them.

It also appeared by the evidence of merchants and captains of ships, that the usage was, where three bills of lading were signed by the captain, and indorsed to different persons, the captain had a right to deliver the goods to whichever he thought proper; that he was discharged by a delivery to either with a receipt on the bill of lading, and was not obliged to look into the invoice or consider the merits of the different claims.

Lee, C. J., in summing up the evidence, said that, to be sure, nakedly considered, a bill of lading transfers the property, and a right to assign that property by indorsement: that the invoice strengthens that right by showing a farther intention to transfer the property. But it appeared in this case, that Jones had the other bill of lading to be as a curb on Hall, who in fact had never paid for the goods. And it appeared by the evidence, that according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury therefore were directed by the Chief Justice to find a verdict for the defendant, which they accordingly did.

(b) *Assignees of Burghall, a bankrupt, v. Howard.*

At Guildhall sittings after Hil. 32 G. 2, coram Lord Mansfield.

One Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard, the defendant, *was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered, on behalf of Bromley, not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as a carrier.

Lord Mansfield was of opinion that the plaintiffs had no foundation to recover; and said, he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property.

The plaintiffs were nonsuited.

tions been treated as a mere equitable claim in cases between him and the consignee. To examine the force of this assertion, it is necessary to take a review of the several determinations.

The first is the case of *Wright v. Campbell*, 4 Burr. 2046, on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at Nisi [*412] Prius, on the *argument of which the Court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing in the report of it an opinion of Lord Mansfield, that the right of the consignor to stop the goods cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes, 1st, that as against the factor, the owner may retain the goods; 2ndly, that a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3rdly, that a bona fide purchaser from the factor shall have a right to the delivery of the goods, because they were sold bona fide, and by the owner's own authority. If the owner of the goods entrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the Court, if the plaintiffs in the action could maintain, that Turings and Co. had sold to them by the intervention of Freeman, and were therefore bound *ex contractu* to deliver the goods. Lord Mansfield's opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favour of the consignor, as delivered in two cases at Nisi Prius; (a) *Savignac v. Cuff* in 1778, and (b) *Stokes v. La Riviere* in 1785. Observations are made on these cases, that they are governed by particular circumstances; and undoubtedly [*413] when there is not *an accurate and agreed state of them, no great stress can be laid on the authority. The case of *Caldwell v. Ball* (c) is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of *Hibbert v. Carter* (d) was also cited on the same side, not as having decided any question upon the consignor's right to stop the goods, but as establishing a position that by the indorsement of the bill of lading, the property was so completely trans-

(a) Ante, p. 391.

(c) 1 Term Rep. B. R. 205.

(b) Ante, p. 400.

(d) 1 Term Rep. B. R. 745.

ferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and, undoubtedly, if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just: for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. The case, therefore, has no application to the present question. And from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods in transitu, before the case now brought before this Court. When a point in law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion, upon loose reports of incidental arguments. The rule, therefore, which the Court is to lay down in this case, will have the effect, not to disturb, *but to settle the notions of the commercial part of this country, on a point of very great importance, as it regards the [414] security and good faith of their transactions. For these reasons we think the judgment of the Court of King's Bench ought to be reversed.

The following account of the further proceedings in this case is given by Mr. East, in a note to his Reports, vol. 2, p. 19:—

This case first came on upon a demurrer to evidence, on which there was judgment for the plaintiff; this Court holding, that though the vendor of goods might, as between himself and the vendee, stop them in transitu to the latter, in case of his insolvency, not having paid for them; yet that if the vendee, having in his possession the bill of lading indorsed in blank by the vendor, before such stopping in transitu, indorse and deliver it to a third person for a valuable consideration and without notice of the non-payment, the right of the vendor to stop in transitu is thereby divested as against such bona fide holder of the bill. This judgment was reversed upon a writ of error in the Exchequer Chamber; where it was considered that a bill of lading was not a negotiable instrument, the indorsement of which passed the property *proprio vigore*, like the indorsement of a bill of exchange; though to some purposes it was assignable by indorsement, so as to operate as a discharge to the captain who made a delivery bona fide to the assignee. 1 H. Black. 357. The latter judgment was in its turn reversed in the House of

Lords in T. 33 G. 3, and a *venire facias de novo* directed to be awarded by B. R. 5 Term Rep. 367, and 2 H. Black. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record MS. The very elaborate opinion delivered by Mr. Justice Buller, upon the principal question before the House, a copy of which he afterwards permitted me to take, I shall here subjoin, as it contains the most comprehensive view of the whole of this subject which is any where to be found. A *venire facias de novo* having been accordingly awarded by B. R., a special verdict was found upon the second trial, containing in substance the same facts as before; with this addition, that the jury found, that by the custom [*415] of merchants, bills of lading for the delivery of goods to the order *of the shipper or his assigns, are, after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person: and that by such indorsement and delivery or transmission, the property in such goods is transferred to such other person. And that by the custom of merchants, indorsements of bills of lading in blank may be filled up by the person to whom they are so delivered or transmitted, with words ordering the delivery of the goods to be made to such person: and according to the practice of merchants, the same, when filled up, have the same operation and effect as if it had been done by the shipper. On this special verdict, the Court of B. R., understanding that the case was to be carried up to the House of Lords, declined entering into a discussion of it; merely saying, that they still retained the opinion delivered upon the former case, and gave judgment for the plaintiffs. 5 Term Rep. 683.

LICKBARROW AND ANOTHER V. MASON AND OTHERS, IN ERROR.—DOM.
PROC. 1793.

Buller, J.—Before I consider what is the law arising on this case, I shall endeavour to ascertain what the case itself is. It appears that the two bills of lading were indorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at Liverpool, be taken possession of, and sold by the plaintiffs, on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the words, "to be so sold by the plaintiffs on Freeman's account," make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange, the effect of a blank indorsement is too universally known to be doubted; and, therefore, on that head I shall only mention the case of *Russell v. Langstaffe*, Dougl. 496, where a man indorsed his name on copper-plate checks, made in the form of promissory notes, but in blank, *i. e.* without any sum, date, or time of payment: and the Court held, that the indorsement on a blank note is a letter of credit for [*416] an *indefinite sum; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your Lordship's bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a particular person by name. In the

case of *Snee v. Prescott*, Lord Hardwicke thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up; and upon that ground part of his decree was founded. But that I conceive to be a clear mistake. And it appears from the case of *Savignac v. Cuff*, (of which case I know nothing but from what has been quoted by the counsel, and that case having occurred before the unfortunate year 1780,^(a) no further account can be obtained,) that though Lord Mansfield at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In *Solomons v. Nyssen*, Mich. 1788, 2 Term Rep. 674, the bill of lading was to order or assigns, and the indorsement in blank; but the Court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another, not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, what difference do the words "to be sold by the plaintiffs on Freeman's account," make in the present case? It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are not found in the bill of lading itself: and, therefore, they cannot alter the nature and construction of it. I say they were not in the bill of lading itself; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was received, and in that there was no restriction or qualification whatever; but it appeared by some other evidence, I suppose by some letter of advice, that the goods were so sent, to be so sold by the plaintiffs on Freeman's account. Supposing that the plaintiffs are to be considered as factors, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for those goods *afterwards, will not put Turing in a better condition in this cause; for a factor has not only a right to keep [*417] goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account.† The truth of the case, as I consider it, is, that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay themselves the 520*l.* advanced in bills out of the produce, and so be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as 510*l.*, Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But I hold that a factor who has the legal property in goods, can never have that property taken from him, till he is paid the uttermost farthing which is due to him. *Kruger v. Wilcocks*, Ambler 252.

This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any question which ever can arise. The first is, whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, whether the defendant, who stands in the place of the original owner, had a right to stop the goods

(a) Lord Mansfield's papers were then burnt, together with his house, in the riots of that period.

† Acc. *Houghton v. Mathews*, 3 B. & P. 488; *Mann v. Shifner*, 2 East, 529; *Hudson v. Grainger*, 5 B. & Ad. 27; *Drinkwater v. Goodwin*, Cowp. 251.

in transitu? And as to the first, every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee. In 1690 it was so decided in the case of *Wiseman v. Vandeputt*, 2 Vern. 203. In 1697, the Court determined again in *Evans v. Martlett*, that the property passes by the bill of lading. That case is reported in 1 Lord Raym. 271, and in 12 Mod. 156; and both books agree in the points decided. Lord Raymond states it to be, that if goods by a bill of lading are consigned to A., A. is the owner, and must bring the action: but if the bill be special, to be delivered to A., to the use of B., B. ought to bring the action: but if the bill be general to A., and the invoice only shows that they are on account of B. (which I take to be the present case) A. ought always to bring the action; for the property is in him, and B. has only a trust. And Holt, C. J., says the consignee of a bill of lading has such a property as that he may assign [*418] it over; and Shower said it had been so adjudged *in the Exchequer. In 12 Mod. it is said that the Court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another; that is, where on the face of the bill it imports to be for another. In *Wright v. Campbell*, in 1767, (4 Burr. 2046,) Lord Mansfield said, "If the goods are bona fide sold by the factor at sea (as they may be where no other delivery can be given) it will be good notwithstanding the stat. 21 Jac. 1. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold bona fide, and by the owner's own authority." His lordship added (though it is not stated in the printed report) that the doctrine in Lord Raymond was right, that the property of goods at sea was transferrable. In *Fearon v. Bowers*, in 1753, Lord Chief Justice Lee held, that a bill of lading transferred the property, and a right to assign that property by indorsement: but that the captain was discharged by a delivery under either bill. In *Snee v. Prescott*, in 1743, (1 Atk. 245,) Lord Hardwicke says, "Where a factor, by the order of his principal, buys goods with his own money, and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the principal, in such case the factor cannot countermand the bill of lading; but it passes the property of the goods fully and irrevocably to the principal." Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits, too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In *Caldwell v. Ball*, in 1786, (1 Term Rep. 205,) the Court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In *Hibbert v. Carter*, in 1787, (1 Term Rep. 745,) the Court held again that the indorsement and delivery of the bill of lading to a creditor *prima facie* conveyed the whole property in the goods from the time of its delivery. The case of *Godfrey v. Furzo*, 3 P. Wms. 185, was quoted on behalf of the defendant. A merchant at Bilbao sent goods from thence to B., a merchant [*419] in London, for the use of B., and drew bills on B. for the money. The goods arrived *in London, which B. received, but did not pay

the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchant in London, praying that the goods might be accounted for to him, and insisting that he had a lien on them till paid.

Lord Chancellor says,—“When a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy.” The whole of this case is clear law; but it makes for the plaintiffs and not the defendants. The first point is this very case; for the bill of lading here is generally to the plaintiffs, and therefore on their account; and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there stated is, what is the law in the case of a pure factor, without any demand of his own? Lord King says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance, or under acceptances on account of the goods, is simply and merely a servant or agent; for which no authority has been, or, as I believe, can be, produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear.—So far from the *contrary appearing here, when it was thought proper to allege on this demurrer that the [*420] price of the goods was not paid, it is expressly so stated; for the demurrer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and mere factor, who has neither advanced nor engaged in any thing for his principal, the principal has a right at all times to take back his goods at will: whether they be actually in the factor's possession, or only on their passage, makes no difference; the principal may countermand his order: and though the property may remain in the factor till such countermand, yet from that moment the property reverts in the principal, and he may maintain *trover*. But in the present case the plaintiffs are not that mere agent or servant; they have advanced 510*l.*, on the credit of those goods, which at a rising market were worth only 557*l.*; and they have beside, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the bar, that the property never passed out of Turing: and to prove it, Hob. 41 was cited. In answer to this I must beg leave to say, that

the position in *Hobart* does not apply; because there no day of payment was given; it was a bargain for ready money; but here a month was given for payment. And in *Noy's Maxims*, 87, this is laid down; "If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." *Thorpe v. Thorpe*, Rep. temp. Holt, 96, and *Brice v. James*, Rep. temp. Lord Mansfield, S. P. So Dy. 30 and 76. And in *Shep. Touch.* 222, it is laid down, that "if one sell me a horse, or anything for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof; and I may have an action for the thing, and the seller for his money." Thus stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster-hall, that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is [*421] no judgment, *nor even a dictum, if properly understood, which impeaches this long string of cases. On the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendant to show that they have superior equity which bears down the letter of the law; and which entitles them to retain the goods against the legal right of the plaintiffs, or they have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against; for the noble Lord who pronounced that judgment, emphatically observed in it, "that the plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them.

But the second question made in the case is, that however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods in transitu, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods in transitu, and on the nature and principle of liens. 1st, Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights.† They are qualified rights, which in given cases may be exercised over the property of another: and it is a contradiction in terms to say a man has a lieu upon his own goods, or right to stop his own goods in transitu. If the goods be his, he has a right to the possession of them whether they be in transitu or not: he has a right to sell or dispose of them as he pleases, without the option of any other person:

† See the distinction drawn by Bayley, J., between the right of possession and that of property, post, 432; in notis.

but he who has a lien only on goods, has no right so to do; he can only retain them till the original price be paid: and *therefore if goods are sold for 500*l.*, and by a change of the market, before they [*422] are delivered, they become next day worth 1000*l.*, the vendor can only retain them till the 500*l.* be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the 500*l.*—2ndly, Liens at law exist only in cases where the party entitled to them has the possession of the goods: and if he once part with the possession after the lien attaches, the lien is gone.† 3rdly, The right of stopping in transitu is founded wholly on equitable principles, which have been adopted in courts of law; and as far as they have been adopted, I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self-evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods: but, by the general usage in trade, he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In *Snee v. Prescott*, Lord Hardwicke says that which not only applies to the case of liens, but to the right of stopping goods in transitu under circumstances similar to the case in judgment: for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So in *Lempriere v. Pasley*, (2 Term R. 485,) the Court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing in transitu to the extent contended for by the defendants; but before I go into them, with your lordships' permission, I will state shortly the facts of the case of *Snee v. Prescott*, with a few more observations upon it. The doctrine of stopping in transitu owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not as *the counsel for the defendants would make it, whether the property [*423] vested under the bill of lading? for that was considered as being clear: but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment? or, in other words, divest the property which was vested in the consignee? *Snee and Baxter*, assignees of *John Tollet v. Prescott and others*, 1 Atk. 245. Tollet, a merchant in London shipped to *Ragueneau and Co.*, his factors at *Leghorn*, serges to sell, and to buy double the value in silks; for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board *Dawson's ship*, marked T; Dawson signed three bills of lading, to deliver at London to factors consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not

† See *Levy v. Barnard*, 8 Taunt. 149.

paid, and Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to Prescott, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which Prescott got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them: and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st. That the factors should be paid; 2nd, the pawnees; and 3rd, the surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for, be thought to have any weight, I answer, 1st. That such provision was founded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indorsement. Lord Hardwicke considered the legal property in that case to remain in the consignor, and, [*424] *therefore, gave him the preference. 2ndly. That whatever might be the law, the mere fact of the consignor's being in possession was a sufficient reason for a court of equity to say, We will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwicke expressly said—"This Court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half-price which they have laid down upon them. He who seeks equity must do equity; and, if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will show that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances." The case of *Snee v. Prescott* is miserably reported in the printed book: and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way: and, perhaps, even himself, by being very diffuse, has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. John Cox, who was counsel in the cause; and it seems to me that, on taking the whole of the case together, it is apparent, that, whatever might have been said on the law of the case in a most elaborate opinion, Lord Hardwicke decided on the equity alone, arising out of all the particular circumstances of it, without meaning to settle the principles of law on which the present case depends. In one part of his judgment he says, that in strictness of law, the property vested in Tollet at the time of the purchase: "but, however that may be," says he, "this Court will not compel the factors to deliver the goods without being disbursed what they have laid out." He begins by saying, "the demand is as harsh as can possibly come into a court of equity." And in another part of his judgment he says, "Suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this Court would not suffer them to take out execution for the whole value, but would

oblige them to account." But further, as to the right of seizing or stopping the goods *in transitu*, I hold, that no man who has not equity on his side *can have that right. I will say with confidence, that no case or authority till the present judgment, can be produced to show that he has. But, on the other hand, in a very able judgment delivered by my brother Ashurst, in the case of Lempriere v. Paisley, in 1788, 2 Term Rep. 485, he laid it down as a clear principle, that, as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason: for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him, has equity in his favour: and if he have law and equity both with him, he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion, delivered in this house by the learned and respectable judge, (a) who has often had the honour of delivering the sentiments of the judges to your lordships, when you are pleased to require it, so lately as the 14th of May, 1790, in the case of Kinloch v. Craig, 3 Term Rep. 787, it was laid down that the right of stopping goods *in transitu* never occurred but as between vendor and vendee; for that he relied on the case of Wright v. Campbell, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to show that it is not the case of vendor and vendee. The terms vendor and vendee necessarily mean the two parties to a particular contract: those who deal together, and between whom there is privity in the disposition of the things about which we are talking. If A. sell a horse to B., and afterwards sell him to C., and C. to D., and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A. and D. together as vendor and vendee, for A. never sold to D., nor did D. ever buy of A. These terms are correlatives, and never have been applied, nor ever can be applied, in any other sense than to the persons who bought and sold to each other. The defendants, or Turing, in whose behalf and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the forcible words of *the noble judge who pronounced the judgment in question,) represent Freeman so as to be answerable [*426] for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness, without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment put an end to all questions about the right of seizing *in transitu*. Two other cases were mentioned at the bar which deserve some attention. One is the case of the assignees of Burghall v. Howard (b) before Lord Mansfield at Guildhall, in 1759; where the only point decided by Lord Mansfield was, that if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the con-

(a) Eyre, then Lord C. B.
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(b) I H. Bla. 365, n. and ante, p. 410, n. a.

signee or his assignees. This was most clearly right; but it does not apply to the present case; for when he made use of the word assignees, he undoubtedly meant assignees under a commission of bankruptcy, like those who were then before him, and not persons to whom the consignee sold the goods; for in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord Mansfield added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods *in transitu* is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property, are all true; and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered, than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size: and when we find him in other instances adopting [*427] the language and opinion of Lord Chief Justice Holt, and saying, that since the cases before him it had always been held, that the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even the case of *Savignae v. Cuff*, (a) of which we have no account besides the loose and inaccurate note produced at the bar, as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord Mansfield answered, the plaintiff has lost his lien, he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so; which, as stated, was no answer to the question made. But I think enough appears on that case to show the grounds of the decision, to make it consistent with the case of *Wright v. Campbell*, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice, that *Lingham* had not paid for the goods; and if so, then, according to the case of *Wright v. Campbell*, he could only stand in *Lingham's* place. But the necessity of recurring to the question of notice strongly proves, that, if there had been no such notice, the plaintiff, who was the assignee of *Lingham* the consignee, would not have stood in *Lingham's* place, and the consignor could not have seized the goods *in transitu*; but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration; because it shows how far only the right of seizing *in transitu* extends, as between the consignor and consignee. The

(a) Cited in 2 Term Rep. 66.

plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods; but the consignee had paid 150*l.* on account of them. Upon the insolvency of the consignee, the consignor seized the goods in transitu; but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of trover, which could not have been sustained but on the ground that the property was *vested in the consignee, and could not be seized in transitu as against him. If the legal property had remained [*428] in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods? But it was holden that he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee: but though the property was in the consignee, yet, as I stated to your lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee: and upon paying or tendering that money, and demanding the goods, the property would have re-vested in him, and he might have maintained trover for them: but admitting that the consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover; and in ascertaining them, regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than for 150*l.* He was entitled to no more, the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as the case of *Wiseman v. Vandeput*; where, though it was determined that the legal property in the goods, before they arrived, was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him: but for what was due, the Court directed an account; and if anything were due from the Italians to the Bonnells, that should be paid to the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case: for they have the legal property in the goods; and, therefore, if anything be due to them, even in equity, that must be paid before any person can take the goods from them: and 520*l.* was due to them, and has not been paid.

After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped in transitu, after they have been sold and paid for, or money advanced upon them bona fide, and *without notice, I do not conceive that the case is open to any arguments of policy or convenience; but if it should be [*429] thought so, I beg leave to say, that in all mercantile transactions, one great point to be kept uniformly in view is, to make the circulation and negotiation of property, as quick, as easy, and as certain as possible. If this judgment stand, no man will be safe either in buying or in lending money upon goods at sea. That species of property will be locked up; and many a man who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would receive a check which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be

bought? There is nothing but the chance of the market; and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, nor a right to seize in transitu. The great advantage which this country possesses over most, if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports: but amidst all these indulgences, the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London:—A cargo of goods of the value of 2000*l.* is consigned to a merchant in London; and the moment they are shipped, the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accepts the bills, he becomes absolutely and unconditionally liable; if he refuses them, he disgraces his correspondent, and loses his custom directly. Yet to engage for 2000*l.*, without any security from the drawer, is a bold measure. The goods may be [*430] lost at sea; and then the merchant here is left to recover his money against the *drawer as and when he may. The question then with the merchant is, how can I secure myself at all events? The answer is, I will insure; and then if the goods come safe, I shall be repaid out of them; or, if they be lost, I shall be repaid by the underwriters on the policy: but this cannot be done unless the property vest in him by the bill of lading; for otherwise his policy will be void for want of interest;† and an insurance, in the name of the foreign merchant, would not answer the purpose. This is the case of the merchant who is wealthy, and has the 2000*l.* in his banker's hands, which he can part with, and not find any inconvenience in so doing; but there is another case to be considered, viz.—Suppose the merchant here has not got the 2000*l.*, and cannot raise it before he has sold the goods?—the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in *Snee v. Prescott*; and upon that idea, he has hitherto had no difficulty in doing so: but if he have not the property, nobody will buy of him; and then his trade is undone. But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, that barilla is shipped for a merchant here, at a time when there has been a dearth of that commodity, and it produces a profit of 25*l.* per cent, whereas, upon an average, it does not produce above 12*l.* The merchant has advices that there is a great quantity of that article in Spain, intended for the British market; and when that arrives, the market will be glutted, and the commodity much reduced in value. He wishes, therefore, to sell it

† St. 19 G. 3, cap. 37, sect. 1.

immediately whilst it is at sea, and before it arrives; and the profit which he gets by that is fair and honourable: but he cannot do it if he have not the property by the bill of lading. Besides, a quick circulation is the life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall, I am confident that, if the goods in question be retained from the plaintiff without *repaying him what he has advanced on the credit of them, it will be mischievous to the [*431] trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and public policy, forbid it. To sum up the whole in very few words: the legal property was in the plaintiff; the right of seizing in transitu is founded on equity. No case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it; and the law, where it adopts the reasoning and principles of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your lordships, as my humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

Ashurst and Grose, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

Eyre, C. J., Gould, J., Heath, J., Hotham, B., Perryn, B., and Thomson, B., contra.

This case stood over from time to time in the House: and was postponed, in order to consider a question which arose in another case of Gibson v. Minet, upon the nature and effect of a demurrer to evidence, which was thought to apply also to the present case; and, finally, the House reversed the judgment of the Exchequer Chamber, which had been given for the defendant; and ordered the King's Bench to award a *venire de novo* (upon the ground that the demurrer to evidence appeared to be informal upon the record) and that the record be remitted.

This celebrated case involves two important propositions. The former is, that *the unpaid vendor may, in case of the vendee's insolvency, stop the goods sold, in transitu*. The latter, that *the right to stop in transitu may be defeated by negotiating the bill of lading with a bona fide indorsee*.

The right of a vendor to stop in transitu is bestowed upon him in order to prevent the injustice which would take place, if, in consequence of the vendee's insolvency, while the price of the goods was yet unpaid, they were to be seized upon in satisfaction of his liabilities, and so the

property of one man were to be disposed of in payment of the debts of another. The doctrine was first introduced in Equity by the cases of Wiseman v. Van-deput, 2 Vern. 203; Snee v. Prescott, 1 Atk. 246, and D'Aquila v. Lambert, 2 Eden, 75, Amb. 39. It has since been repeatedly discussed in courts of common law; and it appears strange, that though stoppage in transitu has been for many years one of the most practically [*432] important branches of commercial law, yet its precise effect upon the contract of sale has never as yet been ascertained. [A highly interesting dis-

quisition upon its history and character will be found in Lord Abinger's judgment in *Gibson v. Carruthers*, 8 Mee. & W. 336.]

The question whether stoppage in transitu rescind the contract of sale altogether, or only puts the vendor in possession of a lien on the goods defeasible [*432a] on payment*of the price agreed on, has often been matter of controversy, particularly in *Clay v. Harrison*, 10 B. & C. 99, and was said in *Stephens v. Wilkinson*, 3 B. & Ad. 323, to be still undetermined. See also *Wilmbursh v. Bowker*, 5 Bing. N. C. 547; [in error, 8 Scott, N. R. 570; *Gibson v. Carruthers*, 8 Mee. & W. 321; *Wentworth v. Outhwaite*, 10 Mee. & W. 451;] and *Edwards v. Brewer*, 2 Mee. & W. 375. Lord Kenyon in *Hodgson v. Loy*, 7 T. R. 445, was of opinion that it was not a rescission of the sale, but was (to use his lordship's own words) "an equitable lien adopted by the law for the purpose of substantial justice," whence it was held to follow that part payment of the price by the vendee would not destroy the right to stop in transitu, but only diminish the lien pro tanto. Confusion has sometimes arisen on this subject, from its being assumed that a vendor's right over the goods in respect of his price is subject to the same rules as an ordinary lien which cannot exist without both the right and the fact of possession, and is lost and cannot be resumed, if the party claiming it abandon either the possession, or the right to possess the thing over which it is claimed: whereas "the vendor's right in respect of his price," says Bayley, J., delivering judgment in *Bloxam v. Sanders*, 4 B. & C. 948, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession, and the right of property, vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he become insolvent before he obtains possession, *Tooke v. Hollingworth*, 5 T. R. 215. If the seller has despatched the goods to the buyer, and insolvency occur, he has a right in virtue of his original ownership to stop them in transitu. *Mason v. Lickbarrow*, 1 H. Bla. 357; *Ellis v. Hunt*, 3 T. R. 464; *Hodg-*

son v. Loy, 7 T. R. 440; *Inglis v. Usherwood*, 1 East, 515; *Bothlingk v. Inglis*, 3 East, 381. Why? Because the *property* is vested in the buyer, so as to subject him to the risk of any accident, but he has not an indefeasible right to the *possession*, and his insolvency without payment of the price defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act on their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that in- [*432b] jury; but they can *maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights, *Gordon v. Harper*, 7 T. R. 9." This luminous view of the principles upon which an unpaid vendor's right depends, is, as will have been seen, totally inconsistent with the idea that stoppage in transitu operates as a rescission of the contract of sale, and deserves the more attention because it is contained in the written judgment of the court delivered after a *curia advisari vult*; see, too, *Edwards v. Brewer*, 2 Mee. & W. 375; [*Martindale v. Smith*, 1 G. & D. 1; 1 Q. B. 397, S. C. In *Wentworth v. Outhwaite*, 10 Mee. & W. 451, Parke, B., in delivering the judgment of the Court of Exchequer, stated that the question discussed above, "what the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet finally decided," and that "there are difficulties attending each construction." In that case, one of several parcels of goods sold under an entire contract had reached the place of destination; and upon the stoppage in transitu, the vendor insisted that the effect was to rescind the contract of sale altogether and consequently to revest in him the property in the part which had reached the place of destination. The barons of the Exchequer decided against that argument, but for different reasons; the majority of the court, Parke, Alderson, and Rolfe, BB., being strongly inclined to think,

that upon the weight of authority a stoppage in transitu must be considered, not as a rescission of the contract, but as merely replacing the vendor in the same position as if he had not parted with the possession; from which it followed that the vendor's right of lien on the part stopped was revested, and no more; whilst Lord Abinger expressed an opinion, to which on consideration he adhered, that the effect of stoppage in transitu is to rescind the contract; but he did not think that that affected the right of the vendee in the case before the Court, to retain the portion of the goods which had been actually delivered to him; or, in other words, had reached the place of their destination; more especially when the goods and the price might be apportioned, and a new contract be implied from the actual delivery and retention of a part. The arguments in *Wentworth v. Outhwaite* contain the authorities on either side of the question, to which may be added, that in the later case of *Jenkyns v. Osborne*, 8 Scott, N. R. 522, post, 433, Tindal, C. J., in delivering a considered judgment of the Court of Common Pleas, spoke of stoppage in transitu as a right to *rescind the contract*; but *the nature of the

[*432c] right was not there in question. It is conceived (notwithstanding the weight of Lord Abinger's opinion on a subject in which his practised and sagacious mind was eminently calculated to arrive at a correct conclusion) that the preponderance of reason and authority is in favour of the opinion expressed by the majority of the court, in *Wentworth v. Outhwaite*.] Supposing the contract of sale not to be rescinded, it seems to follow, that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired; after that period, indeed, the refusal of the vendee or his representatives to receive the goods *and* pay the price, would probably be held to entitle the vendor to elect to rescind the contract, see *Langford v. Tiler*, Salk. 113. But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them till the time of credit has expired? In such a case it is submitted that courts of law having originally adopted this doctrine of stoppage in transitu from equity, would act on equitable principles by holding the vendor invested with an im-

plied authority to make the necessary sale. [It is hardly necessary to add, that a wrongful stoppage in transitu has not the effect of rescinding the contract of sale, or of affecting the vendor's right to sue for the price, acquired before the stoppage. In *Re Humberston*, 1 De Gex, 262; and see *Gillard v. Brittain*, 8 Mee. & W. 575.]

The person who stops in transitu must be a consignor. A mere surety for the price of the goods has no right to do so, *Siffkin v. Wray*, 6 East, 376. But a person residing abroad, who purchases goods for a correspondent in England, *whom he charges with a [*433] commission on the price, but whose names are unknown to those from whom he makes the purchases, may stop the goods in transitu if his correspondent fail while they are on their passage, for the Court thought that the correspondent abroad might be considered as a new vendor, selling the goods over again to the merchant in England, and only adding to the price the amount of his commission. *Feise v. Wray*, 1 East, 93; see *Newsom v. Thornton*, 6 East, 17, where a person who had consigned goods to be sold on the joint account of himself and the consignee, was held entitled to stop them in transitu, the consignee becoming insolvent. [In *Jenkyns v. Osborne*, 8 Scott, N. R. 522; 7 Man. & Gr. 673, S. C., it was attempted, but without success, to confine the right to vendors in whom the property in the goods has actually vested at the time of the stoppage, and to exclude from it a vendor in whom the property in the goods had not vested at the time of the stoppage, but only an interest in and right to receive a *certain portion of a cargo to

[*433a] be afterwards ascertained and appropriated to the parties interested in it, of whom he was one. Tindal, C. J., in giving judgment, said: "We see no sound distinction with reference to the right of stoppage in transitu, between the sale of goods the property of which is in the vendor, and the sale of an interest which he has in a contract for the delivery of goods to him; if he may rescind the contract in the one case, for the insolvency of the purchaser, he must, by parity of reasoning, have the right to rescind it in the other." As to what is a sufficient authority from the vendor to enable another person on his behalf to stop goods in transitu, see *Whitehead v. Anderson*, 9 Mee. & W. 518.]

Stoppage in transitu, as its name imports, can only take place while the goods are on their way; if they once arrive at the termination of their journey, and come into the actual or constructive possession of the consignee, there is an end of the vendor's right over them. And, therefore, in most of the cases the dispute has been whether the goods had or had not arrived at the termination of their journey. The rule to be collected from all the cases is, that they are in transitu so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that, if, after their arrival at their place of destination, they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid to him for them, that puts an end to the right to stop in transitu. See *Nicholls v. Lefevre*, 2 Bing. N. C. 83; *James v. Griffin*, 1 Mee. & W. 20; *Edwards v. Brewer*, 2 Mee. & W. 375; and *James v. Griffin*, *iterum*, 2 Mee. & W. 623; where the Court differed on the question whether evidence of the vendee's intention not to take possession uncommunicated to the wharfinger was admissible. *Mills v. Ball*, 2 B. & P. 457; *Holst v. Pownall*, 1 Esp. 240; *Northey v. Field*, 2 Esp. 613; *Hodgson v. Loy*, 7 T. R. 440; *Smith v. Goss*, 1 Camp. 252; *Coates v. Railton*, 6 B. & C. 422; *Richardson v. Goss*, 3 B. & P. 127; *Scott v. Petit*, 3 B. & P. 469; *Foster v. Frampton*, 6 B. & C. 109; *Allen v. Gripper*, 2 Tyrw. 217; *Rose v. Pickford*, *Hurry v. Mangles*, 1 Camp. 452; *Stoveld v. Hughes*, 13 East, 408. [The arrival of the goods at a place where they are to be at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the transitu, although the place be not that of their ultimate destination. *Wentworth v. Outhwaite*, 10 Mee. & W. 436; *Dodson v. Wentworth*, 5 Scott, N. R. 521; 4 Man. & Gr. 1050, S. C.; because in such a case the goods have got into the hands of agents for the buyer, [*433b] not concerned merely in the *carriage of the goods. And the same, as it seems, where the goods have got into the hands of a person employed by the buyer to receive them from the first carrier or out of the warehouse where they were when sold, and give

them a new destination, as in *Valpy v. Gibson*, 4 C. B. 837, where the goods had been ordered for the Valparaiso market, and the Court of Common Pleas expressed their opinion that the transit was at an end upon the arrival of the goods in the hands of the vendee's shipping agent at Liverpool. In *Cowasjee v. Thompson*, 5 Moore (Privy Council), 165, the goods were purchased in London "free on board," to be paid for upon delivery on board, in a bill at six months, or cash less two and a half per cent. discount, at the seller's option. The goods were delivered by the seller into a vessel indicated by the purchaser, and a receipt for them was obtained from the mate, which the seller kept. The seller elected to be paid by bill, which was accordingly given, and the master, without requiring the return of the mate's receipt, signed bills of lading for the goods as shipped by the purchaser. By the custom of the port, the phrase "free on board" imports that the buyer is considered as the shipper, though the seller is to bear the expense of shipment. The judicial committee held that the transit was at an end, and the right to stop gone, so soon as the goods were put on board and the bill given for the price. Whilst, however, goods sold remain in the hands of a carrier employed to convey them to their original destination as between the buyer and seller, no case of *constructive* possession in the buyer arises, unless "where the carrier enters expressly or by implication into a new agreement distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him," *Whitehead v. Anderson*, 9 Mee. & W. 518. And in the absence of such a new agreement, it seems that the mere acts of marking or sampling the goods, or giving notice to the carrier to hold the goods for the buyer, though done with the intention to take possession, do not establish a *constructive* possession in the buyer, or affect the right to stop in transitu, *ibid.*; and see *Dixon v. Yates*, 5 B. & Ad. 313. The same law holds in the case of goods which, when sold, are on a wharf or in a dock, where they are intended to remain until taken away by the buyer. In

such a case the goods are considered as constructively in transitu (see the remarks of Lord Abinger in *Gibson v. Carruthers*, 8 Mee. & W. 311.) [*433c] and the *right of the vendor to stop in transitu remains so long as the goods are not taken away, and the warehouse keeper or dock owner has not become the agent of the buyer, see *Dixon v. Yates*, 5 B. & Ad. 313; *Taylor v. Scovell*, 14 Mee. & W. 23, where the wharfinger, upon orders received direct from the seller, to weigh and deliver the goods to the buyer, had accordingly furnished the seller with the weights, and delivered a portion of the goods to the buyer's order; yet, inasmuch as the wharfinger had not received warehouse rent from the buyer, or transferred the goods into his name, or done any other act to become his agent, the rest of the goods, without regard to whether the property in them had vested in the buyer or not, were considered subject to the seller's right of stoppage in transitu; and *Lackington v. Atherton*, 8 Scott, N. R. 38; 7 Man. & Gr. 360, S. C., where the seller, who had himself bought the goods of the importer in whose name they were warehoused in the West India Docks, gave the buyer a delivery order upon which the Dock Company refused to act, because not given by the importer; and upon the subsequent insolvency of the buyer, the seller himself obtained a delivery order from the importer and possessed himself of the goods. The question in all such cases seems to be, whether the warehouseman at the time of the stoppage held the goods as agent for the consignor, or as agent for the consignee.] If the vendor allow the vendee to take possession of part of the goods sold under an entire contract, without intending to retain the rest, his right to stop in transitu is gone. *Hammond v. Anderson*, 1 N. R. 69. See *Sluby v. Hayward*, 2 H. Bl. 504; *Hanson v. Meyer*, 6 East, 614. But it is otherwise if he do intend to retain the remainder, *Bunney v. Poyntz*, 4 B. & Ad. 570; [see *Wentworth v. Outhwaite*, 10 Mee. & W. 451; *Tanner v. Scovell*, 14 Mee. & W. 23.] *Prima facie*, however, [it has been said that a] delivery of part imports an intention to deliver the whole. Per *Taunton, J.*, *Betts v. Gibbins*, 2 Ad. & Ell. 73. [That dictum, however, which had been questioned by the author in his work on mercantile law, (third edition, 463, 507,

fourth edition, 459, 502,) has been overruled by the Court of Exchequer in *Tanner v. Scovell*, 14 Mee. & W. 23, where it was laid down that if the buyer takes possession of part, not meaning thereby to take possession of the whole, but to separate that part and to take possession of that part only, it puts an end to the transitu only with respect to that part and no more. In that case, under a general order to deliver the goods, the buyer procured the actual delivery of certain portions of them which he had resold, and the delivery of those portions was held not to operate as a delivery of the whole, or to affect the vendor's [*433d] *right as to the rest. And in *Jones v. Jones*, 8 Mee. & W. 431, the assignee of a cargo of goods under a trust deed, took possession of part of the cargo upon its arrival, and directed the rest to be conveyed to a designated place, with the intention of obtaining possession of the whole for the purposes of the trust, and it was held that such taking possession of part did put an end to the transitu; but it was in that case assumed to be clear law that the mere delivery of part to the buyer, if he means to separate that part from the remainder, does not amount to a delivery of the whole so as to defeat the right to stop in transitu. In *Tanner v. Scovell*, supra, the whole question was stated to depend on the intention of the buyer; but perhaps that statement was intended to apply only to cases like *Tanner v. Scovell*, where it was in the power of the buyer at the time, if he pleased, to take all.]

However, though the determination of the transitu puts an end to the vendor's right to stop the goods, [it has been thought that] the vendee is not allowed to anticipate its natural determination, as, for instance, by going to meet the goods at sea. *Holst v. Pownall*, 1 Esp. 240. Vide tamen, the judgments in *Mills v. Ball*, 2 B. & P. 461; *Oppenheim v. Russell*, 3 B. & P. 54; *Foster v. Frampton*, 6 B. & C. 107; [and *Whitehead v. Anderson*, 9 Mee. & W. 518, where it was laid down as indisputable, that if the vendee take the goods out of the possession of the carrier into his own before their arrival, the right to stop in transitu is at an end; though, if he were to take them without the consent of the carrier, it might be a wrong to him for which he would have a right of action.] Nor can the vendor's right be defeated by the enforcement of a claim against

the vendee, as, for instance, by process of foreign attachment at the suit of his creditor, or by the carrier's assertion of a general lien against him. *Smith v. Goss*, 1 Camp. 282; *Butler v. Woolcot*, 2 N. R. 64; *Nicholls v. Lefevre*, 2 Bing. N. C. 83.

[To make a *notice* effective as a stoppage in transitu, it must be given to the person who has the immediate custody of the goods; or if given to the principal whose servant has the custody, it must be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant, in time to prevent the delivery of the goods to the consignee, *Whitehead v. Anderson*, 9 Mee. & W. 518.]

The second vendee of a chattel cannot, generally speaking, stand in a better situation than his immediate vendor, *Small v. Moate*, 9 Bing. 574. If, therefore, the vendee sell the goods before they have been delivered to him, he sells them, generally speaking, subject to the vendor's right to stop in transitu, *Dixon v. Yates*, 5 B. & Ad. 313; [*433e] *Jenkyns v. Usborne*, 8 Scott, N. R. 505; 7 Man. & Gr. 678, S. C.] But on this rule the principal case has engrafted an exception; for the second and main point in *Lickbarrow v. Mason* is, that the vendee may, by negotiating the bill of lading to a bona fide transferee, defeat the vendor's right to stop in transitu. A succinct history of the law on this point is given by Lord Tenterden, in his admirable work on Shipping, p. 388, where he remarks, that "the earliest mention of the subject in our law books is the case of *Evans v. Martlett*, 1 Lord Raym. 271, 12 Mod. 156; in which Holt, C. J., said, 'the consignee of a bill of lading has such a property, that he may assign it over;' and Shower said [*434] 'that it had been adjudged so in the *Exchequer*.' But, in that case, the effect of such an assignment was not properly before the Court, and does not appear to have been discussed or argued; and the case supposed to be referred to by Shower has not been found. In the case of *Snee v. Prescott*, 1 Atk. 246, the right of the pawnee of the bill of lading as against the consignor was not noticed or insisted upon." He then proceeds to comment on the cases of *Wright v. Campbell*, 4 Burr. 2046, 1 Bl. 628; *Hibbert v. Carter*, 1 T. R. 445; *Caldwell v. Ball*, *ibid.* 205; and *Lick-*

barrow v. Mason; and concludes by stating that "that cause was tried again, and that the Court of King's Bench, at the head of which Lord Kenyon had in the mean time been placed, and who had, in another cause, expressed his approbation of the first judgment in this case, as being founded on principles of justice and common honesty, again decided the case without argument, in conformity to the first decision of that Court; 5 T. R. 683; and, in order that the question might again be carried to the other tribunals, another writ of error was brought; but it was afterwards abandoned, and it is now the admitted doctrine in our courts that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor." [That is to say, an absolute right and property in the goods; but the transfer of a bill of lading does not, like that of a bill of exchange, confer any right on the assignee to sue upon the contract expressed thereby, *Thompson v. Dominy*, 14 Mee. & W. 403. See further, as to the effect of a bill of lading, *Jenkyns v. Usborne*, 8 Scott, N. R. 505, 7 Man. & Gr. 678, S. C., per curiam, *Bryans v. Nix*, 4 Mee. & W. 775, *Bruce v. Wait*, 3 Mee. & W. 15; as to its being revocable, *Mitchell v. Ede*, 3 P. & D. 513, 11 Ad. & Ell. 88, S. C.; as to a mate's receipt, *Evans v. Nichol*, 4 Scott, N. R. 43, *Thompson v. Small*, 1 C. B. 323, *Cowasjee v. Thompson*, 5 Moore (Privy Council,) 165.]

But if the assignee of a bill of [*434a] lading act mala fide; for instance, if he knew that the consignee of the goods was insolvent, and took the assignment of the bill of lading for the purpose of defeating the right to stop in transitu, and so defrauding the consignor out of the price; he will be held to stand in the same situation as the consignee; and the consignor will preserve his right of stoppage. Per Lord Ellenborough, delivering judgment in *Cumming v. Brown*, 9 East. 514. And if the bill of lading contain a condition, ex. gr., if it be indorsed upon it, that the goods are to be delivered, provided E. F. pay a certain draft, every indorsee takes it, subject to that condition, and will have no title to the goods, unless it be performed. *Barrow v. Coles*, 3 Camp. 92.

A factor, however, to whom goods were consigned, stood in a different situation from a vendee with respect to his

power to pass the property therein by an indorsement of the bill of lading. For, though he might bind his principal by a *sale* thereof, he could not by a *pledge*, that not being within the usual scope of his authority. *Martin v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, *ibid.*, 484; *Newsom v. Thornton*, 6 East, 17. But by stat. 4 G. 4, c. 83, amended by 6 G. 4, c. 94, usually called the Factor's Act, the law upon this subject was altered. By that statute, sec. 2, a person *intrusted with*, and in possession of, any bill of lading, is to be deemed the true owner of the goods described in it, so far as to give validity to any contract made by him, for the sale or disposition of the goods, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money, or negotiable instrument, provided the buyer, disponent, or pawnee, have no notice by the bill, or otherwise, that he was not the actual bona fide owner of the goods. (Upon the question, who is to be considered a person "*intrusted*" within the meaning of this section, see *Close v. Holmes*, 2 M. & Rob. 23; *Phillips v. Huth*, 6 Mee. & W. 605; [*Hatfield v. Phillips*, 9 Mee. & W. 647, 14 Mee. & W. 665, 12 Cl. & Fin. 343, S. C.; *Bonzi v. Stewart*, 5 Scott, N. R. 1, 4 Man. & Gr. 295, S. C.; and as to what is a "*disposition*" see *Taylor v. Kymer*, 3 B. & Ad. 337.] But, by sec. 3, if the deposit or pledge be as a security for a pre-existing demand, the depositee or pawnee acquires only the same interest in them that was possessed by the person making the deposit or pledge. Sect. 5 enacts, that any person may accept any such goods or document as aforesaid, on deposit or pledge, from any factor or agent, *notwithstanding he shall have notice* that the party is a factor or agent; but in such case he shall acquire such interest, and no further or other, as was possessed by the factor or agent at the time of the deposit or pledge; and, therefore, in this last case, if the agent's interest ^{*be} defensible, so is the pledgee's. [**434b*] *Flandy v. Allen*, *Dans. & Lloyd*, 22; *Fletcher v. Heath*, 7 B. & C. 517. A fraudulent sale cannot be upheld as a pledge under this section. *Thompson v. Farmer*, 1 M. & M. 48. [As to the pleadings upon stat. 5 G. 4, c. 94, see *Bonzi v. Stewart*, 5 Scott, N. R. 1, 4 Man. & Gr. 295, 8 Scott, N. R. 525.

The provisions of 6 G. 4, c. 94, being found insufficient to meet the wishes or

convenience of merchants, stat. 5 & 6 Vict. c. 39, "An act to amend the law relating to advances bona fide made to agents intrusted with goods," was passed (30th June, 1842).

The 1st section, after reciting *inter alia*, that by 6 G. 4, c. 94, "validity is given, under certain circumstances, to contracts or agreements made with persons intrusted with and in possession of the documents of title to goods and merchandize, and consignees making advances to persons abroad who are intrusted with any goods and merchandize are entitled, under certain circumstances, to a lien thereon, but under the said act and the present state of the law, advances cannot safely be made upon goods or documents to persons known to have possession thereof as agents only;" and that advances on the security of goods and merchandize had become an usual and ordinary course of business, and it was expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to bona fide advances upon goods and merchandize as by the 6 G. 4, c. 94, is given to sales, and that owners intrusting agents with the possession of goods and merchandize, or of documents of title thereto, should in all cases where such owners by the 6 G. 4, c. 94, or otherwise would be bound by a contract or agreement of sale be in like manner bound by any contract or agreement of pledge or lien for any advances bona fide made on the security thereof;" and that "much litigation had arisen on the construction of the 6 G. 4, c. 94, that it did not extend to protect exchanges of securities bona fide made, and so much uncertainty existed in respect thereof that it was expedient to alter and amend the same, and to extend the provisions thereof, and to put the law on a clear and certain basis;" enacts "that from and after the passing of this act any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security bona fide made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continu-

[*434c] ing *advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." This, as well as the other provisions of the statute, though wide enough in terms to include many other cases, has been limited in construction to mercantile transactions. So that in *Wood v. Rowcliffe*, 6 Hare, 191, where it was contended that advances made upon the security of furniture in a furnished house, not in the way of trade, to the apparent owner of the furniture, who in fact was an agent intrusted with the custody of it by the true owner, were within the protection of 5 & 6 Vict. c. 39, Sir James Wigram, V. C., held the contrary, saying in the course of his judgment: "the first act (6 G. 4, c. 94) is for the 'protection of the property of merchants and others,' and the property referred to is 'goods, wares, and merchandize,' intrusted to the agent 'for the purpose of consignment or sale,' or 'shipped;' and upon a judicial construction of the act it has been held that the generality of the expressions must be restricted. Every servant of the owner of goods employed in the care or carriage of such goods, is in one sense 'an agent intrusted with goods,' but still he is not an agent within the meaning of the statute. *Monk v. Whittenbury*, 2 B. & Ad. 484. The title of the second act (5 & 6 Vict. c. 39) is more general; but it appears to me to relate to 'agents,' and to 'goods and merchandize' in a sense which is not applicable to the agency or the property in this case." In *Monk v. Whittenbury*, supra, it was considered that a carrier, warehouseman, packer, or wharfinger, is not "an agent" within 6 G. 4, c. 94; Sir James Wigram, V. C., appears to have treated that decision as applicable also to the construction of 5 & 6 Vict. c. 39. In *Jenkyns v. Osborne*, 8 Scott, N. R. 505, 7 Man. & Gr. 678, S. C., a vendee who had received from the vendor a delivery order for the goods, was considered not to be a person intrusted with a delivery order within the 6 G. 4, c. 94, s. 2, so as to be capable of making a valid pledge of the delivery order, and so defeating the right of stoppage in transitu; the act being intended only to

apply to persons intrusted with such documents as factors or agents; and the vendee being in possession of the document, not as the agent of another, but in his own right. That would a fortiori hold good in a case arising upon the construction of 5 & 6 Vict. c. 29, s. 1, where the word "agent" is expressly used. And therefore, where the person intrusted is not intrusted as agent but as buyer, the right of his assignee *is not holpen by 5 & 6 Vict. [*434d] 39, but must stand or fall by the rule laid down in *Lickbarrow v. Mason*.

The 2nd section authorises the substitution of other goods, documents of title or negotiable securities for those first deposited in consideration of a previous advance; but provides that the lien acquired upon the substituted property shall not exceed the then value of the property given up. The decision which pointed out the necessity for that section was *Bonzi v. Stewart*, 4 Man. & Gr. 525, 5 Scott, N. R. 1, S. C.

Sect. 3 provides and enacts that the act shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances, and exchanges, as shall be made bona fide, and without notice that the agent making such contracts or agreements is acting without authority or mala fide against the owner; that it shall not be construed to extend to or protect any lien or pledge for an antecedent debt; nor to authorise any agent in deviating from any express order or authority received from the owner; "but that, for the purpose and to the extent of protecting all such bona fide loans, advances, and exchanges as aforesaid, (though made with notice of such agent not being the owner, but without any notice of the agent's acting without authority,) and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods."

By the 4th section "any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby re-

presented, shall be deemed and taken to be a *document of title* within the meaning of this act: and any agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto, shall be deemed and taken to have been *intrusted* with the possession of the goods represented by such document of title as aforesaid:—(This legislative interpretation of the word “intrusted” was rendered necessary by the decision in *Phillips v. Huth*, 6 M. & W. 605, and *Hatfield v. Phillips*, 9 Mee. & W. 647, affirmed in the House of Lords, 14 Mee. & W. 647, 12 Cl. & Fin. 343, S. C., that a factor intrusted with a bill of lading, and who, by reason of having the bill of lading, was enabled [*134e] *to and did (but not in pursuance of the instructions of his principal) possess himself of a dock warrant, was not to be considered a person intrusted with the dock warrant within the meaning of 6 G. 4, c. 94):—And “all contracts *pledging or giving a lien upon such document of title* as aforesaid shall be deemed and taken to be respectively *pledges of and liens upon the goods* to which the same relates:”—And such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his *actual custody*, or shall be held by any other person subject to his control or for him or on his behalf:—And “where any loan or advance shall be bona fide made to any agent intrusted with and in possession of any such goods or documents of title as aforesaid, on the faith of *any contract or agreement in writing* to consign, deposit, transfer, or deliver such goods or documents of title as aforesaid, and such goods or documents of title shall *actually be received* by the person making such loan or advance, *without notice* that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title within the meaning of this act, *though such goods or documents of title shall not actually be received by the person making such loan or advance till the period subsequent thereto*:” (This enactment may have sprung from the inclination of opinion

expressed upon the second point argued but not decided, in *Bonzi v. Stewart*, 4 Man. & Gr. 395; 5 Scott, N. R. 1):—And “any contract or agreement, whether made direct with such agent as aforesaid, or *with any clerk or other person on his behalf*, shall be deemed a contract or agreement *with such agent*:”—And “any payment made, whether *by money or bills of exchange* or other negotiable security, shall be deemed and taken to be an *advance* within the meaning of this act:”—(“*Negotiable security*,” that is, *for the payment of money*, sensible *Taylor v. Kymer*, 3 B. & Ad. 320; and although the words are *any payment*, yet with reference to the object of this act, they must be construed to mean any payment by way of *loan or advance*, and not to include a case where the real object of the parties is not a loan or advance, such as was *Learoyd v. Robinson*, 12 Mee. & W. 745, where the factor being liable with the defendant on a bill of exchange, obtained a sum of money from the defendant to take up the bill, at the same time depositing with him the plaintiff's goods. In that case the direction of the Judge, *Coltman, J.*, to the jury, to find for the plaintiff if they considered what was done to be “only a circuitous mode of paying the bill on which the defendant was liable,” was upheld by the Court of Exchequer):—And “an **agent in possession* as aforesaid of such goods [*134f] or documents shall be taken, for the purposes of this act, to have been *intrusted* therewith by the owner thereof, *unless the contrary can be shown in evidence*.”

The 5th section provides that nothing in the act contained shall lessen, vary, alter, or affect the civil responsibility of an agent for any breach of duty or contract or non-fulfilment of his orders or authority.

By the 6th section an agent exercising the powers virtually conferred upon him by the act *mala fide*, and without the authority of his principal, is rendered subject to punishment by transportation, as for a misdemeanor, unless where the property dealt with is not made a security for or subject to the payment of any greater sum of money than the amount which at the time was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent: or unless he shall, pre-

viciously to his being indicted, have disclosed the offence on oath, in consequence of compulsory process in any proceeding bona fide instituted by any party aggrieved, or in an examination or deposition before a Commissioner of Bankrupt.

Sect. 7 preserves the right of the owner to redeem, and enables him to prove under the bankruptcy of the agent for the amount paid to redeem, or the value of, the goods.

The 8th section is the common interpretation clause, and the 9th and last excludes a retrospective application of the provisions of the act.

This act, 5 & 6 Vict. c. 39, it may be observed, relates to *advances* upon the security of goods, and it will still be necessary to resort to the 2nd and 4th sections of 6 G. 4, c. 94, in cases not falling within that category. But let us return to the effect of the indorsement of a bill of lading upon the right to stop in transitu.]

In cases where a bill of lading may be, and has been, pledged by the consignee of the goods, as a security for his own debt, the legal right to the possession of the goods passes to the pledgee; but the right to stop them in transitu, in case the consignee should become insolvent, is not absolutely defeated, as it is in the case of a sale of [435] the bill of lading by the consignee; for the vendor may still resume his interest in them, subject to the rights of the pledgee, and will have a right at least in equity, to the residue which may remain, after satisfying the pledgee's claim. And further, if the goods comprised within the bill of lading be pledged along with other goods belonging to the pledger himself, the vendor will have a right to have all the pledger's own goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so. This was decided in *re Westzinthus*, 5 B. & Ad. 817, where Lapage & Co. having purchased oil from plaintiff Westzinthus, paid for it by acceptance: and being in possession of the bills of lading, pledged them with Hardman & Co., as a security for certain advances. Lapage & Co. became bankrupt, and their acceptance in the plaintiff's favour was dishonoured. At the time of their bankruptcy they owed Hardman & Co. 9271*l.* on account of advances; as a security for which they

held, besides the bill of lading, goods to the value of 9961*l.* 1*s.* 7*d.*, belonging to Lapage himself. The court held that Westzinthus, who had, upon the bankruptcy of Lapage & Co., given notice to the master of the ship that he claimed to stop the oil in transitu, had a right to insist upon the proceeds of Lapage's own goods being appropriated to the discharge of Hardman's lien, and, as they proved sufficient to satisfy it, had a right to receive the entire proceeds of his oils.—“As Westzinthus,” said Lord Denman, delivering the judgment of the Court, “would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession, for a valuable consideration to Hardman, it appears to us, that, in a court of equity, such transfer would be considered as a pledge or mortgage only; and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledgee or mortgagee, in analogy to the common case of a mortgage of real estate, which is considered as a mere security, and the mortgagor, the owner of the land. We, therefore, think that Westzinthus, by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to Hardman's lien thereon), as against Lapage and his assignees, who are bound by the same equity that Lapage himself was; and this view of the case agrees with the opinion of Mr. Justice Buller, in his comment on the case of *Snee v. Prescott* in *Lickbarrow v. Mason*.

“If then Westzinthus had an equitable right to the oil subject to Hardman's lien thereon for his debt, he would, by means of his goods, have become a surety to Hardman for Lapage's debt; and would then have a clear equity to oblige Hardman to have recourse against Lapage's own goods deposited with him to pay his debt in case of the surety. And all the goods, both of Lapage and Westzinthus, having been sold, he would have a right to insist upon the proceeds of Lapage's goods being appropriated, in the first instance, to the payment of the debt.” [*Spalding v. Ruding*, 6 Beav. 376, confirms Westzinthus's case, and shows that the goods cannot be retained as security for a general balance of account, but only for the specific advance made upon security of the bill of lading.]

THE case of *Lickbarrow v. Mason*, has sometimes been supposed to decide, that in the absence of the right of property, and of authority to sell, a consignee of goods may, by an indorsement of the bill of lading, for a valuable consideration to a bona fide vendee, give the latter a title to the goods, as against the true owner. A capacity for transferring the right of property under such circumstances, implies that the instrument to which it is attached, is negotiable; and accordingly, bills of lading have been said to be susceptible of negotiation, not only in text-books, but even in the dicta of judges of no inconsiderable authority. *Supra*, 518, *Berkeley v. Watling*, 7 A. & E. 22; *Bell v. Moss*, 5 Wharton, 189, 205. But by referring to the English reports and statutes, at the period at which promissory notes were introduced, it will be found, that the authority of a legislative enactment, or, at least, of an express judicial decision is requisite to establish the negotiability of any instrument. In the case of bills of lading, both these sources of authority are wanting. *Lickbarrow v. Mason*, applies only to those cases in which a previous sale of the goods has been made to the consignee; and merely determines, that if the vendee of goods re-sell them, after they have left the custody of the vendor, to a bona fide purchaser for value, the right of property acquired by the latter, shall not be defeated by a subsequent stoppage in transitu, if he have taken an assignment of the bill of lading. In this case, the property is transferred by the sale, from the original vendor to the first vendee, and by the subsequent conveyance from him to the purchaser, and these circumstances would be just as effectual in passing the property without, as with the indorsement of the bill of lading; *Ilsey v. Stubbs*, 9 Mass. 65; *Gardner v. Howland*, 2 Pick. 599; *Stanton v. Eager*, 16 Pick. 473; *Nathans v. Giles*, 5 Taunton, 588; *Meyer v. Sharpe*, *ib.* 74. The only effect of the bill, is due to its being a symbol of property, and even when indorsed to the consignee, "its possession cannot confer on him more power over the property, than would the possession of the property itself." "A bill of lading will pass the property upon a bona fide indorsement and delivery, when it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended. But it cannot operate farther:" per GROSE, J., and ELLENBOROUGH, C. J., *Newsom v. Thornton*, 6 East, 41. "The bill of lading is *functus officio*," said Lord DENMAN, in *Hatfield v. Phillips*, 9 M. & W. 467, "as soon as the goods are landed and warehoused in the name of the holder, who then becomes possessed of the goods themselves in the eye of the law, and derives his power, not from the bill of lading, but from such possession." But when transferred to a purchaser, before the arrival of the goods, the bill of lading amounts in fact to a constructive delivery, and consequently creates a constructive possession as it respects third parties, (*Gardner v. Howland*;) and when, therefore, received by a party to whom goods have been sold, or to whom an authority to sell goods has been given, will enable him, in addition to the right of property which he might pass, independently of the bill, to give by its indorsement a constructive possession to the indorsee, and thus defeat the consignor's equity to a stoppage in transitu. An equity, be it observed, which must always be somewhat inequitably exercised, when directed against a bona fide purchaser for value, from a vendee and consignee, by a consignor, who, in addition to parting with the property in goods, has so far parted with the possession, as to have put them in transitu

to a buyer, on the faith of whose property a second purchaser has paid his money.

The result of the whole matter seems to be, that as a delivery is necessary, to give validity to a sale as against subsequent purchasers or execution creditors, when an actual delivery is impossible, it must be made symbolically, and by the symbol best fitted to prevent fraud, and give certainty to the transaction; *Clark v. Chipman*, 2 English, 197; *Lainfair v. Sumner*, 17 Mass. 210. When the goods sold are at sea, an indorsement of the bill of lading is the proper substitute for an actual delivery, because such an indorsement is the mode usually adopted among merchants, and most likely to give notice of the sale to third persons. But when the bill of lading is not in the hands of the vendor at the time of the sale, the invoice or any other instrument which specifies and enumerates the property sold, may be substituted for it; *Gardner v. Howland*, 2 Pick. 599. These principles only apply where the rights of third persons are in question, for as between the parties to a sale themselves, the right of property will pass without actual or constructive delivery; *Holmes v. Crane*, 2 Pick. 606; *Hooban v. Beadwell*, 16 Ohio, 509; and consequently no indorsement of the bill of lading or other substitute for delivery is necessary; *D'Wolfe v. Harris*, 4 Mason, 515. But when a sale or contract for the sale of the same goods is made to or with different persons, he who first obtains possession of the goods or an indorsement of the bill of lading when actual possession is impossible, will have the legal title; *Caldwell v. Ball*, 1 Term, 205; *Lanfair v. Sumner*. This is a mere application of a general principle, which runs through the law of real and personal property. Thus, it is well known that as between two grantees of a reversion, he who first obtained an attornment, acquired the title, although the grant to the other might have been prior in point of time. And in *Lanfair v. Sumner*, 17 Mass. 110; and *Jewett v. Lincoln*, 16 Maine, 116, it was decided, that when the same chattel is sold to different persons, priority of possession will give the second purchaser superiority of right to the first. "The general rule," said Jackson J., in delivering the opinion of the Court in *Lanfair v. Sumner*, "is perfectly well established, that delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession, will hold them against the other. This principle is recognised in the case of *Lamb & al. v. Durant*, 12 Mass. Rep. 54, and in *Caldwell & al. v. Ball*, 1 D. & E. 205. The latter indeed was a case, not of actual delivery of goods to either party, but of delivery of the bill of lading. There were two bills of lading, signed at different times by the master of the ship; and the party, who first obtained one of them by a legal title from the owner of the goods, was held to have the best right, although the bill of lading, under which he claimed, was made the last. The endorsement and delivery of the bill of lading, in such a case, is equivalent to the actual delivery of the goods.

"This is also the rule of the civil law. When the same thing is sold to two different persons, *'manifesti juris est, eum, cui priori traditum est, in detinendo dominio esse potiozem.'*" Cod. 3, 32, 15. So Voet ad Pand. lib. 6, tit. 1, § 20, *'ad vindicationem rei duobus separatim diverso tempore distractæ, non is cui priori vendita, sed cui (pretio soluto, vel fide de eo habita)*

prius est tradita, admittendus est.' And Pothier, in the place cited in the argument, *Vente* No. 318—320, states the same principle; and puts the case of a sale without delivery, and a subsequent attachment by the creditors of the vendor, who, he says, would hold the goods against such a purchaser."

In order, however, to determine more fully, the real effect of the indorsement of a bill of lading, on the transfer of title in chattels personal, it is necessary to examine the principles by which that transfer is regulated under ordinary circumstances, and when no such endorsement is in question. It is well settled, that in the absence of property and authority, a sale of chattels confers no title, even when the vendor is in possession at the time of the sale, and the vendee purchases in good faith and for value; *Hartop v. Hoare*, 1 *Wilson*, 8, S. C. 2 *Str.* 1187; *Wilkinson v. King*, 2 *Campbell*, 335; *Peer v. Humphreys*, 2 *Adol. & Ell.* 295; *Williams v. Barton*, 3 *Bing.* 139; *Cooper v. Willomatt*, 1 *C. B.* 672; *Hyde v. Noble*, 13 *New Hampshire*, 434; *Galvin v. Bacon*, 2 *Fairfield*, 28; *Andrews v. Dietrick*, 14 *Wend.* 31; *Everett v. Saltus*, 15 *Id.* 475; *Cowell v. Hill*, 4 *Denio*, 323; *Stanley v. Gaylord*, 1 *Cushing*, 228. The only exception to this rule at common law, that of a sale in market overt, seems inapplicable to the state of things in this country, and has lost much of its former importance in England; *Wheelright v. Depeyster*, 1 *Johnson*, 480; *Dame v. Baldwin*, 8 *Mass.* 518; *Griffith v. Hawler*, 18 *Vermont*, 480; *Stanley v. Gaylord*, 1 *Cushing*, 536. There are, indeed, only two grounds on which property can be supposed to arise in a vendee, in consequence of a sale made by a vendor who has no property in himself. The first of these supposes a transfer of the former title of the true owner, by virtue of some express or implied authority from him; the second, the creation of a new and independent title, growing out of the circumstances attendant upon the sale, such as the possession of the property by the vendor, the valuable consideration given by the purchaser, and the bona fides of the transaction, so far as he is concerned. And it has sometimes been argued, that where one of two innocent parties must suffer from a sale made under these circumstances, the loss should fall upon the owner, who has intrusted the vendor with the possession of the goods, and enabled him to commit a fraud, rather than on the vendee, who has acted in good faith and with proper caution. But if this conclusion could follow in any case, it would do so in those, where a factor who has been intrusted with the indicia of title in chattels, in addition to the possession of the chattels themselves, and with the authority not only to sell them, but to sell them as his own, and has thus been enabled to hold himself out to the world as the owner, contracts with third parties, who advance money on the faith of his apparent ownership, and a deposit of the goods in pawn. Yet it is well settled, that such a pledge gives no right whatever to the goods as against the real owner, not even that of the factor; *Patterson v. Tash*, 2 *Strange*, 1178; *Kinder v. Shaw*, 2 *Mass.* 278; *Odiorne v. Maxey*, 13 *id.* 178; *Newbold v. Wright*, 4 *Rawle*, 195; *Van Amringe v. Peabody*, 1 *Mason*, 466; *Shaw v. Stone*, 1 *Cushing*, 228. These cases are manifestly inconsistent with the idea, that an owner who permits chattels to be dealt with by an agent, as if they belonged to the latter, will be bound by his acts, for such a rule would extend to all contracts made in good faith, and for a valuable consideration by third parties, whether for transferring an abso-

lute property by sale, or a qualified property by pledge. And they can only be explained on the ground, that as the power of an agent is bounded in all cases by the strict limits of the authority received from the principal, a pledge by a factor, of goods which he is authorised to sell, is necessarily invalid.

The general doctrine that no right can arise under a contract of pledge or sale, in the absence both of property and authority in the party who makes it, is strikingly illustrated by the case of *McCombie v. Davis*, 6 East, 538, 7 id. 5, where a broker who had bought a quantity of tobacco on account of the plaintiff, entered it in his own name on the books of the king's warehouse, and subsequently pledged it to the defendant, who made advances upon it in the belief that he was the real owner. It was held under these circumstances, that as the broker had acted without authority in making the pledge, it was wholly void, and did not even entitle the defendant to retain for the amount due the broker on account of the purchase, because the lien of the latter was divested by parting with the possession of the goods. The same point was decided by the court of King's Bench in *Barton v. Williams*, 5 B. & Ald. 395, and subsequently in error by the Exchequer Chamber in *Williams v. Barton*, 3 Bing. 139, under similar circumstances, except that the unauthorised pledge was of dock warrants, representing goods, and not of the goods themselves. It was determined in like manner in *Guereiro v. Peile*, 3 Barn. & Ald. 610, that the defendants, who had purchased a quantity of wine from the parties to whom it had been consigned for sale by the plaintiff, under the belief that they were the owners, and paid for it in rum, had no title as against the consignors, because the authority given by the latter, only extended to making a sale for cash, and not by way of barter. So in *Evans v. Whittenbury*, 2 B. & Ad. 484, a sale by a wharfinger, who was in the habit of acting as a factor, of goods in his possession, but which he had no authority to sell, was held to be absolutely void at common law, and not within the remedial clauses of the statute 9 Geo. 4. The course of decision has been the same on this point, in the United States as in England, and equally determines, that the title to chattels cannot be transferred by a sale, made without authority from the owner, even when he has parted with the possession to the vendor, and thus enabled him to mislead the vendee by a false appearance of ownership. Thus in *Andrews v. Dietrick*, 14 Wendell, 31, an auctioneer who had dealt with the holder of a house in which the carpets were down, under the belief that he was the owner of the carpets, and had advanced money on the faith of his ownership, was held to have acquired no title as against the true owner, who had delivered them to the party in whose possession they were, under a contract of sale, at so much per yard. This contract required nothing more to make it absolute, and pass the right of property, than that the quantity of carpeting necessary for the house, which was unknown at the time of delivery, although since ascertained, should be communicated to the original owner of the carpet; but it was decided that until this was done, the title remained in him, even as against a bona fide purchaser from the vendee. A similar decision was made in *Everett v. Saltus*, 15 Wend. 475, 20 Wend. 268, with regard to a sale by a party in possession, not merely of property, but of the bill of lading, endorsed in blank, and other documentary indicia of property, who had obtained those indicia without the consent

of the true owner. The same point was determined in *Williams v. Merle*, 11 Wendell, 80, where a sale made by a party in possession of goods, and of an inspector's certificate of their quality, which had been fraudulently procured, was held to pass no title to the vendor. A similar view of the law was taken in *Easton v. Worthington*, 5 S. & R. 130; and it was subsequently decided in *Leekey v. McDermott*, 8 S. & R. 500, that a sale of personal property will be invalid, even where the vendor has obtained the possession of the goods from the owner, unless he has title or authority, as well as possession. And the same point was determined in the recent cases of *Cowell v. Hill*, 4 Denio, 323, and *Stanley v. Gaylord*, 2 Cushing, 228.

It is evident, therefore, under all the decisions, that although the possession of chattels personal, is *prima facie* evidence of property, and consequently of the right to sell, yet that when property does not in fact exist, possession confers no right, either on the holder himself, or on a vendee under him, who may have paid a valuable consideration on the faith of such possession. But the exigencies of commerce have called a class of documents into being, which are substantially acknowledgments, by public or private agents, of the custody or possession of personal property, and of the account or right, in, or for which that custody is held; and the usage of trade has invested these documents, of which the bill of lading may be regarded as the type, with the power of representing the property to which they refer, so that the possession of the document, is, in effect, the possession of the property itself. Thus, warrants or orders, are habitually issued to the persons entitled to the goods, deposited in the various public warehouses in England, directing the delivery of the goods to them or to their assignees, and it is well settled that a sale, accompanied by a delivery of these warrants, has the same effect as if the goods themselves were delivered. This was a mere application of the rule of law, which permits the substitution of a symbolic delivery, where actual delivery is inconvenient or impossible. An effort, was however made in the earlier part of this century, to give a greater effect to the delivery of the symbol, than to that of the substance which it represented, and to treat the holder of a dock or East India warrant for goods, as entitled to pass the right of property in the goods to third persons, in the absence both of title and authority in himself, or in other words, to render these instruments negotiable, and give them the power of creating a title by their transfer, in cases where none existed before they were transferred. The cases of *Zwinger v. Samuda*, 7 Taunton, 265, and *Lucas v. Dorrein*, *ib.* 278, seem to have been understood as determining this point as to dock-warrants, and the principal case as to bills of lading, (*supra*). But although the language held by the puisne judges of the court of common pleas, in the absence of the Chief Justice, in *Zwinger v. Samuda*, and *Lucas v. Dorrein*, tends to justify this conclusion, yet it was not necessarily or properly involved in the decision of those cases, which rest substantially on other grounds, and has not been followed, either by the courts or the profession, as law. Subsequently to these decisions, the statute 6 Geo. 4, c. 94, (which was extended in England by the 5 & 6 Vict. c. 39, and followed in New York and Pennsylvania, by the act of April 14, 1834, in one state, and that of April, 16, 1830, in the other,) provided that persons entrusted with the possession of bills of lading, dock-warrants, or other documents of title to goods, should have the power to make contracts for the sale, disposition or pledge of such goods, which should

be binding as against the true owner. It is evident from the language of this act, as well as from the decisions which have been made under it, that the power thus given is purely statutory, and wholly unknown to the common law. Thus, in *Evans v. Truman*, 2 B. & A. 886, and *Taylor v. Kymer*, 3 id. 320, where advances were made to a broker on the faith of his possession and apparent ownership of East India warrants for indigo, deliverable to order, it was held, that as the case did not come within the remedial provisions of the statute, the party who made the advances acquired no interest, either in the warrants themselves, or in the indigo which they represented. The same point has since been decided in a number of other instances. *Bonzi v. Stewart*, 4 Manning & Granger, 295, 326; *Phillips v. Huth*, 6 M. & W. 572; *Hatfield v. Phillips*, 9 id. 647; 14 id. 665. And the true rule of law, with regard to the effect of the transfer of the documentary evidence of title to goods, on the goods themselves, is conclusively shown by the case of *Newsom v. Thornton*, 6 East, 17, where the indorsee for value of a bill of lading, was held to acquire no interest under the indorsement, because it was a departure from the authority given by the owner to the party who made it, although the transaction would necessarily have taken effect as a negotiation, if such instruments were really negotiable.

A sale either of real or personal property by a vendor without title, will however, be valid in all cases where the true owner has pursued such a course, as to estop him from asserting his title. Thus the owner may depart with the documentary evidence of title to chattels, and with the possession of the chattels themselves, so far as this is necessary for the business of life, or authorized by the custom of trade, but if he go beyond this, and take any unusual or unnecessary step of a nature to mislead third persons, as to the true position of the title, the loss arising from any act done under the false impression, which he has been instrumental in creating, will be thrown upon him. Thus, in *Pickering v. Busk*, 15 East, 38, the owner of hemp, who had directed it to be entered on the books of a wharfinger, in the name of the broker by whom it was purchased, was held to be bound by a subsequent unauthorised sale by the broker, on the ground, that the entry amounted to a fraud on the purchaser, unless it was intended to authorise the broker, to deal with the hemp as his own. "The hemp," said Lord Ellenborough, "could only have been transferred into the name of the broker for the purposes of sale, and the party who transferred it cannot be allowed to rescind a contract which he had authorized. If he intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name." The distinction between this case and that of *McCombie v. Davies*, seems to be, that while the goods sold were entered in both in the name of the agent, this was done in the one by the direction of the principal, while in the other it seems to have been the unauthorized act of the agent. But this is amply sufficient, to reconcile these decisions with each other and with principle, for while a principal is not bound by the unauthorized acts of his agent, he is bound by every act on his own part, which gives them either a real or an apparent authority. And although the entry of the hemp in the name of the agent, in *Pickering v. Busk*, might not go further towards enabling him to hold himself out to the world as the owner, than the transfer of the bill of lading

indorsed in blank in *Newsom v. Thornton*, or of the Dock or India warrants in *Williams v. Barton*, and *Taylor v. Kymer*, yet it must be remembered, that the transfer of these documents was in accordance with the necessary and usual course of trade, while the entry was not, unless intended to give the broker all the rights of an absolute owner. This distinction is still further illustrated by the case of *Dyer v. Pearson*, 3 B. & C. 38. In that case Smith, a merchant residing in London, purchased a quantity of wool for the plaintiffs, and sent them the invoice, but kept the wool and the bill of lading for it indorsed in blank in his own hands. He subsequently sold the wool, and transferred the bill of lading to the defendant, against whom the plaintiffs brought trover. The jury were told at the trial, that if the circumstances under which the purchase was made, justified the defendants in believing that Smith had authority to sell, the verdict ought to be for them. But the verdict was subsequently set aside, and a new trial granted, on the ground that the existence of circumstances justifying the belief, that the vendor has authority to sell, will not enable him to make a good title if such authority does not exist in fact. It was notwithstanding intimated that if the plaintiffs had, by their conduct, enabled Smith to hold himself out as the owner, they might be precluded from recovering against the defendants, who had given value on the faith of such ownership. And although the latter point was not actually decided, it would seem to be law, if taken with the qualification that the acts relied on as precluding an owner from asserting his right, must have been out of the usual and regular course of trade, or at least not within it.

It would seem evident, from what has been said, that *Lickbarrow v. Mason* should not be considered as going beyond the only point which it actually determines, that the right of a vendor to stop in transitu, may be defeated by a sale made by the vendee, accompanied by a transfer of the bill of lading, and not treated as giving bills of lading the character of negotiable instruments, which was wholly unnecessary for the purposes of the decision. For, as the property passes under such circumstances by the sale, the endorsement of the bill has no other effect than that of defeating the right of the vendor to reclaim it, by operating as a constructive and symbolic delivery. The utmost, therefore, that this decision establishes, is an exception to the rule, that an unpaid vendor has a right to stop in transitu, an exception and a rule, which have nothing in common with the negotiability, either of the bill of lading, or of the property which it represents. Nothing can, in fact, be a greater departure from the principles and analogies of the common law, than to treat bills of lading, or other documentary evidences of title to chattels personal, as negotiable instruments. Instruments which represent choses in action, may be negotiable, because the right cannot be separated from the instrument, and has no distinct or actual physical existence. And even there, negotiability only exists in the case of absolute promises for the payment of money, a thing negotiable in itself, and which cannot be reclaimed by the true owner, from any one who has received it bona fide, and in exchange for a valuable consideration. But chattels personal are wholly insusceptible of negotiation in themselves, and it is manifestly inconsistent to give the documents which represent them, a different character. In *Thompson v. Dominy*, 14 M. & W. 402, the indorsement of a bill of lading, was held not to pass any right in the contract set forth on its face, nor entitle

the indorsee to bring suit in his own name, against the owners of the vessel, for their failure to deliver the goods agreeably to its terms. It is difficult to understand, how that which is not negotiable in its direct and primary sense, can be so in its indirect and secondary operation. And in *Warring v. Cox*, 1 Campbell, 369, where the point decided in *Thompson v. Dominy*, had been previously ruled the same way, Lord ELLENBOROUGH declared, that "no case had gone so far as to decide that a bill of lading is transferable like a bill of exchange, or that the mere signature of the person entitled to the delivery of the goods *prima facie*, passes the property in them to the indorsee."

The result of the cases, therefore, as a whole, seems to be that while, on the one hand the possession of bills of lading or other documents of the same nature, may be evidence of title and equivalent for some purposes to actual possession, yet, that on the other, it does not constitute title, nor dispense with the rule *nemo plus juris ad alienum transferre potest, quam ipse habet*. This construction of the law, seems to be the only one consistent with actual decision, and should therefore be adopted, even if inconsistent with some occasional dicta. It may, no doubt, operate hardly in some cases on purchasers, who have parted with value on the faith of an apparent ownership, which subsequently proves not to be real. But the inconvenience which might otherwise arise from this source, is very much diminished in the case both of real and personal property, by the well settled principle, that the rightful owner will be estopped, whenever his negligence gives occasion to the fraud practised on the purchaser (*supra*). And when taken with this limitation the rule that the right of property in chattels cannot be transferred, unless on the ground of authority or title, is just and salutary in its operation. There may be much plausibility, but there is little force in the argument, that when one of two innocent parties must suffer, from a fraudulent or unauthorized sale, the loss shall fall upon him who has entrusted the vendor with the possession of the goods, and thus enabled him to assume the appearance of owning that to which he has no title, rather than on an innocent purchaser, who has bought on the faith of his ownership. The necessities of commerce require, that agents should be entrusted with the possession of goods under circumstances which render it difficult, or impossible to prove, that those who claim under them, were aware, that their possession was fiduciary, and not beneficial. To throw the burden of proving notice, in such cases, on the owner, would place him at the mercy of every fraud between the agent and third persons. Moreover, while the vendee continues to be within the danger of the maxim, *caveat emptor*, and is held to ascertaining at his peril, that the party from whom he purchases, has either property or authority to sell, he may be led to observe, and take advantage of a great variety of circumstances, which if followed up, will serve as clues to lead him to a discovery of the truth, but which would be entirely disregarded, under the temptation of a good bargain, were it once established, that the title of a purchaser will be good, unless it be proved, that he knew that of the vendor to be bad.

On the whole, therefore, it would appear, that the best safeguard against the frauds of agents, who are entrusted with the property of others, is the actual disability which the common law has attached to all their transactions, stepping beyond the bounds of their authority, which enlists the interests of those with whom they deal, on the side of discovering an intended fraud, before its perpetration, as the opposite principle of negotiability, dis-

poses the same interest to facilitate the fraud at the time, and conceal it afterwards.

It would seem, that from the cases and principles stated in this note, we may draw the following conclusions.

The bill of lading is merely, what it professes to be on its face, a receipt for goods, given by a common carrier, accompanied with a promise to redeliver them to the bailor, or according to his directions.

Its delivery or indorsement have no effect in passing property, except as evidence of a sale, or as amounting to a symbolical delivery, and where the sale would have given a good title to the vendee, in the absence of the bill, on the delivery of any other symbol of possession; so that in all cases, where a sale of property is accompanied by an indorsement of the bill of lading, the title passes by the bargain and sale, and not by the indorsement. *Gardner v. Howland*, 2 Pick. 599. Between the original parties to a sale, moreover, the indorsement of the bill is as ineffectual for all purposes, as it is for the transfer of the property, and merely serves as evidence of the relations between them, without affecting those relations by its own operation. Its receipt by the consignee and vendee, will not prevent the consignor and vendor, from exercising his right of stoppage in transitu. And the only case in which the indorsement and delivery of the bill, will confer a greater right than would be conferred without such indorsement, by a properly executed assignment of the property to which the bill relates, is as between consignor and consignee on the one side, and third parties on the other. In such cases, where there has been a sale by the consignee, which would give a title to the vendee, as against the consignor, independently of the indorsement of the bill, the indorsement will take away the right of the latter to a stoppage in transitu, when it would otherwise exist. In like manner, where there have been circumstances of fraud, between vendor and vendee, which would authorise the former to resume possession of the goods, and avoid the sale as against the latter, the indorsement of the bill of lading will amount to a constructive delivery, if the position of the goods be such, that no actual delivery can be made. On this account a purchaser, who has taken an indorsement of the bill under such circumstances, may be entitled to hold the goods, when otherwise he would not. *Rowley v. Bigelow*, 12 Pickering, 307. From this effect of the delivery of the bill of lading, as amounting to a constructive possession, the idea of negotiability has been attached to the indorsement of a document, which, so far from giving a greater right of property to the indorsee than was held by the indorser, transfers of itself no right of property whatever, although, according to circumstances, it may either be evidence of a contract of sale when the goods have arrived, or amount to a constructive delivery, in pursuance of such contract, while they are at sea. It is true, a sale of goods not yet received by the vendee, is not sufficient to divest the right of stoppage in transitu, without an indorsement of the bill of lading. *Craven v. Ryder*, 6 Taunton, 433. This, however, depends upon reasons, entirely unconnected with the negotiability of the bill. When goods, which have been sold and shipped; but which have not been paid for, and have not yet arrived in port, are sold without an indorsement of the bill of lading, the purchaser has notice, constructively, if not actually, that the consignee has not been entrusted with the bill by the consignor, and consequently, that the latter

has not given up his control over the property, or the exercise of the right of stoppage in transitu. *Craven v. Ryder*, per GIBBS, C. J.

The bill of lading has been invested with this character of symbolic possession, when transferred by the consignee for valuable consideration, in order to clothe the latter with the power of converting the goods into cash before they are received, and thus carrying out the intentions of the consignor. In this manner, the parties to a shipment, by keeping the bill of lading in the hands of the consignor, or sending it to the consignee, are enabled to retain the right of stoppage in transitu in the former as against all the world, or to divest him of that right in favour of a bona fide purchaser from the consignee, who takes an indorsement of the bill from the latter. When the object is the power of realizing the value of the goods before their arrival, the latter course will be pursued; and where the solvency of the consignee is doubted, the former. In this manner, the right to stop in transitu, may, at the choice of the parties, either be preserved in full force, or be reconciled with the power of transferring an unincumbered title to property while at sea, which would otherwise necessarily be fettered from the period of the shipment of the goods until that of their arrival.

It still remains to consider the general principles, on which the right of stoppage is dependent, apart from the particular point determined in *Lickbarrow v. Mason*. The right to stop in transitu, in the proper sense of the term, only exists as between vendor and vendee. In all other cases, where goods are consigned to agents, no matter how extensive their authority as factors or otherwise, any subsequent change in their destination, is in fact a revocation of authority, not a stoppage in transitu. *The Merrimack*, 8 Cranch, 317, 353. Such a revocation may be effected after the goods have been received by the consignee, as well as before, except in so far as his right of lien may have attached for the balance of his accounts as agent. It can be ultimately defeated, only by some bona fide transaction between the agent and a third party, done in pursuance of the authority from the consignor; and only then, because, as such an act is that of the consignor himself, it cannot be set aside by him. *Wright v. Campbell*, 4 Burrow, 2046. Nor does the receipt of the bill of lading, alter the rights and relations of the shipper of goods, with regard to the party to whom they are consigned. As between them, it does not amount to constructive possession, and only has that effect, as between the consignor and consignee on the one side, and third parties on the other.

Thus, the receipt of a bill of lading by a factor, to whom his principal is indebted, will not amount to a constructive possession of the goods, nor give the factor a lien for the balance of accounts. *Ryberg v. Snell*, 2 Wash. C. C. Reports, 403; *Walter v. Ross*, *Ib.* 283; *Bonner v. Marsh*, 10 Smedes & Marshall, 376. In order that the lien should attach, the goods themselves must come to the factor's hands; and the owner may prevent it from attaching, either by selling the goods before this occurs, to a third party, or by revoking the factor's authority, and entrusting them to another person. This revocation may be effected whether the factor be insolvent or not; which marks the distinction between such a revocation and a stoppage in transitu, which can only take place in cases of insolvency. *Walter v. Ross*, 2 Wash. C. C. Rep. 283.

It is not necessary, however, in order to support the right of stoppage in

transitu, that the consignor should be the original owner of the goods, or have purchased them on his own account. Although acting as an agent, for a commission, and with the view of paying for them ultimately, with funds derived from the consignee, still, if he have obtained them on his own risk and credit, he will be entitled to stop them in transitu, on the insolvency of the latter; *Newhall v. Vargas*, 13 Maine, 93; 15 Maine, 314; *Ilisley v. Stubbs*, 9 Mass. 65; 7 Mass. 457; *Jenkyns v. Usborne*, 7 M. & G. 678.

In *Gibson v. Carruthers*, 8 M. & W. 321, the principle which, in cases of insolvency, justifies a resumption of the possession of goods, which have not reached the custody of the vendee, was resorted to as a defence where they had never left that of the vendor. An action was brought by assignees in bankruptcy, to recover damages for the failure of the defendants to fulfil a contract to ship a cargo of linseed, on board a vessel belonging to the bankrupt, taking bills of lading in their own name, and receiving payment in cash upon the arrival of the linseed in London. It was insisted for the defendants, that as the bankruptcy had intervened before the period fixed for the delivery of the cargo, they were entitled to retain possession of the goods, as if it had been parted with, they would have been entitled to regain it, by a stoppage in transitu. The soundness of this reasoning was approved by Lord ABINGER, who held that the defendants could neither be bound to part with their goods without being paid for them, nor to send a cargo to a distant, and perhaps falling market, upon the chance that the assignees would provide means of payment for it when there; and also expressed the opinion, that the contract was one which the defendants were not bound to fulfil, towards persons different from those with whom they originally contracted, although standing in the position of assignees in bankruptcy. But the majority of the court differed from his lordship, and held that it was the duty of the defendants to have sent on the cargo in such a manner, as to have retained the control over it on its arrival in London, and then to have been guided by the action of the assignees in delivering it to the latter, or selling it on their own account.

Although the vendor may have received part payment for the goods in cash, he may still have recourse to a stoppage in transitu for the remainder of the price; *Newhall v. Vargas*. Nor will this power be affected by his receipt and negotiation of bills of exchange for the whole amount of the price, although the period of maturity of the bills has not yet arrived; *Bell v. Moss*, 5 Wharton, 189; *Newhall v. Vargas*. In order to destroy this right as between vendor and vendee, there must be full payment, or final delivery of the whole of the goods. If part only be delivered, the right will survive as to the rest; *Tanner v. Scovell*, 14 M. & W. 28; *Buckley v. Furniss*, 10 Wend. 137; 17 Id. 504.

But although an actual possession of part, will not establish, it will not preclude an accompanying constructive delivery and possession of the whole. *Jones v. Jones*, 8 M. & W. 431; *Slubey v. Heyward*, 2 H. Blackstone, 204; *Hammond v. Anderson*, 4 Bos. & Pul. 69. And on the other hand, a valid stoppage in transitu of part of the goods forwarded under an entire contract, will not abrogate the effect of an actual or constructive possession acquired by the consignee of the residue; *Outhwaite v. Wentworth*, 10 M. & W. 436. 451.

It was held in *Dodson v. Wentworth*, 4 M. & G. 1080, that the vendor had no right to resume possession of flax, which he had despatched by a vessel, whence it had been transferred to the boat of a canal company, and finally deposited in the warehouse of another company, for the purpose of safe keeping; it being shown, that the purchaser was in the habit of having goods sent to him, conveyed from the place of such deposit, at his own charge, to his place of residence. The case was rested on the ground, that the final delivery contemplated by the parties had been attained, and that the goods had in effect come to the hands of the person, by whom they had been purchased. The same rule may also prevail, where the goods are still in the custody of the carrier by whom they have been forwarded, if it distinctly appear, that he has expressly, or by implication, agreed to hold them as agent for the vendee, and not on behalf of the vendor, for the purposes of the transitus. In *Wentworth v. Outhwaite*, 10 M. & W. 435, this was held to be established by evidence, that it was the custom of the carriers, upon the arrival of the goods at a town near the residence of the purchaser, to store them for safe keeping in their warehouse, until he took them away in his carts, and that the goods in question, were warehoused under these circumstances, at the time when the stoppage was effected. So, where the goods were brought by the carrier to the town where the vendee resided, and deposited on the wharf until he should be ready to send for them, they were held to be constructively in his possession, and beyond the reach of a stoppage in transitu; *Sawyer v. Joslin*, 20 Vermont, 172.

The general rule, however, undoubtedly is, that the transitus will not be considered at an end, so long as any thing remains to be done, to put the goods finally and actually in the control, or at the disposition of the vendee. Thus, it was held in *Hitchcock v. Cowell*, 20 Wendell, 167; 23 id. 611, the deposit of the goods in a warehouse at the end of a line of canal, along which the carrier had agreed to transport them, but at the distance of thirty miles from the vendee's residence, which was their final destination, for the purpose of safe keeping, until he should send for them, was not such a termination of the transitus, as would defeat the vendor's right of reclamation. Nor will the transitus be at an end, even when the goods have reached their place of destination, if they still remain in the actual or constructive possession of the vendor, nor unless they are actually or constructively in that of the vendee. The arrival of the goods, and the delivery of part, under an order for the delivery of the whole, will not preclude the right to stop the residue; *Tanner v. Scovell*, 14 M. & W. 28. And it would appear, that where an insolvent vendee relies on a constructive possession as against the vendor, he must show that he was entitled to immediate and actual possession. Thus, where the goods were entered in the wharfinger's books, at the place of destination, in the name of the vendee, but with instructions not to deliver them until the freight was paid, the transitus was held to continue in favour of the vendor. And in *Donath v. Bromhead*, 7 Barr, 307, the vendor was allowed to stop goods which had not only been landed at the port of ultimate destination, but entered in the name of the vendee at the custom-house, on the ground that as he had failed to comply with the provisions of the revenue laws, the goods were not subject to his control, and neither actually nor constructively in his possession.

The law was held the same way by the Court of Errors; overruling the Supreme Court, in a case where the goods had been taken to the custom house and entered in the name of the vendee, in consequence of his not paying the duties; *Mottram v. Heyer*, 1 Denio, 483; 5 id. 663. It was said, that the decision went on the ground, that the goods were not at the disposition of the vendee, and that the case would have been different, had they been deposited in a government warehouse, under the system which prevails in England, and has recently been introduced into this country.

The distinction between actual and constructive possession, and the question when possession should be held to exist constructively, were much considered in *Whitehead v. Anderson*, 9 M. & W. 518. In that case, the agent of the assignees of a bankrupt consignee, went on board the vessel, and stated that he came to take possession, of the cargo, which he saw and touched. The captain promised to deliver it to him, as soon as he was paid the freight and other charges due for the voyage. Before this was accomplished, a person acting as agent for the vendors, came on board and delivered a notice of stoppage in transitu to the mate, and thus brought up the question, whether a previous possession had been taken for the assignees. The judgment of the court was delivered by PARKE, Baron, who held the following language: "The law is clearly settled, that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt, that the transit would be at an end: though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action. This is a case of *actual* possession, which certainly did not occur in the present instance. A case of *constructive* possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him.

"It appears to us to be very doubtful, whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody. In the case of *Foster v. Frampton*, 6 B. & C. 107; 9 D. & R. 108, it is clear that there were such circumstances; whether in that of *Ellis v. Hunt*, 7 T. R. 46, is doubtful; but it is unnecessary to determine this point, as there is no finding in this case even of any act done to the timber *with intent to take possession*. It is said, indeed, that the agent of the assignees touched the timber, but whether by accident or design is not stated. There being then no such act of ownership, it seems to us that unless, by contract with the captain, express or implied, the relation in which he stood before, as a mere instrument of conveyance to an appointed place of destination, was altered, and

he became the agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee.

"There is no proof of any such contract. A promise by the captain to the agent of the assignees is stated, but it is no more than a promise, without a new consideration, to fulfil the original contract, and deliver in due course to the consignee, on payment of freight, which leaves the captain in the same situation as before; after the agreement he remained a mere agent for expediting the cargo to its original destination.

"We therefore think that the transaction on the 8th August did not amount to a constructive possession by the vendees, and therefore the defendants are entitled to our judgment."

The better law would, therefore seem to be, that whether that final delivery has been attained which determines the right of stoppage in transitu, is to be decided in each case, by examining whether the parties contemplated any farther, and more absolute, reduction to possession on the part of the vendee.

Although the goods be delivered to an agent of the vendee, or to a person in his employ, or although placed on board his ship, or in his warehouse, still, if this be done with the view of forwarding them to the vendee himself, and the direction in which they have been moving, and are still to move, is the result of the original impulse impressed upon them by the vendor at the beginning of the transitus, the power of the latter to resume possession of the goods will still continue. And all bailments made in pursuance of the original design of the vendor, where that has been to bring the goods more absolutely to the possession of the vendee, are in fact quoad the completion of the transitus, bailments on the account and to the agents of the vendor; and this, although made to persons in the employ of the vendee, and for the purpose of transportation in his vessels. The transitus will therefore, equally continue, whether the consignor ship the goods in a vessel belonging to himself, or in one owned by the consignee, and commanded by a master in his employ. *Stubbs v. Lund*, 7 Mass. 453; *Ilseley v. Stubbs*, 9 id. 65; *Newhall v. Vargas*, 13 Maine, 93; 15 id. 314; *Buckly v. Furniss*, 15 Wendell, 137; 17 id. 504; *Stokes v. La Reviere*, 3 John. 436. Where, however, the shipment is made, not subject to the direction of the vendor, nor with the intent of effecting a final delivery of the goods to the vendee, but is subject to his order, and the only delivery to him contemplated by the parties, there the transitus is terminated at once by the mere fact of the shipment, and the vendor can have no right to resume possession of the goods. *Rowley v. Bigelow*, 12 Pick. 307; *Dixon v. Baldwin*, 5 East, 475; *Valpy v. Gibson*, 4 C. B. 837. And this rule may apply where the position of the goods has not been changed since the sale, as where the vendor gives an order on the keeper of the warehouse in which they are stored, for their immediate delivery to the vendee or his agents. *Frazier v. Hilliard*, 2 Strobbart, 309.

The law with regard to what sort of delivery, will amount to a termination of the transitus, would seem to be held differently in Pennsylvania. In *Bolin v. Huffnagle*, 1 Rawle, 9, the court decided that this does not so much depend on what was the ultimate destination of the goods, or the final object of the voyage, as on the nature of the circumstances attendant upon the particular delivery in question, and the character of the

person to whom it is made. A delivery, for any object whatever, to the possession of an exclusive agent of the vendee, was said to be necessarily a final delivery. And it was held under the influence of this principle, that a shipment of goods made by the plaintiffs at Malaga, on board a vessel belonging to the defendants, and commanded by a master in their employ, although for the purpose of transportation to their place of residence, and an actual delivery to them, determined the transitus, and divested the right of stoppage.

The earlier cases on the subject of stoppage in transitu, seem to have required that manual possession should be taken of the goods, by the party acting on behalf of the consignor. A notice to the carrier in possession of the goods, whether actually in own person or constructively through his agents, was subsequently held to be sufficient. *Lett v. Cowley*, 1 Taunton, 666, 169. But the further distinction was taken in *Whitehead v. Anderson*, that a notice to the principal, will not operate as a stoppage of goods in the hands of his agent, unless the circumstances are such that it can be communicated to the agent, before the termination of the transitus. Hence, an order to the owners, not to deliver the cargo of a vessel at sea, will be insufficient if the goods reach the vendee before it can be made known to the master. In *Bell v. Moss*, 5 Wharton, 189, this difficulty was ingeniously obviated, by addressing the notice while the vessel was still at sea, to the assignees of the consignee, who had become insolvent, which was held to preclude them from taking possession of the goods after their arrival. It could not be urged, under these circumstances, that the parties to whom the notice was given, were unable to give it effect, and the case was decided on the ground that any notorious act of reclamation by the vendor, addressed to the parties in interest, was sufficient. But in *Mottram v. Heyer*, the point was decided the other way, and notice to the carrier treated as essential to a valid stoppage in transitu.

Any agent of the vendor who has power to act for him, either generally or for the purposes of the consignment in question, may stop in transitu, without an authority especially directed to that end, or empowering him to adopt that particular measure. *Bell v. Moss*, 5 Wharton, 189; *Newhall v. Vargas*; *Whitehead v. Anderson*, 9 M. & W. But a stoppage cannot be made by a stranger absolutely without authority, nor, if he makes it, can his act be rendered valid by a ratification on the part of the vendor or his agents, subsequent to the period at which the goods reach the hands of the vendee, for although, in general, a subsequent ratification is equivalent to a prior command, yet this does not hold good where the right by virtue of which alone, ratification is possible, terminates before it is given. *Bird v. Brown*, 4 Exchequer, 786. And the general principle that relation, like other legal fictions, shall not operate to divest vested rights, or render rightful acts wrongful, applies emphatically when it is sought to defeat the title of a vendee, on the ground of the subsequent approval of an act which was wholly unauthorized when originally performed. *Buron v. Denman*, 2 Exchequer, 166; *Wood v. McKain*, 7 Alabama, 800. But a ratification by the vendor, before the goods reach the hands of the vendee, would no doubt give validity to a prior stoppage, although made by a stranger wholly without authority.

We have already seen, that while the goods remain unpaid for, and the

transitus continues, the right of the vendor to stop them, upon the occurrence of insolvency in the vendee, may be defeated by a bona fide sale, for a valuable consideration, accompanied with a transfer of the bill of lading. All these requisites must, however, concur. *Stanton v. Eager*, 16 Pickering, 473. An assignment for the benefit of creditors, or a seizure by an execution creditor, or under process of foreign attachment against the consignee, will leave the goods as much subject to the exercise of the right, as they were previously. *Idem. ibid.* *Buckley v. Furniss*, 15 Wend. 137; 17 id. 504. *Naylor v. Dennie*, 8 Pick. 198. The fact of an assignment for the benefit of creditors, is of itself, notice to the assignee of the insolvency of the consignee, and of the consequent liability of the goods to seizure by the consignor. Yet it would seem, that if an assignee, for the benefit of creditors, take actual possession of the goods before they are reclaimed by the vendor, the right of the latter will be as much defeated, as if they had come to the hands of the assignor himself. *Jones v. Jones*, 8 M. & W. 431. And the Court would seem to have thought that, if the deed of assignment contained a release from the creditors, and was accompanied by an indorsement of the bill of lading, it would be considered as a transfer for a valuable consideration, and preclude any subsequent stoppage in transitu. In this case, however, the assignee, by whom the possession was taken, was himself one of the creditors for whose benefit the deed of assignment was made. Nor will a sale for a valuable consideration, unaccompanied by a transfer of a bill of lading, although sufficient to pass the property in the goods, (*Stanton v. Eager*, 16 Pick. 473; *Gardner v. Howland*, 2 Pick. 399,) affect the power of the consignor, to stop them in transitu. *Ilseley v. Stubbs*, 9 Mass. 65; *Stanton v. Eager*; *Craven v. Rider*, 6 Taunton, 433. The absence of the bill of lading, must be considered as constructive notice, that the consignee has not paid for the goods, and that the consignor has not waived his right of resuming his lien for the purchase-money. *Craven v. Ryder*; *Jenkins v. Osborne*, 7 M. & G. 678.

The stoppage of the goods does not rescind the contract of sale. It merely replaces the consignor in the position in which he was before the transitus began, and enables him to enforce the right of lien, which arises in every vendor, on the non-payment of the purchase-money, and continues until the goods come to the actual possession of the vendee or his agents. *Newhall v. Vargas*, 13 Maine, 93; *Jordan v. James*, 5 Hammond, 98, 15 id. 314; *Wentworth v. Outhwaite*, 10 M. & W. 436, 452. When part of the purchase-money has been paid, a tender of re-payment of such part to the consignee, is consequently, not requisite to the validity of the stoppage; 13 Maine, 93. On the other hand, the consignor becomes liable to pay the freight on the voyage; for the effect of the stoppage is, to revest his possession, ab initio, by relation of law; and moreover, the voyage becomes in fact one performed for his benefit. This liability will accrue, though the goods have been transported on board a ship belonging to the consignee, so that no freight whatever would be due, independently of the stoppage. *Newhall v. Vargas*, 13 Maine, 314.

As the contract of sale is not rescinded by the stoppage, the party who has made it may sue for and recover the price due on the original contract, after a new tender of the goods stopped. And the necessity for a tender may be waived, as in other cases of sale, by the conduct of the purchasers.

15 Maine, 314. The recovery, moreover, may be for the whole value of the goods originally shipped, although part of them may have perished during the voyage, before the stoppage was effected, for the property passes to the vendee, and the risk becomes his, from the moment the contract of sale is complete, although the vendor should resume or retain possession of the goods, by virtue of his lien for their price. *Idem. ibid.*

As a vendor who has retained possession of goods under his lien for their price, may sell them when of a perishable nature, to prevent a total loss, (*Sands v. Taylor*, 5 Johnson, 411,) so a vendor who resumes possession of goods under a stoppage in transitu, may, perhaps, exercise the same power, without losing the right to recover against the vendee, by a subsequent suit, the difference between the sum produced by the sale, and the price fixed by the original contract.

It may be well to observe, in taking leave of the point decided in *Lickbarrow v. Mason*, that the decisions will perhaps finally determine, that where a bona fide sale, for value, of a shipment which has not yet arrived, is made by the consignee, and executed by any constructive delivery of possession, the defeasance of the right of stoppage does not *necessarily* so much depend upon an accompanying indorsement of the bill of lading, by the consignee, to the purchaser, as upon the question whether there has been a past absolute indorsement of such bill, by the consignor to the consignee. It is shown by the case of *Gardner v. Howland*, that in the absence of the bill of lading, any other sufficient constructive delivery will execute the sale and transfer all the rights of the consignee to the purchaser, and it would therefore appear, that where the consignor transfers the bill of lading to the consignee, and thus gives him full power to pass an indefeasible title, a subsequent sale under this power ought to be valid as against the person who gave it, even if unattended by an endorsement of the bill; at least in those cases, where the circumstances are such as to excuse or explain the failure to make it. In *Jenkyns v. Osborne*, 7 M. & G. 678, where the owner of goods sold them while yet at sea, without endorsing the bill, he was held entitled to stop in transitu, as against a subsequent purchaser from the vendee. But this decision is evidently not in point in any case, where the vendor has parted with the bill to the vendee, although the latter may have omitted to transfer it subsequently.

[*437]

*MILLS v. AURIOL.

TRIN.—30 G. 3. in C. P. & B. R.

[REPORTED 1 H. BLACK. 433; AND 4 T. R. 94.]

The bankruptcy of the defendant cannot be pleaded in bar of an action of covenant for rent.

THIS was an action of covenant for non-payment of rent payable quarterly. The covenant on which the breach was assigned, after the usual words, "yielding and paying, &c.," was as follows:—"And the said Peter James (the defendant) for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree (amongst other things) to and with the said Benjamin (the plaintiff), his heirs and assigns, that he the said Peter James, his heirs, executors, administrators, or assigns, should and would, during all the rest of the said term, thereby demised, well and truly pay, or cause to be paid, unto the said Benjamin, his heirs and assigns, the said clear yearly rent of 110*l.*, in manner and form aforesaid, according to the true intent and meaning of the said indenture." The breach was the non-payment of 27*l.* 10*s.*, for a quarter ending December 25, 1789.

The defendant pleaded, 1st, *Non est factum*. 2nd, *Riens in arrere*. 3rd, "That after the making of the said indenture in the said declaration mentioned, and before the suing out of the original writ of the said Benjamin against the said Peter James, to wit, on the first day of January, in the year of our Lord 1789, and from thence until the day of suing out the commission of bankruptcy herein mentioned against the said Peter James, he the said Peter James was a trader within the intent and meaning of the several statutes made and then in force against bankrupts; that is to say, a merchant, dealer and chapman, to wit, at London aforesaid, in the parish and ward aforesaid, and during all that time used and exercised the trade and business of a merchant, in buying and selling divers silks, and other goods, wares, and merchandizes, and receiving consignments of silks, and other goods, and selling the same on commission, for his correspondents and customers, for profit and gain, and thereby sought and endeavoured to get his living as other persons of the same trade usually do; and the said Peter James, so being such trader as aforesaid, within the intent and meaning of the said several statutes made and then in force concerning bankrupts, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James afterwards, and before any of the rent or money in the said declaration mentioned became due and payable, to wit, on the 8th day of June, in the year aforesaid, at London aforesaid, in the parish and ward aforesaid, became and was indebted to one George Tickner Hardy, gentleman, then being a subject of this realm, in 100*l.* of lawful money of Great

Britain, for so much money, before that time, paid, laid out, and expended by the said George Tickner Hardy, to and for the use of the said Peter James, at his special instance and request; and the said Peter James being so indebted as aforesaid, and being a subject of this realm, and so seeking his living by way of buying and selling as aforesaid, he the said Peter James, afterwards, to wit, on the same day and year last aforesaid, at London aforesaid, in the parish and ward aforesaid, (he the said George Tickner Hardy so being a creditor of the said Peter James, and being then wholly unsatisfied his debt,) manifestly became a bankrupt, within the intent and meaning of the several statutes made and then in force against bankrupts; and the said Peter James so being and remaining a bankrupt as aforesaid, he the said George Tickner Hardy, as well for himself as for all other creditors of the said Peter James, afterwards, to wit, on the 9th day of June, in the year aforesaid, at Westminster in the county of Middlesex, to wit, at London aforesaid, in the parish and ward aforesaid, exhibited his certain petition in writing to the Right Honourable Edward Lord Thurlow, then Lord High Chancellor of Great Britain, and thereby petitioned the said Lord Chancellor, to grant to the said George Tickner Hardy *his majesty's commission, to be directed to such and so many persons as he should [*438] think fit to give his authority of and concerning the said bankrupt, and to all other intents and purposes, according to the provisions of the statutes made and then in force concerning bankrupts, as by the said petition remaining in the Court of Chancery of our lord the now king at Westminster aforesaid more fully appears; and the said Peter James further saith, that upon the said petition of the said George Tickner Hardy so exhibited as aforesaid, on behalf of himself and all other the then creditors of the said Peter James, according to the form of the statutes in such case made and provided, for giving them relief on that behalf, afterwards and before the said sum of money in the said declaration mentioned or any part thereof became due, and before the said supposed breach of covenant, to wit, on the 9th day of June in the year aforesaid, at Westminster aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, a certain commission of our lord the now king, founded upon the statutes made and then in force concerning bankrupts, in due form of law issued, under the great seal of Great Britain, bearing date the same day and year last aforesaid, directed to Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, Esquires, and was then and there to them directed, by which said commission, our said lord the now king gave full power and authority to them the said Michael Dodson, Thomas Plumer, Edward Finch Hatton, Robert Comyn, and Charles Proby, four or three of them, to proceed, according to the said statutes, and all other statutes then in force concerning bankrupts, not only concerning the aforesaid bankrupt, his body, lands, tenements, both freehold and copyhold, goods, debts, and all other matters whatsoever, but also concerning all other persons, who by concealment, claim, or otherwise, should offend touching or concerning the premises, or any part thereof, against the true intent and purport of the said statutes, and to do and execute all and every thing and things whatsoever, as well for and towards satisfaction and payment of the creditors of the said Peter James, as towards and for all other intents and purposes whatsoever, according to the order and provisions of the said statutes, as by the said

[*439] commission (amongst other things) more *fully appears : by virtue of which said commission, and by force of the statutes aforesaid, the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, three of the commissioners named in the said commission, afterwards, to wit, on the 11th day of June, in the year aforesaid, to wit, at London aforesaid, in the parish and ward aforesaid, having taken upon themselves the burthen of the said commission, then and there duly adjudged and declared the said Peter James to have been, and become on the day of the issuing of the said commission, and then to be a bankrupt, within the true intent and meaning of the said statutes, some or one of them : and the said Peter James further says, that afterwards, to wit, on the 26th day of June in the year aforesaid at London aforesaid, (the said Peter James then remaining and continuing a bankrupt as aforesaid,) they the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, in due manner and according to the form of the statute in such case made and provided, by an indenture then and there duly made, and bearing date the same day and year last aforesaid, between the said Michael Dodson, Edward Finch Hatton, and Robert Comyn, of the one part, and Robert Mendham of Walbrook, London, merchant, George Marsh of Broad Street, London, silk-broker, and the said George Tickner Hardy of the other part, then and there duly bargained, disposed, assigned, and set over, amongst other things, the said indentures of lease in the said declaration mentioned, and all the estate and interest of the said Peter James, of, in, and to the same, and of, in, and to the premises thereby demised, to the said Robert Mendham, George Marsh, and George Tickner Hardy, (the said Robert Mendham, George Marsh, and George Tickner Hardy, before the said assignment so made to them as aforesaid, having been duly chosen assignees of the debts, credits, goods and chattels, estate and effects of the said Peter James the bankrupt, according to the form of the statutes in such case made and provided,) to hold to them the said Robert Mendham, George Marsh, and George Tickner Hardy, their executors, administrators, and assigns, from thenceforth for the residue of the said demised term then to come and unexpired ; by virtue of which said assignment, all the estate, interest, and term of years then to come and unexpired, property, claim, and demand, of the *said Peter James, of and in the said indenture of lease, and of and in the premises thereby demised, then and there became, and was vested in the said Robert Mendham, George Marsh, and George Tickner Hardy, as such assignees, and the same from thence hitherto hath been, and still is vested in them the said Robert Mendham, George Marsh, and George Tickner Hardy (the said commission still remaining in full force and effect, in no ways superseded, cancelled, or set aside,) and the said Robert Mendham, George Marsh, and George Tickner Hardy, then and there, *to wit*, on the same day and year last aforesaid, at London aforesaid, became, and were for a long time, *to wit*, from thence hitherto have been possessed of and in the said demised premises, with the appurtenances, and this the said Peter James is ready to verify," &c.

To this plea there was a general demurrer, and issue joined on the two first.

The demurrer was argued in Easter Term last by *Bent*, Serjt., for the plaintiff, and *Le Blanc*, Serjt., for the defendant ; and in this term by *Adair*,

Serjt., for the plaintiff, and *Lawrence*, Serjt., for the defendant. The following was the substance of the arguments on the part of the plaintiff:—

The matter disclosed in the third plea affords no answer to the demand of the plaintiff, because the covenant on which the action is brought being express, personally bound the defendant, and was not done away by the assignment under the commission of bankrupt. In leases there are two sorts of covenants, by which tenants are liable either to an action of debt or covenant; namely, express and implied covenants. On the latter, the lessee is liable to either species of action, unless there has been a complete assignment with the assent of the lessor, for by such an assignment the right of action of the lessor is certainly divested. *Walker's case*, 3 Co. 22, a., where the lessee, having assigned his term without the assent of the lessor, was still holden to be subject to debt for the rent in arrear. So in *Wadham v. Marlow*,^(a) Lord *Mansfield* says that the tenant shall not by his

(a) *Wadham v. Marlow*, B. R. Mich. 25 Geo. 3.

This was an action of debt^(†) for rent due on a lease which was expired. The defendant pleaded: 1. *Non est factum*. 2. As to 18l. 5s. one quarter's rent, that he became a bankrupt, and that the said sum of 18l. 5s. was due before his bankruptcy. 3. As to the residue of the sum demanded, that it became due after the bankruptcy. On the first plea issue was joined. On the second the plaintiff remitted the 18l. 5s. and demurred generally to the third.

It was argued in support of the demurrer, that where there is an assignment by the original lessee, if the lessor accepts rent of the assignee, the lessee is thereby discharged, it being an acceptance of the assignee as tenant. The lessor may either resort [*441] to the lessee on the privity of contract, or the assignee on the privity of estate. But having made his election against whom to proceed, he is bound by it. *Walker's case*, 3 Co. 22; *Devereux v. Barlow*, 2 Saund. 181. The case of *Coghill v. Frelove*, 3 Mod. 325, goes farther, as there it is said, that privity of contract with the testator is not discharged by his death. In *Cantrel v. Graham*, Barnes, 69, the Court interposed on behalf of the liberty of the person. That is like the case of a certificate bankrupt having by a subsequent promise made himself liable to a debt contracted before his bankruptcy, where the Court have permitted a common appearance.

As to the general question, whether the plaintiff can recover notwithstanding the assignment? the bankrupt may indeed say, that he has parted with his whole interest, and that it is hard he should be called to account on a contract previously made. But if there be any hardship, it is for the legislature to interpose. Bankruptcy arises from the act of the bankrupt himself; he therefore is liable as much as any other lessee. The certificate can discharge from no debt but what is due before the bankruptcy. *Aylett v. James*, C. B. 22 G. 3, which was an action of covenant; the defendant pleaded his discharge under an insolvent act, and on demurrer judgment was given for the plaintiff. It was there said, that a bankrupt is liable for covenants made before his bankruptcy; and there seems to be no reason why he should not also be liable for a debt accruing in consequence of a covenant made before it.

For the defendant it was contended, that debt was only brought on the reddendum of the lease. *Plowd.* 132; *Co. Litt.* 142, a.; 2 *Black. Com.* 41. It is payable out of the land, not on account of the land. The moment the lessee parts with the possession, the action can no longer be maintained. Notice to the lessor of the assignment by the lessee is sufficient to discharge him. There is a great difference between covenant and debt on the reddendum; the words "yielding and paying" create a covenant to pay, but only on condition that the lessee shall enjoy. It does not hold after eviction or loss of possession. But after loss of possession the party is still liable on an express covenant. 1 *Sid.* 447; 1 *Brownl.* 20. Rent arises on a contract executory. Suppose the bankrupt had entered into a contract to deliver goods at a future day; his assignees might have affirmed or disaffirmed the contract. All his personal engagements pass to them. If the term be of greater value than the rent, it shall be presumed that the assignees have accepted it, and the lessee shall be exonerated. The privity of contract is destroyed by the assignment. When the lessee is deprived of the land without remedy over, he ceases to be liable for the rent. So it is on eviction, entry, and expulsion. *Plowd.* 71; *Noy*, 75. So if deprived by the act of God. 1 *Roll. Abr.* 236. But here the defendant is deprived by the act of law. 7 *Vin.*

(†) *Cooke's Bankrupt Laws*, last edit. 511.

own act destroy the tenancy without the concurrence of the landlord. As the law is *thus with regard to the action of debt on an implied [*442] covenant, so also it is with respect to the action of covenant on an implied covenant, in which the general rule is, that without the assent of the lessor, the lessee shall not discharge himself from his covenant by an assignment of the term.

Thus the law stands as to implied covenants. But with regard to an express covenant, though it be true that no action of debt will lie on it against the lessee after an assignment, where the lessor has by a direct act (such as the acceptance of rent from the assignee) confirmed the assignment, Cro. Jac. 334, yet it is equally true, that on an express covenant, an action of covenant will lie for the lessor against the lessee, notwithstanding his acceptance of rent from the assignee. 1 Sid. 402; Cro. Jac. 309; Cro. Car. 188, 580; Cas. temp. Hardwicke, 343; and in Cro. Jac. 522; 1 Sid. 417; the distinction between express and implied covenants is taken; that in an express covenant, though the lessor accept rent from the assignee, yet he may have an action of covenant against the lessee, but not in case of an implied covenant, which, it is said, is cancelled by the assignment.

The question then is, whether, in the present case, the lease and all the bankrupt's interest being vested in the assignees under the commission, he is discharged from an express covenant? Now the contrary appears from *Thursby v. Plant*, 1 Saund. 237. The assignees of a bankrupt are like any

Abr. 84; 1 Atk. 67. A commission of bankruptcy is an execution in the first instance, not an act of the party. Burr. 2439, *Mayor v. Steward*. There is a difference between an insolvent person and a bankrupt.

Lord Mansfield.—Two points were argued for the plaintiffs. 1st, If there had been no bankruptcy but the lessee had merely assigned to another, he would still remain liable in debt, till the lessor had assented to the assignment. 2nd, Bankruptcy being an act done by the bankrupt himself, he shall remain liable like any other lessee. As to the first point, it is not necessary that there should be an actual acceptance of rent by the lessor in order to discharge the lessee from the action of debt on the reddendum; but any assent is sufficient. The action on the reddendum is founded, not merely on the terms of the demise, but on the enjoyment of the tenant. In *Warren v. Conset*, 2 Lord Raym. 1500, it was agreed that "levied by distress and sic nil debet" was a good plea to debt for rent on an indenture. What shall be deemed an enjoyment by the tenant hath been much agitated as a question of law; but he cannot destroy the tenancy without the assent of the lessor. On behalf of the defendant it was argued, that notice to the lessor is a sufficient discharge of the lessee. But in the cases in Brownl. and Cro. Jac. there was an express acceptance, and in *Siderfin*, though the case is short and confused, it must be so understood. In 2 Saund. 181, it is said he may sue either assignee or lessee. In the present case there is neither acceptance of rent nor assent; and if there were nothing but notice, we are all of opinion that the lessee would be liable to the action. This brings me to the second point, on which there are only two cases; for that of *Aylett v. James* does not apply. Those cases are, *Mayor v. Steward* and *Cantrel v. Graham*. The first was determined on the ground that the covenant was collateral; but there is a strong though obiter dictum of Yates, J. that it would be hard to leave the lessee liable to the covenants, when the act of law had divested him of the emoluments and vested them in his creditors. In *Cantrel v. Graham*, the Court made a direct determination on the point. We have a fuller note of it than there is in Barnes. The counsel said it was merely an effort made to relieve the defendant on account of the hardship of the case. But the court would not have discharged him unless they had been satisfied that the action was not founded. This case is precisely in point, and we agree with the determination. The bankrupt's estate is vested in the assignees by act of parliament. Every man's assent shall be presumed to an act of parliament. It was agreed that if a man be divested by act of law without his own default, he is discharged. This is as strong, because, though it was his own act originally on which an assignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota sed proxima spectantur*.

Judgment for the defendant.

other assignees of a lease. The assignment under the commission is no more than any other assignment with the assent of the lessor, every one having virtually given his assent to an act of parliament. *Wadham v. Marlow*. A bankrupt, though divested of his property, is still liable on his express covenants.

The protection from debts which is given to bankrupts is on condition of a complete obedience to the regulations of the several acts passed on the subject. It is therefore material to consider what those regulations are. By 13 Eliz. c. 7, bankrupts were only discharged to the extent of the sum actually paid: and thus the law remained till the passing of 4 Anne, c. 17, by which a bankrupt surrendering, and conforming with the terms prescribed, was discharged from all debts due at the time he became a bankrupt; the reasons of which provisions are stated by Lord Hardwicke, 1 Atk. 256. To make the remedy complete, the statute *5 Geo. 2, c. 30, [*443] s. 7, gives the defence of a general plea of bankruptcy, and allows the certificate to be evidence in support of it. But the bankrupt is not discharged by these statutes from contingent debts, *Tully v. Sparkes*, Lord Raym. 1546, nor from uncertain damages, nor from debts accruing after the act of bankruptcy, though arising on a cause preceding it. The certificate is not a bar to an action, founded on an express collateral covenant, which does not run with the land. *Mayor v. Steward*, 4 Burr. 2439. In that case the bankrupt was holden liable on an express covenant, and if he be so on one sort of express covenant, why not on another? The reason why in general the creditors of a bankrupt are barred by the certificate is, that they may prove their debts under the commission. But where the creditor cannot come in under the commission, there the certificate is not a bar; and in the present case no debt could be proved under the commission. The defence here set up is founded on a mere *obiter dictum* of Yates, J., in *Mayor v. Steward*, where he says, that "as the act divests the bankrupt of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him, if he should remain still liable to it, when he is disabled by the act of parliament from performing it." But whether there would be a hardship or not, was a matter for the consideration of the legislature. In fact, the hardship would not be greater than in suing a felon after attainder and forfeiture of his lands, yet a felon in such a situation is liable to an action. *Bannister v. Trussel*, Cro. Eliz. 516; *Noy*, 1; *Owen*, 69. But in truth the hardship would be greater on landlords, if the tenant becoming a bankrupt were discharged from his express covenants. They would be liable to fraud, and might be deprived of their rent. The assignees of the bankrupt might assign the lease to an insolvent person, as in *Stra.* 1221, where the former assignee of a term made a further assignment to a prisoner in the Fleet, and by such assignment was discharged from debt for rent by the original lessor; it being holden that an assignee of a term was no longer liable than while the privity of estate continued, and he occupied the premises; which doctrine also agrees with *Walker's* case. By assignment therefore the landlord may be left without remedy unless he should resort to the antiquated process of *cessavit*, *or to the assistance of two justices under stat. 11 G. 2, c. 19, s. 16. Although an action of debt on the reddendum [*444] of a lease is barred by a bankrupt's certificate, according to the case of

Wadham v. Marlow, and although an action of covenant on an implied covenant is also barred by an assignment, yet it does not follow that an action of covenant on an express covenant is likewise barred. Though the party be exonerated in debt, he is not necessarily so in covenant. Debt lies on the reddendum, because a rent issues out of the land, Plowd. 132; Co. Litt. 142, a. It is payable out of the land, and when the possession of the land is parted with, the rent, and the action of debt for the recovery of it, are gone. But an express covenant is a solemn engagement from one man to another; it neither issues out of land nor is done away by the loss of possession. In 1 Salk. 82, it is said that the action of debt is founded on privity of estate, but covenant on privity of contract, which seems to be admitted. 7 Vin. Abr. 330. In the case of Cotterell v. Hooke, Dougl. 97, on covenant for non-payment of an annuity, it appeared on oyer, that there was a bond conditioned for payment of the annuity, besides the deed of covenant; it was pleaded that both were given for the same purpose, that the bond was avoided and the defendant discharged under an insolvent act. But the court held, though the bond were forfeited before the discharge, yet the defendant might be sued afterwards on the covenant. To the same point is Hornby v. Houlditch, And. 40, the judgment of Lord Hardwicke, which case is more fully stated in 1 Term Rep. B. R. 93, which is directly in point to show, that an assignment by an act of parliament does not discharge a party from an express covenant. So also in Aylett v. James,^(a) which was an action of covenant, the defendant pleaded his discharge under an insolvent act, to which there was a demurrer, and judgment for the plaintiff, the court saying, that a bankrupt was liable on an express covenant made before the bankruptcy. The case of an eviction is totally different, since in that case no rent is due, whether the eviction be by the lessor himself, or a person having a superior title.

The following were the arguments for the defendant: Admitting the authority of the cases cited on the other side, which shew that, where there is a voluntary assignment by *a lessee, such assignment does not [*445] excuse him from an express covenant; admitting, also, that the acceptance of rent by the lessor from the assignee would not discharge the lessee from an express covenant; yet there is a clear distinction to be made between an assignment by virtue of the bankrupt laws, and a voluntary assignment by the lessee. By the former, the bankrupt is divested by act of law of all the property, out of which, and in respect of which, the covenant was made. A covenant for payment of rent runs with the land; when therefore the tenant is evicted by a superior title, he is released from his covenant. When he is prevented from enjoying the land in respect of which he entered into the covenant, he is no longer liable on the covenant. Rent is defined to be a certain profit issuing yearly out of lands and tenements corporeal; Plowd. 71; 2 Black. Com. 41; when therefore the land is gone, there is an end of the profits; and it is on account of the profits that covenants of this kind are made. When the consideration is gone, the rent fails. 1 Roll. Abr. 454, pl. 8. Where the lessee makes a voluntary assignment of his term, he has it in his power to make what stipulations he pleases with the assignee; he may receive a consideration, may covenant

(a) C. B. 22 G. 3.

for rent, for indemnity, and the like. But in case of bankruptcy, the bankrupt can make no stipulation, nor receive himself any valuable consideration. There is no analogy therefore between the assignment under a commission of bankrupt and a voluntary assignment by the lessee himself. But it is admitted on the other side, that a voluntary assignment will bar a covenant arising from the words "yielding and paying," &c., which it is said is only an implied covenant; but in *Style*, 387 & 406, those words were holden to make an express covenant. As to the hardship which is supposed to be brought upon the landlord, he may re-enter on non-payment of rent, may distrain, and resort to the land itself for satisfaction. But the lessee, if he be evicted, can have no such remedy: he might therefore suffer a greater hardship. In case of a lawful eviction, the lessee is discharged from his covenants; and where he is divested of his property by an act of parliament, it operates as an eviction, and he ought in justice to be equally discharged. Though the act of bankruptcy was originally his own act, yet the statute is an act of law, and according to *Lord Mansfield's doctrine in *Wadham v. Marlow*, *in jure, non remota sed proxima* [*446] *spectantur*. The case of *Mayor v. Steward* is clearly in favour of the defendant, to show the analogy between an eviction of the tenant by the landlord, and an eviction under an act of parliament: there also the distinction is taken between collateral covenants, and those which run with the land. As to *Bannister v. Trussel*, there was no question in that case of rent reserved on a demise, and the particular enjoyment of certain land: the point was, whether an attainted person was freed generally from all his debts? which the court very properly held he was not. In *Wadham v. Marlow*, Lord Mansfield says, "There is a strong though *obiter dictum* of Yates, J., that it would be hard to leave the lessee liable to the covenants, when the act of law has divested him of the emoluments and vested them in his creditors;" and his lordship also says, that "in *Cantrel v. Graham* the court would not have discharged the defendant unless they had been satisfied that the action was not founded." In *Ludford v. Barber*, though the point was not directly decided, yet the opinion of the court seems to be plainly intimated, that if it had been a question like the present, the rule laid down in *Wadham v. Marlow* would have guided their determination. As to *Hornby v. Houlditch*, there was no bankruptcy in that case, but a South-sea Director was for his misconduct deprived of his property by a bill in the nature of pains and penalties; there was no act of law operating for the benefit of an unfortunate tradesman; besides, there was a large sum reserved for the maintenance of the person who was the object of the punishment; that case therefore cannot be applied to the present. Here the lessor himself has taken away the obligation to pay the rent, by taking away the land which was the consideration of the covenant; since it was assigned by virtue of an act of parliament, to which, according to *Wadham v. Marlow*, the lessor was himself a party.

Lord Loughborough.—There is no degree of doubt but that the law is established, that an action of covenant may be brought on a covenant to pay rent, though the lessee be not in possession of the land, and after acceptance of rent from the assignee by the lessor. This is by privity of contract; but the distinction is clear between debt and covenant. Then

[*447] when the term is taken under the assignment *of commissioners of bankrupt, the question is, whether it is not by the act of the bankrupt himself? It is taken from him because he has contracted debts, and instead of any single creditor suing out a *fieri facias*, the common law execution, there being many creditors they join in taking out a commission of bankruptcy, which is in the nature of a statute execution. By this the property is vested in the assignees, but not so absolutely as in the vendee by a sale under a *fieri facias* made by the sheriff; because if the effects were sufficient without it, the term would remain to the lessee. Covenant then may well be brought against him. Though he is out of possession, yet he is placed in that situation by his own act. I am therefore of opinion that the demurrer ought to be overruled.

Gould, J., of the same opinion.

Heath, J., of the same opinion.

Wilson, J.—The plea of the defendant is not supported by any adjudged case. It has never yet been decided that an action of covenant would not lie upon a covenant by a lessee which runs with the land, and which was entered into before, but broken after, the bankruptcy of the covenantor. I entertained no doubt on this question except what arose from the hints thrown out by some of the judges of the Court of King's Bench whenever the question has come before them, on account of the dictum of Yates, J., in *Mayor v. Steward*, that as the bankrupt is divested of his whole estate, and rendered incapable of performing the covenants, it would be a hardship upon him if he should still remain liable to it, when he is disabled by the act of parliament from performing it. But this opinion was clearly extra-judicial, for, under the circumstances of that case, the Court held the plea to be bad. In *Wadham v. Marlow*, Lord Mansfield spoke of the opinion of Yates, J., as deserving great weight, though it was extra-judicial. But in that case it was not stated that the plaintiff had accepted rent from the assignee as his tenant, and it was contended that debt as well as covenant would lie against the lessee, because the lessor had done no act to show his assent to the assignment. But the Court decided, on the ground that the plaintiff had virtually assented to the assignment, every man's assent being [*448] implied to an act of parliament, and not on the ground that an action of debt would not lie. And *in *Ludford v. Barber* the Court gave judgment for the defendant, because the covenant declared upon had never been entered into by him with the plaintiff. Thus the question stands with respect to judicial decisions. The several statutes relating to bankrupts prior to the 4 Anne, c. 17, left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to satisfy. The hardship was the same, for the bankrupt was deprived of his all, and yet left without any protection against his creditors. The statutes previous to that time meant to give an execution for the equal benefit of all the creditors, and, if they were not fully satisfied by it, to leave them for what was unsatisfied to every remedy against the bankrupt which they had before. Neither that statute, nor the now existing statutes upon the subject, extend to this case. The 34 Hen. 8, c. 4, (a) directs that the Lord Chancellor and other great officers shall have power to sell and

dispose of the lands and goods of bankrupts in as full a manner as the bankrupt himself might have done. Subsequent statutes have empowered the assignees to make the same disposition. The intent of the several statutes was, that the act of the assignees should do no more than the act of the bankrupt himself. I therefore do not see how the maxim "*in jure, non remota sed proxima spectantur*" is applicable. The act of parliament only assigns the interest of the bankrupt in the land, but does not destroy the privity of contract between lessor and lessee. *An action of covenant remains after the estate is gone; but generally speaking, even when the land is gone, the action of debt is also gone, debt being maintainable because the land is debtor.*† *Covenant is founded on a privity collateral to the land.* A covenant of this kind is mixed; it is partly personal and partly dependent on the land; it binds both the person and the land. This brings the case within the principle of *Mayor v. Steward*.

Judgment for the plaintiff.

AURIOL V. MILLS, IN ERROR.

COVENANT in the Common Pleas for rent. Pleas, *non est factum; riens in arrears*; and the bankruptcy of the plaintiff in error, before the rent became due: in which plea it was *stated, that the commissioners [*449] assigned the lease, in which the covenant was inserted, to the assignees for the residue of the term; and that by virtue of such assignment, all the estate, interest, and term of years then to come, &c., of the plaintiff in error in the lease, was and still is vested in the assignees. To the latter plea there was a general demurrer and joinder; and, after two arguments in the Court of Common Pleas, judgment was given for the plaintiff below. The record having been removed into this court by writ of error,

Park, for the plaintiff in error, contended, that the bankrupt was discharged from his covenant to pay rent by the assignment of all his property by the commissioners. The cases principally relied on in the Court of Common Pleas, 1 Sid. 401, 447; 1 Saund. 240; Cro. Jac. 309, 521; Cro. Car. 188, 580; and Cas. temp. Hardw. 343, only prove that the lessee cannot, by his own act, discharge himself from his express covenant, and are, therefore, not applicable to the present case; because here the bankrupt does not endeavour, by his own act, to discharge himself, but the estate, in respect of which he entered into the covenant, is taken from him by law. Now, the general principle of law, which holds a party liable on his express covenant, although the estate, in respect of which it was entered into, is gone, is founded on the presumption that the party voluntarily, and by his own act, assigned over the estate to a person in whom he has confidence, and against whom he has a counter remedy, if he himself be sued by the lessor. But here is no privity of contract between the bankrupt and the assignee under the commission; and, therefore, the reason for the upholding

† See *Webb v. Jiggs*, 4 M. & S. 411; *Randall v. Rigby*, 4 Mee. & W. 134; where it was held on this principle that debt will not lie against a person who covenants to secure an annuity payable out of land.

the privity of contract between the bankrupt and his lessor falls to the ground, especially too as the bankrupt could maintain no action against the lessor on any of his covenants. A party who enters into a covenant is only liable in two respects; either in respect of the estate which he enjoys, or on his personal contract. But in this case the first is assigned over, and is taken from the lessee by act of law, by a compulsory power which he cannot resist: and, as to the other, the law has taken away the means by which he was enabled to perform the contract; and he cannot remain liable on the covenant for himself and his assigns, for that means voluntary assigns; but [*450] here it appears by the *record that the estate is vested in the assignees under the commission, who are not (legally speaking) the assignees of the bankrupt, but of the creditors or commissioners; the bankrupt himself does not even assign in point of fact; he is no party to the deed of assignment. It was contended in the Court of Common Pleas, that a bankrupt remains liable on his express covenants, because there are no express words in the statutes concerning bankrupts to discharge them: but they are by no means necessary; for in *Brewster v. Kitchell*,^(a) Holt, C. J., said, "If H. covenant to do a thing which is lawful, and an act of parliament come in and hinder him from doing it, the covenant is repealed;" for which was cited Dy. 27, pl. 278. In this case, the bankrupt is disabled from performing the covenant, which is the same thing; and the rule of law applies, *lex non cogit ad impossibilia*. A bankrupt is discharged by the bankrupt laws from such obligations as arise in respect of any property vested in the assignees by virtue of those statutes. In *Mayor v. Steward*,^(b) Yates, J., said, "as the act divests him of his whole estate, and renders him absolutely incapable of performing the covenant, it would be a hardship upon him if he should remain still liable to it, when he is disabled by the act of parliament from performing it." And the Court (though they held that the party was liable in that case, which was on a collateral covenant), nearly adopted the language of Yates, J. In *Cantrel v. Graham*^(c), that point was determined; and the authority of that case, as well as the opinion of Yates, J., were afterwards expressly recognized by this Court in *Wadham v. Marlow*^(d), in which Lord Mansfield, after noticing those cases, and speaking of the effect of the assignment of the commissioners of bankrupts, concluded thus: "It was argued, that if a man be divested by act of law, without his own default, he is discharged; this is as strong; because, though it were his own act originally on which the assignment was founded, yet the immediate effect produced is by the act of parliament; *et in jure, non remota sed proxima spectantur*." When this case was determined in the Common Pleas, it was thrown out by one of the judges, that the maxim was not applicable to a case like this: but on examination it will be found to apply with peculiar [*451] force. The objection is, that the bankrupt is divested of his estate by his own *act: but according to Lord Bacon's illustration of the rule,^(e) though the act of bankruptcy be the primary cause on which the bankrupt laws attach, yet the immediate cause of his being divested of his estate is the assignment by the commissioners, beyond which the Court are not to look. For he says, "It were infinite for the law to judge the causes of

(a) Salk. 198.

(b) 4 Burr. 2443.

(c) Barnes, 69, 4to edition.

(d) H. Bl. Rep. 437, and Cook's Bank. Laws, 518, 2d edition.

(e) Bac. Law Tr. 35.

causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." And he puts this case: "If an annuity be granted *pro consilio impenso et impendendo*, and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have access to him for his counsel, nevertheless the annuity is not determined by this non-feasance; yet it was the grantee's act and default to commit the treason whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory, and not voluntary, in regard to the imprisonment." Now that is a much stronger instance than the present; for that proceeded on the express crime of the grantee. With respect to the case of *Hornby v. Houlditch*,^(f) which was relied on in favour of the plaintiff below: it is to be observed in the first place that it does not appear by a MS. note of that case, taken by Lee, C. J., that Lord Hardwicke concurred in opinion with the Court: and, even if he did, that case is clearly distinguishable from the present. The question there depended on an act of parliament, a bill of pains and penalties, which was passed on account of the crimes of the South Sea Directors; and even there the Directors had a certain sum (and that too a considerable one) reserved to them for the payment of their private debts: but bankrupts are considered as unfortunate traders rather than as criminals; the allowance to them when made, is very inconsiderable, and it is contingent whether or not they are to receive any allowance. Neither is this case like the one to which it was compared below, of a common law execution, where it is said that the tenant, whose term is thus taken from him, is liable on his covenant; because there the privity of contract is not at an end; the lessee has his remedy over against the vendee of the sheriff: whereas in this case the bankrupt has no control whatever over the assignees in whom the term is now *vested. The argument *ab inconvenienti* may fairly be urged in construing the statutes relating [*452] to bankrupts: by determining that the bankrupt is discharged in this case, the lessor will not suffer, because he always has his remedy against the tenant in possession: whereas to hold that the bankrupt continues liable after his bankruptcy, is to decide that he is bound by his covenant to pay rent for an estate which is absolutely taken from him by the compulsory power of the law, and in the expectation of enjoying which only he entered into the covenant.

Bond, Serjt., contra.—It appears from all the authorities on this subject, that nothing can discharge a person from his express covenant but the express words of an act of parliament, or the release of the covenantee. The cases of *Wadham v. Marlow*, and *Cantrel v. Graham*, are not applicable to the present; for they were both^(g) actions of debt. That species of action is founded on the possession of the tenant; and when the lessor consents that the lessee shall assign to another person, the lessee is discharged. But this action is founded on the express covenant of the lessee; and the case of *Hornby v. Houlditch* clearly proves that he remains liable on that covenant, notwithstanding his bankruptcy. That was

(f) Andr. 40, and 1 T. R. 93, n. a.

(g) It does not appear clearly from the report of the case of *Cantrel v. Graham*, whether it were an action of debt or covenant; though, from some expressions used by the Court in determining it, it rather appears to be the former.

a kind of statute execution like the present: and Lord Hardwicke, in giving his opinion on the case, alluded to the instance of a bankrupt. From the reign of Queen Elizabeth, when the first statute relating to bankrupts was passed, down to that of Queen Anne, bankrupts continued liable for their debts contracted before their bankruptcy, and the dividends under the commissions were only considered as a payment pro tanto: the statute 4 Anne (the reasons for making which provisions are stated by Lord Hardwicke in 1 Atk. 255-6) for the first time discharged them from their debts in toto; but that act only gives a discharge from debts due at the time of the bankruptcy. Now the demand made by the defendant in error in this case, was not a debt due at the time of the bankruptcy, and therefore the plaintiff in error is not discharged from it. What fell from Yates, J., in *Mayor v. Steward*, was merely an extrajudicial opinion, not necessary to be given on the case then before the Court; and it was only an observation on the hardship of the case, without saying what the law was upon the subject. [*453] But if it be a case of *hardship, it can only be remedied by the legislature, and not by the courts of law. A statute execution is analogous, in this respect, to a common law execution; in that, if a term be taken under a fieri facias, the lessee still continues liable on his covenant. So if a person be divested of all his property by attainder in felony, he is liable for his debts contracted before, though deprived by law of the means of paying them. *Cro. Eliz.* 516. There may possibly be some hardship on the lessee in particular cases: but it would also be extremely hard on the landlord, if he were deprived of his remedy on the covenant of the lessee; for though he may always bring an action of debt against the tenant in possession, yet the term may be assigned over to an insolvent, as was done in the case, 2 Str. 1221. It seems therefore in point of reason and justice, as well as of strict law, that the defendant in error is entitled to the judgment given in his favour by the Court of Common Pleas.

Buller, J., observed, that in arguing the case of *Wadham v. Marlow*, a case was cited from *Hob.* 82: and he asked the counsel whether that case affected the present. No answer being given,

The Court said it would be proper, before they gave judgment, to look into the cases that had been mentioned.

Lord *Kenyon*, C. J., on the next day delivered the opinion of the Court.

It was not owing to any doubt that we entertained on this question that we did not pronounce judgment when the case was argued: but as a case was alluded to in *Hobart*, which was not argued upon at the bar, we wished to have an opportunity of examining that case before we gave our opinion. But, on looking into it, we think that it does not press upon the present case; and we are all of opinion (in which *Buller, J.*, who is now absent, concurs) that the judgment of the Court of Common Pleas must be affirmed. It is extremely clear, that a person who enters into an express covenant in a lease, continues liable on his covenant notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, [*454] it appears by the authorities that an action of debt will not lie against *the original lessee; but all those cases with one voice declare, that if there be an express covenant, the obligation on such covenant still con-

tinues. And this is founded not on precedents only, but on reason; for when a landlord grants a lease, he selects his tenant; he trusts to the skill and responsibility of that tenant; and it cannot be endured that he should afterwards be deprived of his action on the covenant to which he trusted by an act to which he cannot object, as in the case of an execution. In such a case the lessor has no choice of the under-tenant: so here the assignees are bound to sell the term, and perhaps they may assign to a person in whom the lessor has no confidence.

Then it remains to be considered whether any exception to that general rule has taken place in the case of a bankruptcy. It seemed admitted in the argument, and indeed it cannot be disputed, that, where a disposition of the lease has been made by virtue of a *fieri facias*, or an *elegit*, the lessee continues liable on his covenant, notwithstanding the estate be taken from him against his consent. On the same principle the South Sea Director was held liable, although he was divested of his property by the act of confiscation. So in the case of an attainder, and other cases, which it is not necessary to mention particularly, as they are all collected in the report of this case in the Common Pleas. Then what is there peculiar in the case of a bankrupt, which should differ it from those cases? No act of parliament has said that he shall be discharged from his covenants; neither is there any resolution in either of the courts of law to that effect: but, on the contrary, it has been uniformly determined in all the various cases on the subject, that, for all contracts which are not to be performed till a period subsequent to the bankruptcy, the bankrupt shall still be liable, notwithstanding he is stripped of all his property; as in the case of *Goddard v. Vanderheyden*,^(a) and many others. So, in this case, the defendant's liability to pay happened after the bankruptcy; and therefore, on the principle of those cases, he remains liable, notwithstanding the commission of bankruptcy divested him of all his property; for a certificate would only have made him a new man from the time when the act of bankruptcy was committed. But instances have occurred where persons, who have been declared bankrupts, have been possessed of considerable property after paying all their debts; as in that of *Sir S. Evans*. Then, in reason, why should a person not [*455] continue liable on his covenant, when his affairs are arranged? Then it was contended that the bankrupt put an end to the privity of contract: but that argument is not well founded; for it was asked by Lord Hardwicke, in the case of *Hornby v. Houlditch*, as it is reported in the reports^(b) of this Court, "what is there here to discharge the privity of contract or estate between the lessor and lessee? or, what is there to discharge an express covenant?" In the language of Lord Hardwicke, I may ask the same questions in this case. Has the landlord done any act to discharge the lessee? Even in cases where the landlord has expressly consented to receive the assignee as his tenant, the original lessee has always been held liable on his covenant; and those are, in my opinion, much stronger cases than the present, where the assignees are forced upon the landlord without his consent. This is like the case of an execution, and, indeed, in some of the books it is called a statute-execution. In every view of the question, therefore, I am

(a) 3 Wils. 262.

(b) 1 T. R. 93, n. a.

clearly of opinion, that this case was properly decided in the Court of Common Pleas, and that that judgment ought to be affirmed.

Judgment affirmed. (a)

It appears to have been taken for granted, throughout the argument in both courts, that the bankrupt's term had become properly vested in his assignees; and that the fact sufficiently appeared upon the pleadings. However, the case of *Copeland v. Stephens*, 1 B. & Ad. 593, has since decided that the general assignment of a bankrupt's personal estate under the fiat, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as regards the term, and their acceptance of the estate. For "an assignment by commissioners of bankrupt is the execution of a statutable power given to them for a particular purpose, viz., payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them. Whatever passes, passes by force of the statute, for the purpose of effecting the object of the statute; and, therefore, the assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rent and covenants; for, the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose, the acceptance of a term which, instead of furnishing the means of such a payment, would diminish the fund arising from other sources, cannot be within the scope of their trust or duty. And, in this respect, such a term differs from the debts of the bankrupt, and his unincumbered effects and chattels. The whole estate remains in the bankrupt until acceptance by the assignees, subject to their right to have the land by their acceptance." Per Lord Ellenborough, C. J., *ib.* [See *Ringer v. Cann*, 3 Mee. & W. 343, per cur. [456] And *although st. 1 & 2 W. 4, c. 56, s. 25, has now abolished the assignment, and rendered the appointment of the assignees equivalent thereto; still, as it has given to the appointment an effect precisely co-extensive with that of the

assignment, the doctrine of *Copeland v. Stephens* remains, as far as that statute is concerned, in full force. So that, if the law now rested on the decisions in *Mills v. Auriol*, and *Copeland v. Stephens*, a bankrupt lessee would be liable exactly as if no bankruptcy had taken place, until acceptance of the lease by his assignees; and, after their acceptance of it, he would continue liable on his express covenants in the same manner as if the lease had passed into the hands of an ordinary assignee. And this it is important to remember, because, though the enactment now about to be cited improves the situation of the bankrupt in some respects, yet there are very many cases to which it does not extend, and to those cases the above doctrines continue to apply in full force.

Stat. 6 G. 4, c. 16, which extends the relief afforded by a previous enactment in 49 G. 3, c. 121, sect. 19, enacts, in section 75, "that any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained:—*And if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declared as aforesaid; and if the assignees shall not (upon being thereto required) elect whether they will accept or decline such lease or agreement for a lease,—the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement in case they shall decline the same, or may*

(a) See *Marks v. Upton*, 7 T. R. 305.

make such other order therein as he shall think fit."

It has been held that *parol leases* fall within this section, the offer to deliver possession being equivalent to the delivery up of the lease, (*Slack v. Sharpe*, 8 Ad. & Ell. 366. [Accord. *Exparte Hopton*, 2 M. D. & D. 347, but see *Briggs v. Sowry*, 8 Mee. & W. 729, per cur. obiter.]

This statute applies only to cases arising between lessor and lessee, it does not apply to the case of the assignee of a lease becoming bankrupt: *Manning v. Flight*, 3 B. & Ad. 211. *Taylor v. Young*, *Ibid.* 521. In the former case the plaintiffs, as devisees of John Manning, brought covenant for rent against the defendants as lessees, who pleaded that they assigned to one W. P. B., who afterwards became a bankrupt; that the arrears of rent sued for fell due after the date of his commission; that the assignees declined the lease, and that the bankrupt within fourteen days delivered it up to the plaintiffs. The plaintiffs replied, that they did not accept it, and, upon demurrer, the court held, that the plea was bad.—"If," said Littledale, J., "before the statute, there had been an assignment of the lease, and the lessors had accepted rent from the assignee, they might, notwithstanding, have proceeded by covenant against the lessees, the privity of contract not being destroyed. The 6 G. 4, c. 16, s. 75, makes no difference in this respect: *it contemplates the case of a bankrupt lessee only, not of an assignee of the term.* The statute operates only as a personal discharge of the bankrupt, for it does not say that the lease and covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants." [In *Exparte Vardy*, 3 M. D. & D. 345, the statute was applied by Knight Bruce, V. C., to a case where the lease was in the hands of an equitable mortgagee; and in *Exparte Norton*, *Ibid.* 312, to a case where one of two lessors was in partnership with the tenant, and by the partnership articles the lease was agreed to be partnership property.]

There can be no apportionment of rent under the section, so as to make the bankrupt liable to what accrued previous to the bankruptcy, *Slack v. Sharpe*, 8 Ad. & Ell. 366.

When the assignees accept the lease,

the discharge of the bankrupt is so complete, that, even though he should afterwards come in as the assignee of his own assignees, he will incur no greater liabilities than any other person would in the same character. *Doe d. Cheere v. Smith*, 5 Taunt. 800. But a surety for a lessee is liable for breaches of covenant which occurred after the date of a commission of bankruptcy against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under 6 G. 4, c. 16, s. 75;—for even assuming that delivery up to operate as a surrender, still the surrender of the lease cannot be held to relate back to the date of the fiat or commission. *Tuck v. Fyson*, 6 Bing. 331.

Wherever the provisions of the 6 G. 4, c. 16, s. 75, do not apply, (and there are several cases besides that of [*457] the assignee of a lease to which they would probably be held inapplicable; for instance, they would probably be held not to include the case of a lessee becoming bankrupt after having made an under-lease), in all such cases recourse must be had to the doctrines established in *Mills v. Auriol*, and *Copeland v. Stephens*, in order to ascertain the extent of the bankrupt's liability.

In cases where the provisions of the act apply, the course to be pursued by the bankrupt, in order to obtain his discharge, depends upon the adoption or non-adoption of the lease by his assignees; since, if they adopt it, he has merely to remain quiescent: but if they decline it, he must then, within 14 days after he has had notice of their election, deliver the lease up to the lessor;—and, in cases where the provisions of the act do not apply, the extent of the bankrupt's liability also depends upon the adoption or rejection of the lease by the assignees. It has frequently, therefore, become important to inquire what acts on the part of the assignees amount to an adoption of the lease; and the general rule upon this subject is, that any intermeddling with the estate in the capacity of owner, amounts to an adoption of it; but that a mere experiment to ascertain its value has not such an effect. Thus, where the assignees put up the lease to sale, and accepted a deposit from the purchaser, they were held to have adopted it. *Hastings v. Wilson*, *Ibid.* 290. See also *Hanson v. Stevenson*, 1 B. & Ad. 208; *Welsh v. Myers*, 4 Camp. 368; *Hancock v. Welsh*, 1 Camp. 347;

Thomas v. Pemberton, 7 Taunt. 206; Clarke v. Hume, 1 R. & M. 207; Page v. Godder, 2 Stark. 309; Gibson v. Courthorpe, 1 D. & R. 205. But in the case of Turner v. Richardson, 7 East, 335, the assignees never entered on the premises: and the question was, whether the putting up the lease to sale by auction, was a taking possession; the Court held that it was not so, it being a mode used by the assignees for ascertaining whether it was advisable for them to take possession or no. See Wheeler v. Bramah, 3 Camp. 340; Hill v. Dobie, 8 Taunt. 325; [Lindsay v. Limbert, 12 Moore, 209.]

If the assignees adopt the lease, they may exonerate themselves from all liabilities by assigning it over, in the same way as an ordinary assignee may. Onslow v. Corrio, 2 Mod. 330.

[There are provisions in the insolvent

acts, 1 & 2 Vict. c. 110, s. 50, and 7 & 8 Vict. c. 96, s. 12, similar to those of the bankrupt law regarding leases; and it was held upon the construction of 1 G. 4, c. 119, one of the old insolvent acts, that where the assignee had accepted the lease, and acted as tenant, his executor (no new assignee having been appointed) was liable for breaches subsequent to the testator's death, Abercrombie v. Hickman, 8 Ad. & Ell. 687. See as to the effect of an assignment under the insolvent act, Lindsay v. Limbert, 12 Moore, 209, 2 C. & P. 526, S. C.; Doe d. Palmer v. Andrews, 12 Moore, 601, 4 Bing. 348, S. C.; Topham v. Dent, 6 Bing. 515, 4 Moo. & P. 264, S. C., which suggest a possible distinction between the effect of a bankruptcy and an insolvency, upon terms of years belonging to the bankrupt or insolvent.]

Whether a demand which originated before bankruptcy, continues in force afterwards, depends in general on whether it could have been proved under the commission, or before the tribunal authorized to make distribution of the bankrupt's estate, in payment of his debts. For there would be a manifest injustice, in depriving the creditor of the power of subsequent recourse against the person of the bankrupt, without any present equivalent from the estate. Under the former bankrupt laws of England and this country, no demand could be admitted to proof, which was not a present debt, although debts payable in futuro might be proved, if due in præsenti; Lansing v. Prendergast, 9 Mass. 128; Selfridge v. Gill, 4 id. 96; Rathbone v. Murray, 1 Caines, 588; and even when uncertain in amount, if susceptible of being reduced to certainty; Fowles v. Treadwell, 24 Maine, 347. To give a contract for the payment of money the character of a debt, the consideration must be executed, and the obligation of the contract absolute; and hence, when the one was contingent or the other executory, the demand could not be proved under the commission, and the liability of the bankrupt continued, notwithstanding his discharge. Thus in Sparhawk v. Broome, 6 Binney, 256, a bankrupt was held liable on the endorsement of a note, between the issuing of the commission and the date of the certificate, because the obligation imposed by the endorsement, did not become absolute until the subsequent default of the maker. The same rule was applied in Murray v. De Rottenham, 6 Johns. Ch. 52, by Chancellor KENT, who held the bankrupt answerable after his discharge, upon a previous covenant to pay the taxes on land, which he had conveyed to a trustee for the benefit of his creditors.

The obligation of a tenant to pay the future rent reserved on a lease, as it shall accrue in futuro, comes within the scope of these decisions. For although the obligation to pay the rent throughout the whole of the term, is so far absolute, from the moment at which the lease is executed, that it can-

not be thrown off by any act of the tenant, yet it is not a debt in the proper sense of the term, because it is not founded upon an executed consideration. A lease is essentially an executory contract, in which the right of the landlord to the rent, is a correlative of that of the tenant to the possession and enjoyment of the premises; and anything which defeats or impairs the one, necessarily suspends or extinguishes the other. It is accordingly well settled on the one hand, that the creditor cannot claim a dividend from the estate of a bankrupt lessee, on account of rent which has not yet accrued; and on the other, that his right of personal recourse against the lessee himself, is not impaired by the discharge of the latter under the certificate. The law was so held in the principal case, as to a discharge in bankruptcy, and has been repeatedly applied in this country with regard to proceedings in insolvency, as well as bankruptcy. *Lansing v. Prendergast*, 9 Johnson, 27; *Hamilton v. Atherton*, 1 Ashmead, 67; *Warder v. Simpson*, 2 Wharton's Digest, 63. *Bosler v. Kuhn*, 8 W. & S. 183.

But although a lessee cannot set up his discharge as a bankrupt, as a release from the obligation of future and accruing rent, yet there are other grounds on which he may rely for protection in certain cases, and to a limited extent, irrespectively of the discharge; and whether he be discharged or not. Nothing is better settled, than that the assignment of a term with the assent of the lessor, not only casts the burden of the rent on the assignee, but completely exonerates the lessee, unless he has given an express covenant for its payment. And it was held in *Wadham v. Marlow*, *supra*, that where the liability of the lessee is founded on the acceptance of the premises, subject to the reddendum, and not on an express covenant, he may set up the transfer of the term to the assignees under the commission, as a bar to an action for future rent, without proving any actual assent on the part of the lessor, because every man's assent is to be presumed to the passage of an estate by operation of law, and by virtue of a legislative enactment. But the further distinction was subsequently taken, both in England and this country, that although the assent of the lessor is to be presumed under these circumstances, that of the assignees is not, for as the object of the assignment is to pass a beneficial interest in the bankrupt's property, with a view to the payment of his debts, and as the rights and obligations of a lease are inseparably connected, the law will not cast them upon the assignees, unless they show their willingness to accept the burden with the benefit. It is accordingly held, that unless the assignees enter on the demised premises, or take some other step to evince their assent to the passage of the term, under the general operation of the assignment, and authorize the landlord to treat them as his tenants, the liability of the lessee will continue on the same footing after, as before the bankruptcy. And even when the interest of the lessee in the lease passes to the assignees, he will still be bound by his express covenants, and only exonerated from those which are implied by the law. *Supra*.

The principles which govern the operation of the bankrupt laws, on the liability of the bankrupt, apply in general to the insolvent laws passed at different periods, by the states of this country. As a general rule, no demands are barred by a discharge under these laws, which are contingent and executory, or which have not the character of present debts; *Frost v. Carter*, 1 Johnson's Cases, 73; *Buel v. Gordon*, 6 Johnson, 126; *The Mechanics'*

Bank v. Capron, 15 id. 367. It necessarily follows, that the discharge of a lessee as an insolvent, will not exonerate his person or estate from future rent, except in so far as he can bring his case within the operation of the doctrine laid down in *Wadham v. Marlow*, and set up the transfer of his interest in the term, to the insolvent assignee, as a bar to the implied obligation of the lease.

The bearing of the doctrine held in *Auriol v. Mills*, in cases of bankruptcy, is necessarily dependent upon the purport and provisions of the particular bankrupt act under which each case arises, for as the operation of every such law on the contract of the parties is purely arbitrary, and dependent upon the will of the legislature by which it is enacted, it may be so worded as to discharge executory or contingent obligations, as well as those which are certain and executed. Thus, the system of bankruptcy which now prevails in England, under the statute 6 Geo. 4, varies from that which existed at the period of the decision in *Auriol v. Mills*, and entitles the creditor to prove future and uncertain claims against the estate, while it exonerates the bankrupt from liability, for all demands which are thus open to proof. The fifth section of the recent bankrupt act this country, passed August 19, 1841, followed the provisions of the English statute, by declaring that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, bondsmen, bail, or other persons, having uncertain or contingent demands against such bankrupt, should be permitted to come in and prove such debts or claims, under the act, and should have a right, when their debts and claims became absolute, to have the same allowed them." And it was further provided, by another section of the same act, that the certificate of the bankrupt should be a bar to all debts which were provable.

There can be little doubt that the object of the legislature in passing this act, was to give the same full and liberal relief to the bankrupt, as had been given by the 6 Geo. 4. Agreeably to the construction given to the English statute, all demands which can by possibility be proved under the commission, will be barred by the certificate; and a surety cannot recover, for a payment made after the bankruptcy of the principal when the debt was due before; *Filbey v. Lawford*, 3 M. & G. 468; *Jackson v. Magee*, 3 Q. B. 48; or even when it was not, if it could notwithstanding have been proved by the creditor. It was held accordingly, in *Spalding v. Dixon*, 21 Vermont, 45, and *Stilton v. Pease*, 10 Missouri, 473, that the true construction of the act of Congress is, that future and contingent demands, of every description, are provable against the estate of the bankrupt, and barred by the grant of the certificate. A similar construction was adopted in *Hardy v. Carter*, 8 Humphreys, 153, and a surety refused permission to recover against a bankrupt principal, for payments made subsequently to the discharge of the latter. But it has at the same time been decided both here and in England, that although a contingent demand may be proved by the creditor, and will consequently be extinguished, yet that this does not hold good, unless the demand is actually in existence, and that a distinction must be taken between a contingent demand, and a contingency, whether a demand will exist; *Woodard v. Herbert*, 24 Maine, 358. It was accordingly de-

cided in this case, that a surety might recover against a bankrupt principal, for the default of the latter in not appearing agreeably to the condition of a bond, given by the surety for his appearance, although the default did not happen until after bankruptcy, because until default, the demand was not only contingent, but it was a contingency, whether there would ever be a demand. The same principles were applied in *McDougal v. Paton*, 8 Taunt. 584, where the liability against which the surety sought to be protected, grew out of a stipulation for the performance of collateral covenants, which were not broken at the time of the bankruptcy. Nor will a claim against a co-surety for contribution, be barred by his discharge as a bankrupt, before the debt becomes due by the principal, for until then, there is no legal or equitable demand on which the discharge can operate, and it is wholly uncertain whether one will ever come into existence. As soon, however, as such a debt becomes due, an equitable obligation attaches to all the sureties to contribute to its payment, which may well be barred by a discharge in bankruptcy. An opposite determination in *Goss v. Gibson*, 8 Humphreys, 197, seems inconsistent with principle, and can only be reconciled with the decision of the same court, in *Hardy v. Carter*, on the ground of a distinction between the equitable rights of sureties against each other, and against the principal, which has no real or well founded existence.

Although no express provision was made in the recent bankrupt act of the United States, with reference to future and accruing rent, corresponding to the provisions of the English act, or which could take it out of the terms of the general provision, that all future and contingent demands may be proved by the creditor, yet it has been repeatedly held, not to be within the scope of the act, either as it regards proof or discharge. Thus, it was decided in *Steinmetz v. Ainslie*, 4 Denio, 573; *Bosler v. Kuhn*, 8 W. & S. 183; and *Prentiss v. Kingley*, 10 Barr, 120, that rent, whether reserved on a grant in fee, or for years, and whether secured by an express covenant, or dependent merely on the reddendum, is wholly without the terms of the fifth section of the act, and will not be barred by the discharge of the lessee as a bankrupt. No doubt can be entertained of the soundness of these decisions: for apart from the unreasonableness of supposing that the legislature intended to abrogate one side of an executory contract, while leaving the other in full force, the case does not fall within the terms of the act. Rent is, it is true, so far a demand, that a release of all demands will extinguish a rent, but it is more than a demand, it is an accruing profit issuing out of the realty, and cannot be regarded as a present demand, in the strict legal sense of the term, even when there is an express covenant for its payment as it falls due. "A rent service," said GIBSON, C. J., in *Bosler v. Kuhn*, "is not a debt; and a covenant to pay it is not a covenant to pay a debt: it is a security for the performance of a collateral act. The annual payments spring into existence and for the first time become debts when they are demandable; for while they are growing due the landlord has no property in any thing distinct from the corpus of the rent, or the realty of which they are the produce; and the fruit must be severed from the tree which bears it, before it can become personal property and a chose in action. A debt is an entire thing, though it be payable by instalments; and to admit it to be proved, when thus constituted, would require the instalment

to be combined by a penalty, such as formerly was called in aid of an annuitant; or else to be consolidated by the contract." It is, therefore, evident, that the construction put on the former English bankrupt act, in the principal case, is equally applicable to that which existed recently in this country, and that future rent is not such a debt or demand, as can be proved by the creditor or extinguished by the certificate of discharge of the bankrupt, within the meaning of either of these acts.

A much narrower construction has been given in some of the cases, to the provisions of the act of August 19, 1841, which declare that the claims of sureties, endorsers, and all other holders of future and contingent demands may be admitted to proof, and that all demands which can be proved, shall be barred, than that stated above; and it has been held, in some instances, that a surety cannot prove his demand against the principal, until he has reduced it to certainty by payment, and in others, that if he can, it is still optional with him to do so, and that it will not be barred unless actually proved. The latter construction was adopted in *Wells v. Mann*, 17 Vermont, 503; and the former in *McMullin v. The Bank of Penn Township*, 2 Barr, 343; *Cake v. Lewis*, 8 id. 493, and *Pogue v. Joyner*, 1 English, 241. Both constructions, however, seem equally inadmissible; the one, because the act expressly declares, that all debts which may be proved, shall be barred; and the other, because it renders the act unmeaning, by making a provision for the proof of contingent debts inapplicable until they become certain, and is, moreover, founded upon an interpretation of the act of 6 Geo. 4, which has been rejected by the English Courts.

It is well settled, that when a cause of action is laid in tort, although founded in contract, it will not be barred by a certificate in bankruptcy, and this, although the plaintiff had an election to proceed either in tort or contract; *Hughes v. Oliver*, 8 Barr, 426; *Williamson v. Dickens*, 5 Iredell, 289. When, however, a demand founded in tort, has once passed into a judgment, it acquires the character of a debt, and as such, may be discharged. But to produce this effect, the judgment must actually have been entered before the bankruptcy, and a mere liquidation of the damages by a verdict or award of arbitrators, will not be sufficient. *Crouch v. Gridley*, 6 Hill, 250.

H.

*MASTER v. MILLER. [*458]

TRINITY.—31 GEO. 3.—K. B. & CAM. SCACC.

[REPORTED 4. T. R. 320, AND 2 HEN. BL. 140.]

An unauthorized alteration of the date of a bill of exchange, after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be afterwards brought upon it, even by an innocent holder for a valuable consideration.†

THE first count in this declaration was in the usual form, by the indorsees of a bill of exchange against the acceptor; it stated that Peel and Co., on the 20th of March, 1788, drew a bill for 974*l.* 10*s.* on the defendant, payable three months after date to Wilkinson and Cooke, who indorsed to the plaintiffs. The second count stated the bill to have been drawn on the 26th of March. There were also four other counts: for money paid, laid out, and expended; money lent and advanced; money had and received; and on an account stated. The defendant pleaded the general issue; on the trial of which a special verdict was found.

It stated, that Peel and Co., on the 26th March, 1788, drew their bill on the defendant, payable three months after date to Wilkinson and Cooke, for 974*l.* 10*s.*, “which said bill of exchange, made by the said Peel and Co., as the same hath been altered, accepted, and written upon, as hereafter mentioned, is now produced, and read in evidence to the said jurors, and is now expressed in the words and figures following; to wit, ‘June 23rd, 974*l.* 10*s.*, Manchester, March 20, 1788, three months after date pay to the order of Messrs. Wilkinson and Cooke 974*l.* 10*s.*, received, as advised, Peel, Yates, and Co. To Mr. Cha. Miller, C. M., 23rd June, 1788.’ That Peel and Co. delivered the said bill to Wilkinson and Cooke, which the defendant afterwards and before the alteration of the bill hereinafter mentioned accepted, that Wilkinson and Cooke afterwards indorsed the said bill to the plaintiffs, for a valuable consideration [*459] *before that time given, and paid by them to Wilkinson and Cooke for the same. That the said bill of exchange, at the time of making thereof and at the time of the acceptance, and when it came to the hands of Wilkinson and Cooke as aforesaid, bore date on the 26th day of March, 1788, the day of making the same; and that after it so came to and whilst it remained in the hands of Wilkinson and Cooke, the said date of the said bill, without the authority or privity of defendant, was altered by some person or persons to the jurors aforesaid unknown, from the 26th day of March, 1788, to the 20th day

† See *Hutchins v. Scott*, 2 Mee. & W. 809, where an agreement which had been altered while in the custody of the person producing it, was held admissible in evidence for some purposes.

of March, 1788. That the words 'June 23,' at the top of the bill, were there inserted to mark that it would become due and payable on the 23d of June, next after the date; and that the alteration hereinbefore mentioned, and the blot upon the date of the bill of exchange, now produced and read in evidence, were on the bill of exchange, when it was carried to and came into the hands and possession of the plaintiffs. That the bill of exchange was on the 23d of June, and also on the 28th of June, 1788, presented to the defendant for payment; on each of which days respectively he refused to pay." The verdict also stated that the bill so produced to the jury and read in evidence was the same bill upon which the plaintiffs declared, &c.

This case was argued in Hilary term last, by Wood for the plaintiffs, and Mingay for the defendant; and again on this day by Chambers for the plaintiffs, and Erskine for the defendant.

For the plaintiffs it was contended, that they were entitled, notwithstanding the alteration in the bill of exchange, to recover, according to the truth of the case, which is set forth in the second count of the declaration, namely, upon a bill dated the 26th March; which the special verdict finds was in point of fact accepted by the defendant. More especially as it is clear that the plaintiffs are holders for a valuable consideration, and had no concern whatever in the fraud that was meditated, supposing any such appeared. The only ground of objection which can be suggested is upon the rule of law relative to deeds, by which they are absolutely avoided, if altered even by a stranger in any material part, and upon a supposed analogy between those instruments and bills of exchange; but upon investigating [*460] the grounds on which the rule stands as applied to deeds, it will be found altogether inapplicable to bills: and if that be shown, the objection founded on the supposed analogy between them must fall with it. The general rule respecting deeds is laid down in *Pigot's case*,^(a) where most of the authorities are collected; from thence it appears, that if a deed be altered in a material point, even by a stranger, without the privity of the obligee, it is thereby avoided; and if the alteration be made by the obligee, or with his privity, even in an immaterial part, it will also avoid the deed. Now that is confined merely to the case of deeds, and does not in the terms or principle of it apply to any other instruments not executed with the same solemnity. There are many forms requisite to the validity of a deed, which were originally of great importance to mark the solemnity and notoriety of the transaction; and on that account the grantees always were, and still are, entitled to many privileges over the holders of other instruments. It was therefore reasonable enough that the party in whose possession it was lodged, should, on account of its superior authenticity, be bound to preserve it entire with the strictest attention, and at the peril of losing the benefit of it in the case of any material alteration even by a stranger; and that he is the better enabled to do from the nature of the instrument itself, which, not being of a negotiable nature, is not likely to meet with any mutilation, unless through the fraud or negligence of the owner; whereas bills of exchange are negotiable instruments, and are perpetually liable to accidents in the course of changing hands, from the inadvertence of those by whom they are negotiated, without any possibility of their being discovered by innocent indorsees,

(a) 11 Co. 27.

who are ignorant of the form in which they were originally drawn or accepted; and the present is a strong instance of that; for the plaintiffs cannot be said to be guilty of negligence in not inquiring how the blot came on the bill, which mere accident might have occasioned. That the same reasons, upon which the decisions of the courts upon deeds have been grounded, will not support such judgments upon bills, will best appear by referring to the authorities themselves. When a deed is pleaded, there must be a *profert in curiam*, unless, as in *Read v. Brookman*,^(b) it be lost or destroyed by accident, which must however be stated in *the pleadings. The reason of which is, that anciently the deed was actually brought into [*461] court for the purpose of inspection; and if, as is said in 10 Co. 92, b. the judges found that it had been rased or interlined in any material part, they adjudged it to be void. Now as that was the reason why a deed was required to be pleaded with a *profert*, and as it never was necessary to make a *profert* of a bill of exchange in pleading, it furnishes a strong argument that the reason applied solely to the case of deeds. So deeds, in which were erasures, were held void, because they appeared on the face of them to be suspicious. 13 Vin. Abr. tit. Faits, 37, 38; Bro. Abr. Faits, pl. 11, referring to 44 Edw. 3, 42. Nor could the supposition of fraud have been the ground on which that rule was founded with respect to deeds; for in *Moor*, 35, pl. 116, a deed which had been rased was held void, although the party himself who made it had made the erasure; which was permitting a party to avail himself of his own fraud: but it is impossible to contend that the rule can be carried to the same extent as to bills; nor is it denied but that if the blot here had been made by the acceptor himself, he would still have been bound. In *Keilw.* 162, it is said that if A. be bound to B. in 20%. and B. rase out 10%. all the bond is void, although it is for the advantage of the obligor; and even where an alteration in a deed was made by the consent of both the parties, still it was held to avoid it. 2 Rol. Abr. 29, letter U. pl. 5. (Lord Kenyon observed that there had been decisions to the contrary since.) Fraud could not be the principle on which those cases were determined; whereas it is the only principle on which the rule contended for can be held to extend to bills of exchange, but which is rebutted in the present case by the facts found in the special verdict. According to the same strictness, where a mere mistake was corrected in a deed, and not known by whom, it was held to avoid it. 2 Rol. Abr. 29, pl. 6; and it does not abate the force of the argument that the law is relaxed in these respects, even as to deeds, for the question still remains, whether at any time bills of exchange were construed with the same rigour as deeds? The principle upon which all these cases relative to deeds were founded was, that nothing could work any alteration in a deed, except another deed of equal authenticity; and as the party who had possession of *the deed was bound to keep it securely, it might well be presumed that [*462] any material alteration even by a stranger was with his connivance, or at least through his culpable neglect. In many of the cases upon the alteration of deeds, the form of the issue has weighed with the Court; as in 1 Rol. Rep. 40, (which is also cited in *Pigot's case*, 11 Co. 27,) and *Michael v. Seockwith*, Cro. El. 120, in both which cases the alteration was after

(b) 3 T. R. 151.

plea pleaded; and on that ground the Court held it was still to be considered as the deed of the party on *non est factum*. Now the form of the issue in actions upon deeds and those upon bills is very different: in the one case, the issue simply is, *whether it is the deed of the party*, which goes to the time of the plea pleaded? as appears from the case before cited, and from 5 Co. 119, b. and Dy. 59; but here the issue is, *whether the defendant promised, at the time of the acceptance, to pay the contents?* The form of the issue is upon his promise, arising by implication of law from the act of acceptance, which is found as a fact by the special verdict agreeable to the bill declared on in the second count; and in no instance, where an agreement is proved merely as evidence of a promise, is the party precluded from showing the truth of the case. Not only therefore the forms of pleading are different in the two cases, but the decisions which have been made upon deeds, from whence the rule contended for as to erasures and alterations is extracted, are altogether inapplicable to bills. The reasons for such rigorous strictness in the one case, do not exist in the other. On the contrary, all the cases upon bills have proceeded upon the most liberal and equitable principles with respect to innocent holders for a valuable consideration. The case of *Minet v. Gibson*(a) goes much farther than the present: for there this court, and afterwards the House of Lords, held that it was competent to inquire into circumstances extraneous to the bill, in order to arrive at the truth of the transaction between the parties; although such circumstances operated to establish a different contract from that which appeared upon the face of the bill itself; whereas the evidence given in this case, and the facts found by the special verdict, are in order to show what the bill really was; which it is competent for these parties to do against whom no fraud can be imputed, if any [*463] exist. If the blot had fallen on the paper *by mere accident, it *constat* upon this finding that it did not so happen. Even if felony were committed by a third person, through whose hands the bill passed, although that party could not recover upon it himself, yet his crime shall not affect an innocent party, to whom the bill is endorsed or delivered for a valuable consideration. In *Miller v. Race*,(b) where a bank-note had been stolen, and afterwards passed bona fide to the plaintiff, it was held that he might recover it in trover against the person who had stopped it for the real owner. And the same point was held in *Peacock v. Rhodes*,(c) where the bill was payable to order. Again, in *Price v. Neale*,(d) it was held that an acceptor, who had paid a forged bill to an innocent indorsee, could not recover back the money from him. Now if it be no answer to an action upon a bill against the acceptor to show that it was a forgery in its original making by a third person's having feigned the hand-writing of the drawer, still less ought any subsequent attempt at forgery, even if that had been found which is not, to weigh against an innocent holder. But it would have been impossible to have recovered in any of these cases if the deed had been forged in any respect, even by strangers to it; which shows that these several instruments cannot be governed by the same rules. And so little have the

(a) 3 T. R. 481, in B. R., and 1 H. Bl. 569, in Dom. Proc.
(c) Dougl. 633.

(b) 1 Burr. 452.

(d) 3 Burr. 1354.

forms of bills of exchange and notes been observed, when put in opposition to the truth of the transaction, that in *Russell v. Langstaffe*(*e*) the court held, in order to get at the justice of the case, that a person, who had indorsed his name on blank checks which he had entrusted to another, was liable to an indorsee for the sums of which the notes were afterwards drawn; and yet the form of pleading supposes the note to have been a perfect instrument, and drawn before the indorsement. But the case which is most immediately in point to the present, is that of *Price v. Shute*, E. 33 Car. 2, in B. R.;(*f*) there a bill was drawn payable the 1st of January; the person upon whom it was drawn accepted it to be paid the 1st of March; the holder, upon the bill's being brought back to him, perceiving this enlarged acceptance, struck out the 1st of March, and put in the 1st of January; and then sent the bill to be paid, which the acceptor refused; whereupon the payee struck out the 1st of January, and put in *the 1st of March again: and in an action brought on this bill, the question [*464] was, whether these alterations did not destroy it? and it was ruled they did not. This case therefore has settled the doubt; and having never been impeached, but on the contrary recognised, as far as general opinion goes, by having been inserted in every subsequent treatise upon the subject, it seems to have been acted on ever since. And it would be highly mischievous if the law were otherwise: for however negligent the owner of a deed may be supposed to be, who lets it out of his possession, the holder of a bill of exchange is by the ordinary course of such transactions obliged to trust it, even in the hands of those whose interest it is to avail themselves of this sort of objection. For it is most usual for the bill to be left for acceptance, and afterwards for payment, in the hands of the acceptor, who may be tempted to put such a blot on the date as may not be observed at the time, through the confidence of the parties. But even if the alteration should be considered as having destroyed the bill, why may not evidence be given of its contents, upon the same principle as governed the case of *Read v. Brokman*?(*g*) where it was held that pleading that a deed is lost by time and accident, supersedes the necessity of a profert. But at any rate the plaintiffs are entitled to recover on the general counts for money paid, and money had and received, on the authority of *Tatlock v. Harris*;*(h)* for though it is not expressly stated that so much money was received by the defendant, yet that is a necessary inference from the fact of acceptance which is found.

For the defendant it was contended, that the broad principle of law was, that any alteration of a written instrument in a material part thereof, avoided such instrument; and that the rule was not merely confined to deeds, though it happened that the illustration of it was to be found among the old cases upon deeds only because formerly most written undertakings and obligations were in that form. This principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected

(*e*) Dougl. 514.
(*h*) 3 T. R. 174.

(*f*) 2 Moll. c. 10, s. 28.

(*g*) 3 T. R. 151.

[*465] in the attempt, he were *not to be in a worse situation than he was before. If any difference were to be made between bills of exchange and deeds, it should rather be to enforce the rule with greater strictness as to the former; for it would be strange that, because they were more open to fraud from the circumstance of passing through many hands, the law should relax and open a wider door to it than in the case of deeds, where fraud was not so likely to be practised. The principle laid down in Pigot's case⁽ⁱ⁾ is not disputed as applied to deeds. But the first answer attempted to be given is, that the rule as to deeds is *sui generis*, and does not extend to other instruments of an inferior nature, because it arises from the solemn sanction attending the execution of instruments under seal. As to this, it is sufficient to say that no such reason is suggested in any of the books; but the rule stands upon the broad ground of policy, which applies at least as strongly to bills as to deeds, for the reason above given. Then it is said that there is a material distinction between the several issues in the two cases. But the difference is more in words than in sense; the substance of the issue in both cases is, whether in point of law the party be liable to answer upon the instrument declared on? and therefore any matter which either avoids it ab initio, or goes in discharge of it, may be shown as much in the one case as in the other. Upon non est factum the question is, whether in law the deed produced in evidence be the deed of the party? so on non assumpsit the question is, whether the bill given in evidence be in point of law the bill accepted by the defendant? because the promise only arises by implication of law upon proof of the acceptance of the identical bill accepted, and given in evidence. Now neither of the counts in the declaration was proved by the facts found. For in the first count the bill is dated the 20th of March; but, as there is no evidence of the defendant's having accepted such a bill, of course the plaintiffs are not entitled to recover on that count. Neither can they recover on the second, because though it is found that he accepted a bill dated the 26th of March, as there stated, yet inasmuch as the bill stated to have been produced in evidence to the jury is dated the 20th, of course the evidence did not support the count. With respect to the cases cited of bills of exchange having been always [*466] construed by the most liberal *principles, and particularly in the case of *Minet v. Gibson*, the same answer may be given to all of them, which is, that so far from the original contracts having been attempted to be altered, all those actions were brought in order to enforce the observance of them in their genuine meaning against the party who, in the latter case particularly, endeavoured by a trick to evade the contract: whereas here the contract has been substantially altered by the parties who endeavour to enforce it; or at least by those whom they represent, and from whom they derive title. Then the case in *Molloy*, of *Price v. Shute*, is chiefly relied on by the plaintiffs; to which several answers may be given. First, the authenticity of it may be questioned; for it is not to be found in any reports, although there are several contemporaneous reporters of that period. In the next place, the bill, as originally drawn, was not altered upon the face of it; and therefore, as against all other persons at least than the acceptor, it might still be enforced. But principally it does not appear but

that the action was brought against the drawer, who, as the acceptor had not accepted it according to the tenor of the bill, was clearly liable; as the payee was not bound to abide by the enlarged acceptance, but might consider it as no acceptance at all. Then if this bill be void for this fraud, no evidence could be given to prove its contents, as in the case of a deed lost; because in that there is no fraud. But even if any other evidence might have been given, it is sufficient to say that in this case there was none. And as to the common counts, if the general principle of law contended for applies to bills of exchange, it will prevent the plaintiffs from recovering in any other shape. Besides which, it is not stated that the defendant has received any consideration; upon which ground the case of *Tatlock v. Harris* was decided.

In reply it was urged, that the issue was not whether the defendant had accepted this bill in the state in which it was shown the jury, but whether he had promised to pay in consequence of having accepted a bill dated the 26th March, drawn by? &c.; and those facts being found, the promise necessarily arises. It is said that the policy of the law will extend the same rule to the avoidance of bills of exchange which have been altered, as to deeds; because there is even greater reason to guard against fraudulent *alterations in the former than in the latter case. To which it may [*467] be answered that the foundation of the rule fails in this case; for no fraud is found, and none can be presumed; and it is admitted, that if the blot had been made by accident, it would not have avoided the bill; and nothing is stated to show that it was not done by accident. Besides, the policy of the law is equally urgent in favour of the plaintiffs, it being equally politic to compel a performance of honest engagements. Here the defendant is only required to do that which in fact and in law he has promised to do. And if he be not liable on this contract, he will be protected in withholding payment of that money which he has received, and which by the nature of his engagement he undertook to repay. No answer has been given to the case cited from *Molloy*; for though the case is not reported in any other book, it bears every mark of authenticity, by noting the names of the parties, the court in which it is determined, and the time of the decision: and it has been adopted by subsequent writers on the same subject. Again, the alteration there was full as important as this, for it equally tended to accelerate the day of payment; and, lastly, it is not denied but that the action might have been maintained on the bill against any other person than the acceptor; which is an admission that the policy of the law does not attach so as to avoid such instruments upon any alteration, for otherwise it would have avoided the bill against all parties.

Lord *Kenyon*, C. J.—The question is not whether or not another action may not be framed to give the plaintiffs some remedy, but whether this action can be sustained by these parties on this instrument?—for the instrument is the only mean by which they can derive a right of action. The right of action which subsisted in favour of *Wilkinson* and *Cooke*, could not be transferred to the plaintiffs in any other mode than this, inasmuch as a chose in action is not assignable at law. No case, it is true, has been cited either on one side or the other, except that in *Molloy*, of which I shall take notice hereafter, that decides the question before us in the identical case of a bill of exchange. But cases and principles have been cited at the bar,

which, in point of law as well as policy, ought to be applied to this case. [*468] That the alteration in this instrument would have avoided *it, if it had been a deed, no person can doubt. And why in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor: now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offence was compounded of those two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been since increased, the principle still remains the same. I lay out of my consideration all the cases where the alteration was made by accident: for here it is stated that this alteration was made while the bill was in the possession of Wilkinson and Cooke, who were then entitled to the amount of it; and from whom the plaintiffs derive title: and it was for their advantage (whether more or less is immaterial here) to accelerate the day of payment, which in this commercial country is of the utmost importance. The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time: for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased should be thereby avoided. Then let us see whether the policy of the law, and some later cases, do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened. It was doubted so lately as in the reign of George the First, in Ward's case (*a*), whether forgery could be committed in any instrument less than a deed, or other instrument of the like authentic nature; and it might equally have been decided there that, as none of the preceding determinations extended to that case, the policy of the law should not be extended to it. But it was there held that the principle extended to other [*469] instruments as well as to deeds; and that *the law went as far as the policy. It is on the same reasoning that I have formed my opinion in the present case. The case cited from Molloy indeed, at first made a different impression on my mind; but on looking over it with great attention, I think it is not applicable to this case. No alteration was there made on the bill itself; but the party to whom it was directed, accepted it as payable at a different time, and afterwards the payee struck out the enlarged acceptance; and, on the acceptor refusing to pay, it is said that an action was maintained on the bill. But it does not say against whom the action was brought; and it could not have been brought against the acceptor, whose acceptance was struck out by the party himself who brought the action. Taking that case in the words of it, "that the alterations did not destroy the bill," it does not affect this case: not an iota of the bill itself was altered; but on the person to whom the bill was directed refusing to

(a) 2 Str. 747, and 2 Lord Raym. 1461.

accept the bill as it was originally drawn, the holder resorted to the drawer. Then it was contended that no fraud was intended in this case; at least, that none is found; but I think that, if it had been done by accident, that should have been found, to excuse the party, as in one of the cases where the seal of the deed was torn off by an infant. With respect to the argument drawn from the form of the plea, it goes the length of saying, that a defendant is liable, on *non assumpsit*, if at any time he has made a promise, notwithstanding a subsequent payment: but the question is, whether or not the defendant promised in the form stated in the declaration? and the substance of that plea is, that according to that form he is not bound by law to pay. On the whole, therefore, I am of opinion that this falsification of the instrument has avoided it; and that, whatever other remedy the plaintiffs may have, they cannot recover on this bill of exchange.

Ashhurst, J.—It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration [*470] avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke; and it certainly was for their advantage, because it accelerated the day of payment. Now, upon these facts, the jury would perhaps have been warranted in finding that the alteration was made by them: at all events, it was their business to preserve the bill without any alteration. If Wilkinson and Cooke had brought this action, they clearly could not have recovered, because they must suffer for any alteration of the bill while it was in their custody: then, if the objection would have prevailed in an action brought by them, it must also hold with regard to the plaintiffs, who derive title under them. For wherever a party takes a bill under such suspicious circumstances appearing on the face of it, it is his duty to inquire how the alteration was made; he takes it at his risk, and must take it subject to the same objection as lay against the party from whom he received it. Upon the whole, there seems to be no difference between deeds and bills of exchange in this respect in favour of the latter: but, on the contrary, if there be any difference, the objection ought to prevail with greater force in the latter than in the former; for it is more particularly necessary that bills of exchange, which are daily circulated from hand to hand, should be preserved with greater purity than deeds, which do not pass in circulation. It would be extremely dangerous to permit the party to recover on a bill as it was originally drawn, after an attempt to commit a fraud, by accelerating the time of payment. For these reasons, therefore, I concur in opinion with my Lord.

Buller, J.—In a case circumstanced as the present is, in which it is apparent, as found, and has been proved beyond all doubt, that the bill of

exchange in question was given for a full and valuable consideration, that the plaintiffs are honest and innocent holders of it, and that the defendant [*471] has the amount of the bill in his hands, it is astonishing to *me that a jury of merchants should hesitate a moment in finding a verdict generally for the plaintiffs, more especially as I understand it was left to them by the Chief Justice to read the bill as it undoubtedly was drawn, and by that means to put an end to the question at once. It was rightly so left to the jury by his Lordship; for that was the furtherance of the justice of the case, and it tended to prevent expense, litigation, and delay, which are death to trade. That the defendant cannot be suffered to pocket the money for which this bill was drawn, or to enable the drawer to do so, but that sooner or later, provided a bankruptcy do not intervene, it must be paid, I presume no man will doubt. The drawer has received the value, the plaintiffs have paid it, and the defendant has it in his hands. On this short statement, every one who hears me must anticipate me in saying that the defendant must pay it. Nay, if actual forgery had been committed, the defendant could not be permitted to retain the money; he must not get 900*l.* by the crime of another; but, in such a case, I agree it would be difficult to sustain the present or any action for the money till something further had happened than has yet been done. The law, proceeding on principles of public policy, has wisely said—That where a case amounts to felony, you shall not recover against the felon in a civil action; but that rule does not appear by any printed authority to have been extended beyond actions of trespass or *tort*, in which it is said that the trespass is merged in the felony. That is a rule of law calculated to bring offenders to justice. But whether that rule extend to any case after the offender is brought to justice, or whether at any time it may be resorted to in an action between persons guilty of no crime, are questions upon which I have formed no opinion, because this case does not require it. Upon this special verdict, there is no foundation for saying that any one has been guilty of forgery, nor even of a fraud, as it strikes my mind. Fraud or felony is not to be presumed; and unless it be found by the jury, the court cannot imply it. *Minet v. Gibson* is a most decisive authority for that proposition, if any be wanted; and I do not think there is any foundation for the distinction attempted to be taken between that case and the present. It has been contended that the [*472] party there recovered, because the nature of the *obligation was not altered: but the determination did not proceed entirely on that ground, but on this, that, according to the true intent and meaning of the parties, the bill was intended to be made payable to bearer; so here the plaintiffs do not attempt to enforce the contract contrary to the terms of it, but according to that form by which the defendant originally consented to be bound, as stated in the second count. The special verdict finds that Peel and Co., on the 26th of March, 1788, drew a bill of exchange on the defendant for 947*l.* 10*s.*, payable to Wilkinson and Co.; which bill, as the same has been altered, accepted, and written upon, is set out *in hac verba*. Upon the fac-simile copy of the bill set out in the verdict, there appears to be a blot over the date; and the jury have thought fit to read it as it now stands, the 20th. I must confess I should never have read it so; for seeing that there was something above the figure 0, that is the last reading which I should have given to it. I should have said on the face of the bill, this must have been

either a 6 or an 8; it could not have been 8, because the 0 is as high as the 2, and therefore it must be a 6: but the jury have found no difficulty in saying it was a 6; and I will examine presently whether there be any objection to let it remain as a 6. The verdict further finds that the defendant, before any alteration of the bill, accepted it; and Wilkinson and Co., indorsed it to the plaintiffs, who paid a valuable consideration for it. Then it is stated, that whilst the bill was in the hands of Wilkinson and Cooke, the date, without the authority of the defendant, was altered by persons unknown, from the 26th to the 20th of March. They further find that the words "23rd of June" were inserted at the top of the bill, to mark that the bill would then become due; and that the alteration and the blot were on the bill when it was delivered to the plaintiff. This is the full substance of the special verdict; and there is neither forgery, felony, nor fraud, found or supposed by the jury; we therefore can neither intend nor infer it. The verdict amounts only to saying there is a blot on the bill, but how it came there we don't know; and we beg to ask the Court whether the circumstance of a blot being on the bill which we cannot account for makes the bill void. Provided I have accurately stated the question, surely such a verdict is without precedent. Suppose a child had torn out a bit of the *bill on which the top of the 6 was written, is the holder of the [*473] bill to lose his 974*l*.? or is the defendant to get 974*l*. by such an accident? But to decide whether I have accurately stated the question in the cause, it is necessary to examine the words of the special verdict minutely, and by degrees. The jury have said that the bill was altered. The words "altered" may raise a suspicion and alarm in our minds; but let not our judgment be run away with by a word, without examining the true sense and meaning of it as it is used in the place where we find it. How was it altered, what is the alteration, when was it made, and for what purpose? The jury have said it was altered by means of putting a blot over the date; but by whom or when that was done we don't know, further than that it was done whilst the bill was in the possession of Wilkinson and Cooke; but we do not find that it was done for any bad purpose, or with any improper view whatever. Upon this finding, the Court are bound to say it was done innocently. But the jury have also said, that "June 23rd" was inserted at the top of the bill to mark when the bill would become due. When and by whom was that done? The jury have not said one word upon the subject. Was that done even during any part of the time whilst the bill was in the possession of Wilkinson and Cooke? No. It is consistent with the finding, that the plaintiffs, who are found to be bona fide holders of the bill, upon reading the date to be the 20th, and calculating the time which it had to run from that date, put down "June 23rd" with the most perfect innocence. If the bill had been originally dated the 20th, the 23rd June would have been the true time of payment. But admitting that a wrong date had been put down, as denoting the time of payment, is there any case or authority which says that that circumstance shall render the bill void? Every bill which has been negotiated within the memory of man is marked by some holder or another with the day when it will become or is supposed to become due. That in some sense of the word is an alteration; for it makes an addition to the bill which was not there when it was drawn or accepted. But was it done fraudulently? The answer is—It was not, and therefore it is of no avail. So here

the jury have not said it was done fraudulently, and therefore it affords no objection. When the jury have *stated what the alteration is, and [*474] how it was made, namely, by making a blot, and having fixed no sinister or improper motive for so doing, it is the same as if they had said only "here is a blot on the bill." Suppose the jury had said in a few words that this bill was drawn, indorsed, and accepted, by the defendant, as the plaintiffs allege, but here is a blot upon it which makes the date look like the 20th instead of the 26th. The true answer would have been—Blot out the blot by your own understanding and conviction, and pronounce your verdict according to the truth of the case. It was nobly said in another place, (I heard it with pleasure, and thought it becoming the dignity of the person who pronounced it, and the place in which it was pronounced,) "That the law is best applied when it is subservient to the honesty of the case. And if there be any rule of law which says you cannot recover on any instrument but according to the terms of it, forlorn would be the case of plaintiffs. By the temperate rules of law we must square our conduct." The honesty of the plaintiff's case has been questioned by no one; and therefore I should imagine the wishes of us all would have been in favour of their claim, provided we are not bound down by some stubborn rule of law to decide against them. Here again I must beg leave to resort to what was forcibly said in another place, upon a similar subject, and which I shall do as nearly in the words which passed at the time as I can; because they carried conviction to my mind; because they contain my exact sentiments; and because they are more emphatical than any which I could substitute in the place of them. "The question (it was said) is, whether there be any rule of law so reluctant that it will not recede from words to enforce the intention of the parties. I believe there is no such rule. For half of a century there have been various cases which have left the question of forgery untouched. If a bill be forged, the acceptor is bound." Speaking of the case of *Stone v. Freeland*, it was said, "if any one say that case is not law, let him show why it is not so. Judges can only look to former decisions. This has been a rule in the commercial world above twenty years." This reasoning seems to me to be sound and decisive, if it apply to the present case; and to prove that it does apply, I need only quote the case, [*475] mentioned at the bar, of *Price v. Shute*, reported in *Beawes's Lex Mercat.*, tit. Bill of Exchange, pl. 222, and *Moll.* 109. There a bill was payable 1st January, and the person to whom it was directed accepted it to pay on the 1st of March, with which the servant returned to his master, who, perceiving this enlarged acceptance, struck out the 1st of March and put in the 1st of January, and at that time sent the bill for payment, which the acceptor refused; whereupon the possessor struck out the 1st of January and inserted the 1st of March again. In an action brought on this bill, the question was, whether these alterations did not destroy the bill; and ruled by Lord Chief Justice Pemberton, that they did not. Now, on reading this case, I cannot consider it in any other light than as an action brought against the acceptor; for it only states what passed between those parties. Here then is a rule which has prevailed in the commercial world for 110 years; it stands uncontradicted and unimpeached: it was decided by great authority; and, as I take it, on deliberation. For when it is said to have been in *B. R.*, that must either have been in this court, or on a case

saved by Chief Justice Pemberton for his own opinion : which was a common way of proceeding in those days. In that case the term "alteration" is used, and therefore we need not be frightened or alarmed at that word. The effect of the alteration was to accelerate the payment ; so it is here. But in one respect that case goes beyond the present ; for there the alteration was made by the plaintiff himself ; here it was not. It is true, in that case, when the plaintiff found he could not receive the money on the 1st of January, he altered it back to the 1st of March ; but if the first alteration vitiated the bill, no subsequent alteration could set it up against the acceptor without his consent. Here the plaintiffs have not re-altered the bill ; but they have acted a more honest part ; they have left the bill as it was to speak for itself ; but they have treated it as a bill of the 26th of March ; they have proved that it was a bill of the 26th of March ; they demanded payment according to that date ; and the jury have found all these facts to be true. And it is material to consider what was the issue joined between the parties ; for there is a great deal of difference between the plea of non est factum and the present : here the question is, whether the drawer made such a bill, and whether the defendant accepted it ; and this is found by the jury. Then the *case of Price v. Shute, in sense and substance, is a direct authority in point with the present ; though it vary in a minute and immaterial circumstance. The plaintiffs in treating the bill, and making a demand as they have done, seem to have followed the sober advice and directions given by Beawes in pl. 190 ; where he says, "he that is possessor of a bill which only says 'pay,' without mentioning the time when, or that is without a date, or not clearly and legibly written, payable some time after date, &c., so that the certain precise time of payment cannot be calculated or known, must be very circumspect, and demand the money whenever there is any probable appearance of the time being completed that was intended for its payment ; or that he can demonstrate any circumstance that may determine it, or make it likely when it shall be paid." It is impossible that this writer could have supposed that the bill was rendered void by any blot, obliteration, or erasure : on the contrary, he tells you that it must be demanded in time, and that you may make out by circumstances or other evidence when it was, or was likely to be, payable. That has been made out by evidence in the present case. Upon this head I shall only add one authority more, which is Carth. 460, where a bill was accepted after a day of payment was elapsed. It was objected that it was impossible in such a case for the defendant to pay according to the tenor of the bill, and, therefore the declaration was bad ; but the Court held it good, and said the effect of the bill was the payment of the money, and not the day of payment. So here the defendant having accepted this bill, whatever may be the construction as to the date, must pay the money. I hold that in this case there is no fraud either express or implied ; and that as the plaintiffs have proved that they gave a valuable consideration for the bill, and that it was indorsed to them by those through whose hands it passed, their case is open to no objection whatever. But I will suppose for a moment, though the case do not warrant it, that Wilkinson and Cooke did mean a fraud ; still I am of opinion that would not affect the case between the plaintiffs and the defendant. It is a common saying in our law-books, that fraud vitiates every thing. I do not quarrel with the phrase, or mean in the smallest degree

to impeach the various cases which have been founded on the proof of fraud.

[*477] But still we must recollect that the principle which I have mentioned is always applied *ad hominem*. He who is guilty of a fraud shall never be permitted to avail himself of it; and if a contract founded in fraud be questioned between the parties to that contract, I agree, that, as against the person who has committed the fraud, and who endeavours to avail himself of it, the contract shall be considered as null and void. But there is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two others. Even as between the parties themselves we must not forget the figurative language of Lord Chief Justice Wilmot, who said that "the statute law is like a tyrant; where he comes, he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest." 2 Wils. 351. If an alteration be made to effect a fraud, the alteration shall be laid out of the question; but still the contract shall exist to its original and honest purpose, and shall be carried into execution as if the fraud had never existed. A case somewhat similar to this is to be found in the book which I have before quoted, and which though not a binding legal authority, yet, where its propositions are founded on practice and good sense, is deserving of some attention. Beawes, tit. Bill of Exchange, pl. 135, says, "where the possessor of a bill payable to his order fails, and to defraud his creditors indorses it to another, who negotiates it, and effectually receives the value, indorsing it again to a third, &c., and though the creditors, having discovered the fraud, oppose it, yet the acceptant must pay it to him who comes to receive it, on proof that he paid the real value for it." But it has been contended that there is an analogy between bills of exchange and deeds, and that in the case of deeds any erasure or alteration will avoid the deed. In answer to this, first, I deny the analogy between bills of exchange and deeds, and there is no authority to support it. In the case of deeds, there must be a *profert*, and, as we learn from 10 Co. 92, b., in ancient times the judges pronounced upon view of the deed, though Lord Coke says that practice was afterwards altered. But there never is a *profert* of a bill of exchange; the judges cannot determine on a view of that, but it must be left to a jury to decide upon the whole of the evidence, according to the truth of the case. Again, in the

[*478] *case of joint and several bonds the objection was founded on its being a substantial injury to the defendant; for if it were considered as a sole bond, the defendant would be answerable for the whole debt; but if it were a joint bond, he would be liable to only half or other proportionable part of it. So far in those days did the Court look into the equity of the case. But the blot on this bill is no injury to the defendant; he is not liable to pay till the bill became due, computing the time from the original date; then he must pay it: he alone is liable; and he never can be charged a second time on the bill. Secondly, it is not universally true that a deed is destroyed by an alteration, or by tearing off the seal. In Palm. 403, a deed which had erasures in it, and from which the seal was torn, was held good; it appearing that the seal was torn off by a little boy. So in any case where the seal is torn off by accident after plea pleaded, as appears by the cases quoted by the plaintiff's counsel. And in these days, I think even if the seal were torn off before the action brought, there would be no difficulty in framing a declaration, which would obviate every doubt upon

that point, by stating the truth of the case. The difficulty which arose in the old cases depended very much on the technical forms of pleading applicable to deeds alone. The plaintiff made a *profert* of the deed under seal, which he still must do, unless he can allege a sufficient ground for excusing it; when that is done, the deed or the *profert* must agree with that stated in the declaration, or the plaintiff fails. But a *profert* of a deed without a seal will not support the allegation of a deed with a seal. For these reasons I am of opinion that the plaintiffs are entitled to judgment on the second count, which is drawn upon the bill, stating it to bear date the 26th March.

But supposing there could be any doubt on this part of the case, I am also of opinion that the plaintiffs are entitled to their judgment on either of the two counts for money paid, or for money had and received. Here it is material to recal to our minds the facts found by the verdict. The bill produced to the jury was drawn for value, and was accepted by the defendant. He is not found to have no effects of the drawer's in his hands; and his accepting the bill imports, and is at the least *prima facie* evidence, that he had; and on this verdict he must be taken *to have the amount in his hands. In Burr. 1675, Aston, J., said, it is an admission of [*479] effects. By his acceptance he gave faith to the bill; and the plaintiffs, giving credit to that fact, have actually paid the value of the bill on receiving it. On this case the money paid by the plaintiffs is money paid for the use of the defendant; for the money was advanced on the credit of the defendant, and in consequence of his undertaking to pay the bill. Again, the money in the defendant's hands is so much money received by him for the use of the plaintiffs, who were holders of the bill when it became due. The defendant has got that money in his pocket, which in justice and conscience the plaintiffs ought to have, and therefore they are entitled to recover it in an action for money had and received.

In answer to this, it was in the last term suggested for consideration, whether this bill after the alteration were not a *chose in action*, which could not be assigned? It is laid down in our old books, that for avoiding maintenance a *chose in action* cannot be assigned, or granted over to another. Co. Litt. 214, a., 266, a.; 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In 2 Roll. Abr. 45 & 46, it is admitted that an obligation or other deed may be granted, so that the writing passes: but it is said that the grantee cannot sue for it in his own name. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance. Bro. tit. Maintenance, 7, 14, 17, &c. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpoena*, or suppress the truth. That such doctrine repugnant to every honest feeling of the human heart should be soon laid aside must be expected. Ac-

cordingly a variety of *exceptions were soon made; and, amongst [*480] others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it. 2 Roll. Abr. 115; but in the midst of all these doctrines on maintenance, there was one case in which the courts of law allowed of an assignment of a *chose in action*, and that was in the case of the crown; for the courts did not feel themselves bold enough to tie up the property of the crown, or to prevent that from being transferred. 3 Leon. 198; 2 Cro. 180. Courts of equity from the earliest times thought the doctrine too absurd for them to adopt, and therefore they always acted in direct contradiction to it; and we shall soon see that courts of law also altered their language on the subject very much. In 12 Mod. 554, the Court speaks of an assignment of an apprentice, or an assignment of a bond, as things which are good between the parties, and to which they must give their sanction and act upon. So an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 Roll. Abr. 29; Sid. 212, and T. Jones, 222; and lastly, by all the judges of England in Mouldsdale v. Birchall, 2 Black. 820, though the debt assigned was uncertain. After these cases, we may venture to say that the maxim was a bad one, and that it proceeded on a foundation which fails. But still it must be admitted, that though the courts of law have gone the length of taking notice of assignments of *choses in action* and of acting upon them, yet in many cases they have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving the shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases, in which the Court have taken care that it shall never work injustice. In Bottomley v. Brooke, C. B. Mich. 22 G. 3,(a) which was debt on bond, the defendant pleaded that the bond was given for securing 103*l.* lent to the defendant by E. Chancellor; and was given by her direction in trust for her, and that E. Chancellor was indebted to the defendant in more money. To this plea there was a demurrer, which was withdrawn by the advice of the Court. In Rudge v. Birch,† K. B. Mich. 25 G. 3,(b) on the same pleadings there was judgment for the defendant. And in Winch v. Keeley, K. B. Hil. [*481] 27 G. 3,(c) where the obligee assigned over a bond and afterwards became a bankrupt, the Court held that he might notwithstanding maintain the action. Mr. J. Ashhurst said, "It is true that formerly courts of law did not take notice of an equity or a trust; but of late years, as it has been found productive of great expense to send the parties to the other side of the hall, wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this court will take notice of a trust, why should they not of an equity? It is certainly true that a *chose in action* cannot strictly be assigned; but this Court will take notice of a trust, and see who is beneficially interested." But admitting that on account of this quaint maxim

(a) 1 T. R. 621.

† But these cases have been disapproved of. Tucker v. Tucker, 4 B. & Ad. 745. And see Wake v. Tinkler, 16 E. 36, where Lord Ellenborough said, that the doctrine laid down in them was rather to be restrained than extended.

(b) 1 T. R. 622.

(c) Ante, vol. i. 619.

there may still be some cases in which an action cannot be maintained by an assignee of a chose in action in his own name, it remains to be considered, whether that objection ever did hold or ever can hold in the case of a mercantile instrument or transaction. The law-merchant is a system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith. In *Pillan v. Van Mierop*, Lord Mansfield said, if a man agree to do what if finally executed would make him liable, as in a court of equity, so, in mercantile transactions, the law looks on the act as done. I can find no instance in which the objection has prevailed in a mercantile case; and in the two instances most universally in use, it undoubtedly does not hold; that is, in the cases of bills of exchange, and policies of insurance. The first is the present case; and bills are assignable by the custom of merchants; so in the case of policies of insurance; till the late act was made, requiring that the name of the person interested should be inserted in the policy, the constant course was to make the policy in the name of the broker; and yet the owner of the goods maintained an action upon it. Circulation and the transfer of property are the life and soul of trade, and must not be checked in any instance. There is no reason for confining the power of assignment to the two instruments which I have mentioned; and I will show you other cases in which the Court have allowed it: 1st, In *Fenner v. Mears*, where the defendant, a captain of an East Indiaman, borrowed 1000*l.* of Cox, and gave two Respondentia bonds, *and signed an indorsement on the back of them, acknowledging that, in case Cox chose [*482] to assign the bonds, he held himself bound to pay them to the assignees. Cox assigned them to the plaintiff, who was allowed to recover the amount of them in an action for money had and received. De Grey, Chief Justice, in disposing of the motion for a new trial, said (a) Respondentia bonds have been found essentially necessary for carrying on the India trade; but it would clog these securities, and be productive of great inconvenience, if they were obliged to remain in the hands of the first obligee. This contract is therefore devised to operate upon subsequent assignments, and amounts to a declaration, that upon such assignment the money which I have borrowed shall no longer be the money of A., but of B., his substitute. The plaintiff is certainly entitled to the money in conscience, and therefore, I think, entitled also at law: for the defendant has promised to pay any person who is entitled to the money. So in the present case, I say the plaintiffs are in conscience entitled to the money, and the defendant has promised to pay, or, which is the same thing, is by law bound to pay the money to any person who is entitled. The very nature and foundation of an action for money had and received is, that the plaintiff is in conscience entitled to the money; and on that ground it has been repeatedly said to be a bill in equity. We all remember the sound and manly opinion given by my Lord Chief Justice here in the beginning of the last term, on a motion made by Mr. Bearcroft for a new trial, wherein he said, if he found justice and honesty on the side of a plaintiff here, he would never turn him round, in order to give him the chance of getting justice elsewhere.—2ndly, *Clarke v. Adair*, sittings after Easter, 4 Geo. 3: Debray, an officer, drew a bill on the agent of a regiment payable out of the first money which should become due

(a) 2 Bl. Rep. 1272.

to him on account of arrears or non-effective money. Adair did not accept the bill, but marked it in his book, and promised to pay when effects came to hand. Debray died before the bill was paid; and the administratrix brought an action against Adair for money had and received. It was allowed by all parties that this was not a bill within the custom of merchants: but Lord Mansfield said that it is an assignment for valuable consideration, with notice to the agent; and he is bound to *pay it. He [*483] said he remembered a case in Chancery, where an agent under the like circumstances had paid the money to the administrator, and was decreed notwithstanding to pay to the person in whose favour the bill was drawn. 3rdly, In *Israel v. Douglas*, C. B. East, 29 G. 3., (a) A. being indebted to B., and B. indebted to C., B. gave an order to A. to pay C. the money due from A. to B.; whereupon C. lent B. a further sum, and the order was accepted by A. On the refusal of A. to comply with the order, it was held that C. might maintain an action for money had and received against him. And Mr. J. Heath expressly said he thought in mercantile transactions of this sort such an undertaking may be construed to make a man liable for money had and received. This opinion was cited with approbation in the House of Lords in *Gibson v. Minet*. Lastly, I come to the case of *Tatlock v. Harris*, (3 T. R. 182,) in which Lord Kenyon, in delivering the judgment of the court, said it "was an appropriation of so much money to be paid to the person who should become the holder of the bill. We consider it as an agreement between all the parties to appropriate so much property to be carried to the account of the holder of the bill; and this will satisfy the justice of the case, without infringing any rule of law." All these cases prove that the remedy shall be enlarged, if necessary, to attain the justice of the case; and that if the plaintiff has justice and conscience on his side, and the defendant has notice only, the plaintiff shall recover in an action for money had and received. Let us not be less liberal than our predecessors, and even we ourselves, have been on former occasions. Let us recollect, as Lord Chief Justice Wilmut said in the case I have alluded to, that not only *boni judicis est ampliare jurisdictionem*, but *ampliare justitiam*: and that the common law of the land is the birthright of the subject, under which we are bound to administer him justice, without sending in his writ of subpoena, if he can make that justice appear. The justice, equity, and good conscience of the case of these plaintiffs can admit of no question; neither can it be doubted but that the defendant has got the money which the plaintiffs ought to receive. For these reasons, I am of opinion that the plaintiffs are entitled to judgment on either of these three counts in the declaration, [*484] namely, on the count on the bill of exchange, *stating the date to be the 26th; or on the count for money paid; or on the count for money had and received.

Grose, J.—The only question in this case is, whether there appears on the face of this special verdict a right of action in the plaintiffs on any of the counts. The first count is on a bill of exchange, dated the 20th of March; but, there being no proof of any bill of that date, there is clearly an end of that count. The second is on a bill dated the 26th of March; but the defendant objects to the plaintiffs' recovering on this count also, because the

bill having been altered while it was in the hands of Wilkinson and Cooke, it is not the same bill as that which was accepted; and that is the true and only question in the cause. My idea is, that the plaintiffs' right of action, as stated in this count, cannot be maintained at common law, but is supported only on the custom of merchants, which permits these particular choses in action to be transferred from one person to another. The plaintiffs, as indorsees, in order to recover on this bill, must prove the acceptance by the defendant, the indorsement from Wilkinson and Cooke to them, and that this was the bill which was presented when it became due. Now has all this been proved? The bill was drawn on the 26th of March, payable at three months' date; the defendant's engagement by his acceptance was, that it should be paid when it became due, according to that date; but afterwards the date was altered; the date I consider as a very material part of the bill, and by the alteration the time of payment is accelerated several days: according to that alteration, the payment was demanded on the 23d of June, which shows that the plaintiffs considered it as a bill drawn the 20th of March; then the bill which was produced in evidence to the jury was not the same bill which was drawn by Peel and Co., and accepted by the defendant; and here the cases which were cited at the bar apply. Pigot's is the leading case; from that I collect, that when a deed is erased, whereby it becomes void, the obligor may plead non est factum, and give the matter in evidence, because at the time of plea pleaded it was not his deed; and 2ndly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. *Such is the law respecting deeds :† [*485] but it is said that that law does not extend to the case of a bill of exchange; whether it do or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed, and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party, in whose favour it is made, from attempting to make any alteration in it. This prin-

† [In Dr. Leyfield's case, 10 Rep. 92, one of the reasons for profer is stated to be that it be not rased or interlined in material points or places, and upon that the judges in ancient time did judge of their own view the deed to be void, but of late times have left that to be tried by the jury if the rasing or interlining were before delivery. On similar principles a deed, the name of the grantee in which is introduced after delivery is void. *Hibblewhite v. M'Morine*, 6 Mee. & W. 200. But if the grantee be sufficiently identified, such an addition as filling up a blank left for his christian name will not hurt. *Eagleton v. Guttridge*, 11 Mee. & W. 465.]

ciple too appears to me as applicable to one kind of instruments as to another. But it has been contended that there is a difference between an alteration of bills of exchange and deeds; but I think that the reason of the rule affects the former more strongly, and the alteration of them should be more penal than in the latter case. Supposing a bill of exchange were drawn for 100*l.*, and after acceptance the sum was altered to 1000*l.*: it is not pretended that the acceptor shall be liable to pay the 1000*l.*: and I say that he cannot be compelled to pay the 100*l.*, according to his acceptance of the bill, because it is not the same bill. So if the name of the payee had been altered, it would not have continued the same bill. And the alteration in every respect prevents the instrument's continuing the same, as well when applied to a bill as to a deed. It was said that Piggott's case only shows to what time the issue relates: but it goes further, and shows, that if the instrument be altered at any time before plea pleaded, it becomes void. It is true the court will inquire to what time the issue relates in both cases. Then to what time does the issue relate here? The plaintiffs [*486] **assumpsit* in law, otherwise the *assumpsit* did not arise. It was incumbent on them to prove that, before the action was brought, this identical bill, which was produced in evidence to the jury, was accepted by the defendant, presented, and refused: but if the bill, which was accepted by the defendant, were altered before it was presented for payment, then that identical bill, which was accepted by the defendant, was not presented for payment; the defendant's refusal was a refusal to pay another instrument; and therefore the plaintiffs failed in proving a necessary averment in their declaration. If the bill had been presented and refused payment, and it had been altered after the action was brought, then it might have been like the case mentioned at the bar. It was contended at the bar, that the inquiry before a jury in an action like the present should be, whether or not the defendant promised to pay the bill at the time of his acceptance: but granting that he did so promise, that alone will not make him liable unless that same bill were afterwards presented to him. I will not repeat the observations which have been already made by my Lord on the case in *Molloy*: but the note of that case is a very short one; and the principle of it is not set forth in any other book, nor indeed do the facts of it sufficiently appear. I doubt also whether it was a determination of this court: it only appears that there was a point made at *Nisi Prius*, but not that it was afterwards argued here. But it has been said that a decision in favour of the plaintiffs will be the most convenient one for the commercial world; but that is much to be doubted; for if, after an alteration of this kind, it be competent to the court to inquire into the original date of the instrument, it will also be competent to inquire into the original sum and the original payee, after they have been altered, which would create much confusion, and open a door to fraud. Great and mischievous neglects have already crept into these transactions; and I conceive that keeping a strict hand over the holders of bills of exchange, to prevent any attempts to alter them, may be attended with many good effects, and cannot be productive of any bad consequences, because the party who has paid a value for the bill may have recourse to the person who immediately received it from him. On these grounds, there-

fore, I am of *opinion that the plaintiffs cannot recover on the second count. Neither do I think that they can recover on the general counts, because it is not stated as a fact in the verdict that the defendant received the money, the value of the bill. [*487]

Per curiam.

Judgment for the defendant.

MASTER V. MILLER, IN THE EXCHEQUER CHAMBER, IN ERROR.

ON behalf of the plaintiff, *Wood* argued as follows: It has been contended, on the other side, in the court below, that the acceptor of the bill was discharged from his acceptance by the alteration of the date, though made without the knowledge of the holder: but no case has been cited to show, that an alteration, such as was made in the present instance, would vitiate a written instrument, except it were a deed. But there is a material difference between deeds and bills of exchange. Deeds seldom if ever pass through a variety of hands, and are not liable to the same accidents to which bills are, from their negotiability, exposed. There is therefore good reason in the rule, which requires that deeds should be strictly kept, and which will not suffer the least alteration in them; but the same rule is not applicable to bills. In ancient times the court decided on the inspection of deeds, for which reason a profert was necessary, that they might see whether any rasure or alteration had taken place: but bills of exchange were always within the cognizance of the jury. The form of the issue on a deed also, is different from that on a bill; in the one it is, that it is not then, *i. e.* at the time of plea pleaded, the deed of the party; 11 Co. 27, a, *Piggott's* case; but the issue on a bill is, that the defendant did not undertake and promise. Here the jury have expressly found that the defendant did accept the bill, and the promise arises by implication of law from the acceptance. An alteration in the date, subsequent to the acceptance, will not do away the implied promise. In *Price v. Shute*, "a bill was drawn payable the 1st of January; the person upon whom it was drawn accepts the bill to be paid the 1st of March; the servant brings back the *bill: the master perceiving the enlarged acceptance, strikes out the 1st of March, and [*488] puts in the 1st of January, and then sends the bill to be paid; the acceptor then refuses: whereupon the person to whom the moneys were to be paid strikes out the 1st of January, and puts in the 1st of March again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled they did not." 2 *Molloy*, 109. In *Nicols v. Haywood*, *Dyer*, 59, it was holden in the case of a bond, that where the seal was destroyed by accident before the trial, the jury might find the special matter, and being after plea pleaded, it could not be assigned for error, but the plaintiff recovered. To the same point also is *Cro. Eliz.* 120, *Michael v. Stockwith*. So in the present case, it was competent to the jury to find the special matter, and an alteration in the bill, subsequent to the time of the acceptance, ought not to prevent the plaintiff from recovering. In *Dr. Leyfield's* case, 10 Co. 92, b, it is said, "in great and notorious extremities, as by casualty of fire, that all his evidence were burnt in his

house, there, if that should appear to the judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses:" the casualty by fire is only put as an instance, for the principle is applicable to all cases of accident. Thus also in *Read v. Brookman*, 3 Term Rep. B. R. 151, a deed was pleaded as being lost by time and accident, without a profert: and the present case is within the reason and spirit of that determination.

Beaucroft, contra.—On principles of law and sound policy, the plaintiff ought not to recover. The reason of the rule, that a material alteration shall vitiate a deed, is applicable to all written instruments, and particularly to bills of exchange, which are of universal use in the transactions of mankind. And here there was a material alteration in the bill, inasmuch as the time of payment was accelerated. As to the case of *Price v. Shute*, it is but loosely stated, and that not in any book of reports; and it does not appear against whom the action was brought.

Lord Chief Justice *Eyre*.—I cannot bring myself to entertain any doubt on this case; and if the rest of the Court are of the same opinion, it is needless to put the parties to *the delay and expense of a second argument. [489] When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded; for by the custom of merchants a duty arises on bills of exchange from the operation of law, in the same manner as a duty is created on a deed by the act of the parties. With respect to the argument from the negotiability of bills of exchange and their passing through a variety of hands, the inference is directly the reverse of that which was drawn by the counsel for the plaintiff: there are no witnesses to a bill of exchange, as there are to a deed; a bill is more easily altered than a deed; if therefore courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cypher in a bill for 100*l.*, by which the sum might be changed to 1000*l.*, and the holder having failed in attempting to recover the 1,000*l.* might afterwards take his chance of recovering the 100*l.*, as the bill originally stood. But such a proceeding would be intolerable. It was said in the argument that the defendant could not dispute the finding of the jury, that they had found that he accepted the bill, and therefore that the substance of the issue was proved against him. But the meaning of the plea of non assumpsit is, not that he did not accept the bill, but that there was no duty binding on him at the time of plea pleaded. (a) There are many ways by which the obligation of the acceptance might be discharged; for instance, by payment. And it was certainly competent to him to show, that the duty which arises prima facie from the acceptance of a bill, was discharged in the present case by the bill itself being vitiated by the alteration which was made.

Lord Chief Baron *Macdonald*.—I see no distinction as to the point in question between deeds and bills of exchange: and I entirely concur with my Lord Chief Justice, in thinking there would more dangerous consequences follow from permitting alterations to be made on bills than on deeds.

The other judges declared themselves of the same opinion.

Judgment affirmed.

(a) See Dougl. 111 & 112, 8vo., *Sullivan v. Montague*, and the notes there.

[*490] *Since the decision of this case, it has never been doubted that a material alteration in a bill or note [not satisfactorily accounted for] operates as a satisfaction thereof, *except as against parties consenting* to such alteration. In *Alderson v. Langdale*, 3 B. & Ad. 660, the doctrine was carried still further, and it was held that such an alteration made by the plaintiff operated as a satisfaction not only of the bill, but of the debt which it was given to secure. In *Alderson v. Langdale*, the debtor was the *drawer* of the bill altered; but in *Atkinson v. Hawdon*, 2 Ad. & Ell. 628, it was held that where the debtor, being himself the maker or acceptor, could have had no remedy on the instrument against any other party to it, his liability [to pay the debt secured thereby] would not be extinguished by the alteration. [In that case the declaration, so far as is material to this point, was for goods sold and delivered, and on an account stated. *Plea*, that the defendant accepted a bill at two months for the debt; *Replication*, that it was not paid when due; *Rejoinder*, that the plaintiff had altered it without the defendant's assent. *Demurrer*, and judgment for the plaintiff, the defendant's counsel admitting that the rejoinder could not be supported. It is obvious that this case has no bearing upon the effect of such an alteration in an action on the bill itself.]

Alterations in the date, sum, or time for payment, or the insertion of words authorizing transfer or expressing the value to be received on some particular account, adding the name of the maker or drawer, or an unwarranted place for payment, are *material* alterations within the above rule. See *Walton v. Hastings*, 4 Camp. 223, 1 Stark. 215; *Outhwaite v. Luntly*, 4 Camp. 179; *Bowman v. Nicholl*, 5 T. R. 537; *Cardwell v. Martin*, 9 East, 190; *Kershaw v. Cox*, 3 Esp. 246; *Knill v. Williams*, 10 East, 431; *Clark v. Blackstock*, Holt, N. P. 474; *Tidmarsh v. Grover*, 1 M. & S. 735; *Cowie v. Halsall*, 4 B. & Ad. 197; *R. v. Treble*, 2 Taunt. 328; *Alderson v. Langdale*, 3 B. & Ad. 660; *Taylor v. Mosely*, 6 C. & P. 278. [*Crotty v. Hodges*, 4 Man. & Gr. 561, 5 Scott, N. R. 221, S. C.; *Harrison v. Cotgreave*, 4 C. B. 562, where the defendant pleaded his infancy at the time of the alteration (not stating it to have been made without his consent), and that he had not ratified the contract as altered after he

came of full age. *Mason v. Bradley*, 11 Mee. & W. 590, where the name of one of the makers of a promissory note was cut off.]

Even if the alteration be made *with the consent* of all the parties to the bill or note; still, as it thereby becomes a new contract, the old stamp will not suffice, *Bowman v. Nicholl*, 5 T. R. 537; unless, indeed, the alteration was merely to correct a mistake, and so render the instrument what it was originally intended to have been, *Kershaw v. Cox*, 3 Esp. 246; *Jacob v. Hart*, 6 M. & S. 142; *Clark v. Blackstock*, Holt, N. P. 474. [*Byrom v. Thomson*, 11 Ad. & Ell. 316. *Cariss v. Tattersall*, 3 Scott, N. R. 257, 2 Man. & Gr. 890, S. C., which see as to the evidence sufficient to prove an assent to the alteration. *Wright v. Inshaw*, 1 Dowl. N. S. 802. The addition of a new contractor with the assent of all parties does not hurt, *Zouch v. Clay*, 1 Vent. 185, 2 Lev. 35, S. C.; and according to *Catton v. Simpson*, 8 Ad. & Ell. 136, 3 N. & P. 248, S. C., it does not even render a new stamp necessary.]

An alteration made with the consent of parties *before a bill or note has issued* is of no importance, for, up to the time of issue, it is in fieri; *Downes v. Richardson*, Bayley on Bills, 5th Ed. 116; *Johnson v. D. of Marlborough*, 2 Stark. 313; [*Tarleton v. Shingler*, 7 C. B. 812;] so when made by an agent of all parties. *Sloman v. Cox*, 5 Tyrw. 175, 1 C. M. & R. 471, S. C. And a bill or note is said to be *issued* when it is in the hands of some party entitled to make a claim upon it. *Downes v. Richardson*, *ubi supra*; *Cardwell v. Martin*, 9 East, 190; *Kennerley v. Nash*, 1 Stark. 452.

If a bill or note exhibit the appearance of alteration, it lies upon the holder to account for it. *Henman v. Dickenson*, 5 Bing. 183; *Bishop v. Chabre*, 1 M. & M. 116; *Knight v. Clements*, 8 Ad. & Ell. 213; [*Clifford v. Lady Parker*, 2 Man. & Gr. 909, 3 Scott, N. R. 233, S. C. Whether an interlineation like an alteration raises a *prima facie* case of suspicion, so that the onus of explaining it is thrown upon the party producing the instrument, see 2 Wms. Saund. 200 c, n.(b.)]

A cancellation *by mistake* does not affect the liability of the parties whose signatures are cancelled. *Roper v. Birbeck*, 15 East, 17; **Wilkinson v. Johnson*, 3 B. & C. 428; [*490b] *Novelli v. Rossi*, 2 B. & Ad. 765. [Ac-

cord. *Warwick v. Rogers*, 5 Man. & Gr. 352, 6 Scott, N. R. 1, S. C., where an unsuccessful attempt was made to fix a banker who has made such a cancellation with the amount of the bill.] Nor does the addition of a thing perfectly immaterial. *Catton v. Simpson*, 8 Ad. & Ell. 136.

When an *acceptance* is altered by inserting a place of payment, without adding the words "there only," or "not elsewhere," the alteration is, in an action against the acceptor, immaterial if made by his consent, st. 1 & 2 G. 4, c. 78, having rendered the above words necessary in order to a special acceptance. *Walter v. Cubley*, 2 C. & M. 151. But if made without his sanction, it avoids the bill, being the unauthorized appointment of an agent to pay the bill. *Taylor v. Moseley*, 6 C. & P. 278; *Macintosh v. Haydon*, R. & M. 362; *Desbrowe v. Wetherby*, 1 M. & Rob. 438; *Calvert v. Baker*, 4 Mee. & W. 417. [*Crotty v. Hodges*, 4 Man. & Gr. 561; 5 Scott, N. R. 221, S. C.]

Although for a long time *Pigot's case*, 11 Rep. 26 a, and *Master v. Miller*, were the authorities always referred to upon questions of alteration, and although such questions seldom arose except in actions upon deeds, bills of exchange, and promissory notes, yet the doctrine of those two cases has been extended to other written instruments. In *Powell v. Divett*, 15 East, 29, the Court of Queen's Bench applied it to the case of bought and sold notes, and held that a vendor who, after the bought and sold notes had been exchanged, prevailed on the broker, without the consent of the vendee, to add a term to the bought note for his the vendor's benefit, thereby lost all right against the vendee. {A similar decision was made in *Mollet v. Wackerbarth*, 5 C. B. 181, where V. Williams, J., said, "The doctrine of *Pigot's case* as to alterations in deeds, has once been extended to all instruments comprehending words of contract."} And in *Davidson v. Cooper*, 11 Mee. & W. 795, where to a count in *assumpsit* on a guaranty, the defendant pleaded that after it was given to the plaintiff, it was altered in a material particular *by some person to the defendant unknown*, without his consent, by affixing a seal so as to make it appear to be the deed of the defendant, upon a motion for judgment *non obstante veredicto*, the Court of Exchequer reviewed and ex-

pounded the law upon the general subject of alteration, and, holding the case to fall within the doctrine of *Pigot's case*, gave judgment for the defendant. And that judgment was affirmed by the Court of Exchequer Chamber, "after much doubt," 13 Mee. & W. 343. The doubt at first entertained by the Court of Exchequer Chamber may however be considered as fortifying their ultimate decision, which was founded on the principle, "that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original estate." "It is," said Lord Denman, in delivering the judgment, "highly important [*490c] for *preserving the purity of [legal instruments, that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud or laches on his part."

An instrument which, by reason of an alteration, becomes invalid as the foundation of an action, is not however thereby necessarily avoided for all purposes. For instance, the alteration of a deed of conveyance, though it may deprive the covenantee of all right to sue upon the covenants therein contained, does not affect the ownership of the property conveyed; and the deed may, it seems, still be adduced in evidence, to show what was originally conveyed thereby, *West v. Steward*, 14 Mee. & W. 47. In such cases, to use the words of Lord Abinger, in delivering the judgment of the Court, in *Davidson v. Cooper*, 11 Mee. & W. 800, "the deed is produced merely as proof of some right or title created by or resulting from its *having been executed*." Also, in the *Earl of Falmouth v. Thomas*, 9 Mee. & W. 469, the rule as to the destructive effect of altering a written instrument was stated by Parke, B., to apply where the obligation sought to be enforced is *by reason of the instrument*. That was an action by landlord against tenant for mismanagement of a farm, and an instrument purporting to be a written agreement for the letting of the farm with stipulations as to the mode of tillage, though exhibiting an erasure and interlineation of the term of years not satisfactorily accounted for, was admitted as evidence of the terms upon which the defendant (who had become tenant from year to year under a contract implied from the fact of occupation, to abide by all the terms of the

written agreement applicable to a tenancy from year to year), held the premises. In that case the instrument given in evidence does not appear to have operated specifically as an agreement upon the terms of the existing tenancy; it did not contain the contract which the plaintiff sought to enforce; it was only part of the evidence to prove that such a contract existed, though not in writing; as such evidence, only that part of the written instrument which stated the mode of tillage was material, and that part had not been altered. It was like the printed paper in *Lord Bolton v. Tomlin*, 5 Ad. & Ell. 856; 1 N. & P. 247, S. C., with the additional circumstance that it was identified by the tenant's signature. In *Gould v. Coombes*, 1 C. B. 543, also, a promissory note, assumed to have been avoided as a contract by adding the name of a maker, was yet admitted in evidence together with an "I O U" for the amount, given whilst the note was valid, to sustain a count upon an account stated. In *Hutchins v. Scott*, 2 Mee. & W. [490*d*] 809, likewise, an altered agreement was admitted in evidence for a collateral purpose; but some of the observations in that case must be taken subject to correction by *Davidson v. Cooper*.

Since the rules of II. 4 W. 4, the effect of an alteration has frequently been obviated by the form of the pleadings, as in *Sibley v. Fisher*, 7 Ad. & Ell. 444, where the issue being on the indorsement of a bill only, an alteration in the date was held irrelevant. And in *Heming v. Trenery*, 9 Ad. & Ell. 926, where a contract had been interlined, and the plaintiff declared upon it as in its original state, the defendant, having pleaded non assumpsit only, was not allowed to rely upon the effect of the interlineation. That case has been approved and acted upon in *Mason v. Bradley*, 11 Mee. & W. 590, *Davidson v. Cooper*, 11 Mee. & W. 778, and *Parry*

v. Nicholson, 13 Mee. & W. 778, from which it is clear that, where the count is framed upon the instrument in its original state, an alteration which does not render a new stamp necessary cannot be taken advantage of under a plea denying the contract. The case of *Calvert v. Baker*, 4 Mee. & W. 417, where, in an action upon a bill declared upon as it was originally accepted, the defendant was allowed under a plea denying the acceptance to rely upon an alteration of the bill, can only be sustained on the ground that a new stamp was rendered necessary by the alteration; (see *Parry v. Nicholson*, *supra*, per Parke, B.); and on examination that ground will perhaps be found untenable. Where, on the other hand, the plaintiff declares upon the instrument as altered, there the defendant may raise any available defence arising out of the alteration under a plea denying the contract; for, either he has not authorized the alteration and so, never having made any such contract as that declared upon, must succeed in substance; or if he has authorized it, his objection can only be the want of a fresh stamp, and that may be taken, on the production of the altered instrument to prove the issue. The case of a deed set out on *oyer* as altered, and thereby made part of the declaration, falls within the same reasoning. See *Vaugh v. Bussell*, 1 Marsh. 214, 5 Taunt. 707, S. C. In pleading an alteration the defendant ought to show that it was in writing, *Hardern v. Clifton*, 1 Q. B. 523; that it was made after his contract was complete (as, for instance, in the case of the acceptor of a bill, by acceptance), *Langton v. Lazarus*, 5 Mee. & W. 629; and, either that it was made without his consent, or that it was of such a character as to render a new stamp necessary, and made under circumstances in which a new stamp could not legally be affixed; see *Bradley v. Bardsley*, 14 Mee. & W. 573, 3 Dowl. & L. 476, S. C.]

The practice which allows deeds to be declared upon without profert, and, therefore, excuses their destruction or loss, has greatly modified the consequences resulting from alterations in deeds. There is no doubt, that if,

by any agency, a verbal alteration be made, which destroys the identity of the instrument, the *altered* instrument may be avoided by plea of non est factum, because that is not the deed which the party executed: but the legal destruction of the original deed, cannot have a greater effect than its actual destruction or loss, and, therefore, by the modern practice, the original deed may be set up by parol evidence; only, the person by whose act or privity the spoliation was committed, shall not be relieved against his own fraud or folly. Fraud in the person altering, is, therefore the ground of the instrument being made effectively void. Accordingly, the rule, as now received, is, that, an alteration, after execution, *made by one claiming a benefit under the deed, or by his privity*, destroys the instrument as to him, and he can never sue upon it. *Lewis & Lewis v. Payne*, 8 Cowen, 71; *Withers v. Atkinson*, 1 Watts, 237. The *instrument*, as far as the spoliator is concerned, is from that time destroyed and extinguished: its past operation is not counteracted; executed contracts evinced by it, are not rescinded; estates and titles vested by transmutation of possession, whether by common law or the statute of uses, are not divested: but no future benefit can be derived by that party, from the deed, and no covenants, obligations, or other executory contracts, can be enforced by him through its instrumentality; *Herrick v. Maliñ*, 22 Wendell, 388, in the Court of Errors; *The People v. Muzzy*, 1 Denio, 240, 243; *Briggs & Briggs v. Glen & Bryan*, 7 Missouri, 572, 575; *Hatch and another v. Hatch and another*, 9 Massachusetts, 307; *Barrett v. Thorndike*, 1 Greenleaf, 73; *Bliss v. McIntyre et al.*, 18 Vermont, 466. But an alteration, or spoliation, as by tearing the seals off, made or committed *not* by the party suing, nor by his privity, works no harm; as, if it be done by a stranger, *Rees v. Overbaugh*, 6 Cowen, 746; *Nichols v. Johnson*, 10 Connecticut, 193; *Rhoads v. Frederick*, 8 Watts, 448; *Medlin v. Platte county*, 8 Missouri, 235; *Lee v. Alexander, &c.* 9 B. Monroe, 25; or by the obligor, or one of the obligors; *Cutts v. U. S.*, 1 Gallison, 69; *Barrington and others v. Bank of Washington*, 14 Sergeant & Rawle, 405; *Williams v. Moseley*, 2 Florida, 304, 329. And where an alteration is made in a deed, by a party entitled under it, it is avoided only as to him, and the instrument continues unchanged in law, as to other innocent parties to it. Thus where a conveyance of land in fee is made, with covenants reserving an annual rent, and after execution the deed is altered in a material part by the grantor, the law, in consonance with justice and policy, avoids the covenants reserving rents in favour of the fraudulent grantor, but preserves the fee-simple to the innocent grantee discharged from the covenants in the deed, and the covenant being avoided as relates to the covenantor and his right of action extinguished, a bona fide purchaser from him is in no better situation than he was; *Arrison v. Harmstead*, 2 Barr, 191, 194. The distinction stated above, between an executed and an executory operation of a deed, that is between the effect of an alteration in avoiding rights in action created by it, and not vacating the transfer of an interest, or the discharge of a right, once executed by it, is recognized in the late English cases, although they differ from the American cases, in holding that a material alteration made by a stranger voids a deed as completely as when made by the party holding it. In *Davidson v. Cooper*, 11 Meeson & Welsby, 778, 800; affirmed on error, 13 id. 343, Lord ABINGER, C. B., said that the strictness of the rule in *Pigot's case*, that a material

alteration, by the party holding it or by a stranger, renders the instrument altogether void from the time when such alteration is made, had not been relaxed in modern times, when the altered deed is relied on as the foundation of a right sought to be enforced; but that the case is different, where the deed is produced merely as proof of some right or title created by, or resulting from its *having been executed*; as in the case of an ejectment to recover lands which have been conveyed by lease and release: "There," said Lord ABINGER, "what the plaintiff is seeking to enforce, is not, in strictness, a right under the lease and release, but a right to the possession of the land, resulting from the fact of the lease and release having been executed. The moment after their execution, the deeds become valueless, so far as they relate to the passing of the estate, except as affording evidence of the fact that they were executed. If the effect of the execution of such deeds was to create a title to the land in question, that title cannot be affected by the subsequent alteration of the deeds: But if the party is not proceeding by ejectment to recover the land conveyed, but is suing the grantor under his covenants for title, or other covenants contained in the release, then the alteration of the deed in any material point, after its execution, whether made by the party or by a stranger, would certainly defeat the right of the party suing to recover." In like manner in *Todd v. Emly*, 11 id. 1, 4, on a replication of non est factum to a release pleaded, a deed of release of which the seal had been torn off by the party released, was thought by PARKE, B., to be admissible in evidence, because the replication meant that it was not the deed of the plaintiffs for the purpose of proving a release; and therefore that the issue was proved by the production of a deed which had operated as a deed, though now in a cancelled state.

The rule as to notes is essentially the same as that applied to deeds. An alteration by accident, mistake, or the act of a stranger, after a party's right upon a note is complete, will not prevent his recovering upon it; but if the note be altered by a party entitled upon it, it is wholly voided as to him; *Martendale v. Follet*, 1 New Hampshire, 95. And where an instrument, which is meant to be the only security of a debt, and in which previous implied and parol liabilities have become merged, is voided by a fraudulent alteration on the part of the creditor, he cannot recover on the consideration of the contract; *Martendale v. Follet*; *Mills v. Starr*, 2 Bailey, 359. But see *Serle v. Norton*, 9 M. & W. 309.

Whether the alteration was made before or after execution, is for the jury: the first presumption of fact, from omitting to note the alteration at the attesting, is, that it was made afterwards; *Morris's Lessee v. Vanderen*, 1 Dallas, 64; *Prevost v. Gratz*, 1 Peters's C. C. 365; but if the alteration be against the interest of the party appearing to have made it, or claiming under it, or be immaterial, or there be other circumstances, this may be rebutted: and, upon rebutting evidence satisfactory to the court, the whole case is for the jury. *Heffelfinger v. Shutz et al.*, 16 Sergeant & Rawle, 44; *Bank v. Hall*, 1 Halsted, 215; *Smith v. McGowan*, 3 Barbour's S. Ct. 405, 408; *Bailey v. Taylor and another*, 11 Connecticut, 531, where the cases on this subject are examined at considerable length; *Jackson v. Osborne*, 2 Wendell, 555. In *Tillon v. The C. & E. Mut. Ins. Co.* 7 Barbour's S. Ct. 564, the Court said, that where the alteration was suspicious, and beneficial to the holder, the presumption was against him, and he must explain it, before

he can recover; and that the evidence in explanation must be adequate, *prima facie*, in the opinion of the court. In *Davis v. Jenney*, 1 Metcalf, 221, the case of a note, MORTON, J. charged the jury, that in the absence of all explanation, the legal presumption was, that the alteration was after execution, and the court above, per SHAW, C. J., said, that they considered it, "a question of very great importance," but it was not necessary then to decide it. The opinion of the Chancellor, adopted by the Court of Errors, in *Herick v. Malin*, appears to have been, that if the alteration were material, the party claiming on the deed must explain it; if immaterial, it will rather be presumed to have been done before execution. *Wickes v. Caulk*, 5 Harris & Johnson, 36, 41, seems to say, that the burden of proof is on him who alleges that the alteration was *after* execution. And in *Matthews v. Coulter*, 9 Missouri, 705, 710, in the case of an unsealed agreement, it was held that an alteration would be presumed to have been made before or at the time of signing unless there be something to create suspicion or raise a presumption to the contrary, as, if the ink differ, or the handwriting be that of a holder interested in the alteration, in which case, the alteration must be explained. In like manner, in *Adm'rs of Beaman v. Russell*, 20 Vermont, 205, where the cases are reviewed, it is held that the rule of the common law is, that an alteration of a written instrument, if nothing appear to the contrary, should be presumed to have been made at the time of its execution, and, generally, that the whole inquiry whether there has been an alteration, and if so, whether in fraud of the defending party, or otherwise, to be determined either from the appearance of the instrument itself, or from that and other evidence in the case, is for the jury. On the other hand, in *Hills v. Barnes*, 11 New Hampshire, 395, in the case of a note, it was held that the question as to the time when the alteration was made, is for the jury, who in some cases may be satisfied from the appearance of the paper itself, that the alteration was made before execution; but that in the absence of all evidence, either extrinsic, or on the face of the note, as to the time of the alteration, it will be presumed to have been made subsequently to the execution and delivery of the note; and that this rule is necessary for the security of the maker of the note; who must otherwise take evidence of the appearance of the note when it is delivered, in order to protect himself against alterations subsequently made without his privity. See, also, *Humphreys v. Guillou*, 13 id. 386, 388. And this is adopted as the true rule in *Walters v. Short*, 5 Gilman, 252, 258. In Pennsylvania, it has been decided, that in the case of negotiable instruments, the holder must show, that any material alteration was lawfully made; *Simpson v. Stackhouse*, 9 Barr, 186.

If the deed or note has been in the possession of the party claiming upon it, it affords a presumption that the alteration was made by him; and it lies upon him to show that he was not privy to it. *Chesley v. Frost*, 1 New Hampshire, 145; *Bowers v. Jewell*, 2 id. 543; *Barrington and others v. Bank of Washington*, 14 Sergeant & Rawle, 423. In *U. S. v. Linn et al.*, 1 Howard's Sup. Ct. 104, a distinction is noted between those alterations which appear upon the face of the instrument, and those which are extrinsic: in that case, in debt on an instrument appearing to be a regular bond, the plea alleged that after the defendant had signed, the instrument was, without his consent or authority, altered by affixing a seal; and the court held the

plea bad, for not alleging that the alteration was made by the plaintiff, or with his privity; for as the plea stood, the alteration might have been either by the plaintiff or by a stranger, and as pleas are to be taken most strongly against the party pleading, the court would intend it was the latter; and they said that where the alteration appears on the face of the instrument, as an erasure or alteration, the law imposes on the party claiming under it, the burden of explaining the alteration, for it was presumed to have been made while in his possession; but that where the instrument carries with it no appearance of alteration, the defendant who in his plea alleges a fatal alteration, must show it to have been such; and this is approved and acted upon in *Cotten v. Williams*, 1 Florida, 37, 49.

An alteration, however, even in a material part, may be made in a deed or note, after execution, if it is proved, or may be presumed, to have been done by *consent* of all the parties; *Woolley v. Constant*, 4 Johnson, 54; *Speake et al. v. U. S.*, 9 Cranch, 28; *Barrington et al. v. Bank of Washington*, 14 Sergeant & Rawle, 405; *Stephens v. Graham*, 7 id. 505; *Smith v. Weld*, 2 Barr, 54; *Willard v. Clarke*, 7 Metcalf, 435. 437; *Hills v. Barnes*, 11 New Hampshire, 395; *Humphreys v. Guillou*, 13 id. 386, 388; *The Richmond Manuf. Co. v. Davis*, 7 Blackford, 412; *Beary v. Haines*, 4 Wharton, 17; but the parties must be at that time legally competent to consent; *Moore and others v. Lessee of Bickham and West*, 4 Binney, 1. And a deed when thus altered in a material part, takes effect from the time of the alteration, as a re-execution of it; *Penny v. Corwithe*, 18 Johnson, 499; *Tompkin v. Corwin*, 9 Cowen, 255; in *Barrington et al. v. Bank of Washington*, it is said by DUNCAN, J., that this agreement to alter and accept the new obligation is a quasi re-execution; but in *Speake v. U. S.*, it was the opinion of LIVINGSTON, J., against the majority of the court, that if the alteration be material, there should be a re-execution; and this opinion seems to rest on strong reasons: see *Miller v. Stewart*, 9 Wheaton, 680, 708. In a recent case, where the principles applicable to the subject, were clearly and ably conceived, it was held, that where a party to a deed consents *at the time* to an alteration, there is a mixture of consideration and deliberation in the act which gives evidence of his intention to make the deed his own; but that an agreement to be responsible, after such alteration has been made, should not bind him unless the act of recognition were of a character so unequivocal, that no doubt could remain, that in legal contemplation at least, there was a making and delivery of the deed; *Sans v. The People*, 3 Gilman, 327, 336. In Connecticut it is held, that after acknowledgment before a magistrate, a *material* alteration, even by consent, cannot be made, without re-acknowledgment, though an *immaterial* one may; *Colt v. Starkweather*, 8 Connecticut, 290: and in Pennsylvania, not the smallest alteration, even by consent, can be made after acknowledgment, without there be a re-acknowledgment; *Moore and others v. Lessee of Bickham and West*.

This consent of the parties,—at least, (and probably only,) where the alteration is immaterial—may be *implied*, as well as express and actual: it may be implied from circumstances, custom, the nature of the alteration, &c.; *Hale v. Russ*, 1 Greenleaf, 334; *Ogle v. Graham*, 2 Penrose & Watts, 132: and see *Woodworth v. Bank of America*, 19 Johns. 391; where one of the main points held by the majority against the minority appears to have

been, that consent or authority to make material alterations cannot be implied, (at least in law,) and that such alterations can only be made with the *assent* of the party to be charged. In *Texira v. Evans*, 1 Anst. 228, it was held that a bond delivered with a blank for the name of the obligee, and for the sum due, and afterwards filled up, was valid; but this was overruled in *Hibblewhite v. McMorine*, 6 M. & W. 200. The principle of the latter case is adhered to in North Carolina and Arkansas; *McKee v. Hicks*, 2 Devereux, 379; *Davenport v. Sleight*, 2 Devereux & Battle, 381; *Graham v. Holt*, 3 Iredell's Law, 300; *Cross and Bizzell v. State Bank*, 5 Pike, 525: but in most other states of the Union, the authority of *Texira v. Evans*, appears to be followed. See *The Richmond Manuf. Co. v. Davis*, 7 Blackford, 412; and see the other cases collected in note to *Hibblewhite v. McMorine*, 6 M. & W. 216, Am. ed.

As to the question, whether an immaterial alteration will avoid an instrument, or whether, to have that effect, it must be material, there has been some divergency in the cases, in respect to deeds and to notes: though, probably, the rule now finally arrived at, is in effect the same as to both.

AS TO DEEDS: in some of the cases, the dicta are, that an immaterial alteration by a party claiming under the deed, will avoid it as to him; *Morris's Lessee v. Vanderen*, 1 Dallas, 64, 67; *Smith v. Weld*, 2 Barr, 54; *Barrett v. Thorndike*, 1 Greenleaf, 73; *Lewis & Lewis v. Payne*, 8 Cowen, 71: in others, it is doubted, *Hatch et al. v. Hatch et al.*, 9 Massachusetts, 307; *Hunt v. Adams*, 6 id. 521; *O'Neale v. Long*, 4 Cranch, 60: and, in some, it is said, that only material alterations are fatal. *Smith v. Crooker et al.*, 5 Massachusetts, 538; and see *Langdon v. Paul*, 20 Vermont, 217, 220. Upon principle, it would seem, that the slightest alteration in the deed must make a variance in the instrument, and cause it, in its new state, to be not the deed originally made by the party. But the doctrine of implied consent from circumstances has been carried so far in the modern cases, (*supra*,) that there can be little reason to doubt, upon the principle of all those cases, that the circumstance of the alteration being immaterial,—viz. not in the least affecting the nature or extent of the obligor's liability—is evidence from which the jury may presume an authority to alter, or is even a presumption in law of authority and consent: and this, which has been repeatedly applied to notes, in *Hale v. Russ*, 1 Greenleaf, 334, recognised in the case of a deed: and see *Stahl v. Berger*, and *Beary v. Haines*. So that, practically, the rule may be taken to be, that a material alteration by a party, of itself avoids the deed as to him: but an immaterial alteration does not, unless it is fraudulent. (It may be observed, that in the New Hampshire cases, it is held, that an alteration, to avoid a deed, in any case, must be actually *fraudulent*; i. e. a material, of which the court judge, and from interested motives, on which the jury decide; and to this view, the case of *Adams and another v. Frye*, 3 Metcalf, 103, in Massachusetts, (*post*,) appears to accede; but the Pennsylvania cases clearly hold that a material alteration by the party, of itself voids the instrument.)

Alterations in deeds are immaterial, "where neither the rights nor interests, duties nor obligations, of either of the parties, are in any manner affected or changed;" *Smith v. Crooker et al.*, 5 Massachusetts, 538. The

erasure by the obligee in a bond, of the name of one surety and insertion of another, avoids the bond as to another surety not having consented; *The State v. Polke*, 7 Blackford, 27; and the addition of another obligor to a joint and several bond, without the consent, express or implied, of the previous obligors, renders the deed void as to them; *Shipp's adm'r v. Suggett's adm'r*, 9 B. Monroe, 5. In *Marshall and another v. Gougler*, 10 Sergeant & Rawle, 164, it was held, that adding new names as witnesses, for the purpose of authenticating the instrument, was a material alteration, for it affected the evidence, and this is confirmed in *Henning v. Werkheiser*, 8 Barr, 518. In *Adams and another v. Frye*, where this point was examined at length, the court lay down the rule thus: "1. That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently, and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, such act will avoid the bond, and discharge the obligor from all liability on the same. . . . 2. That the act of the obligee in procuring the signature of one as a witness, who was not present at its execution, and not duly authorised to attest it, will, if unexplained, be *prima facie*, sufficient to authorise the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference; and if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration." See, also, *Thornton v. Appleton*, 29 Maine, 298, 299. —The proper manner of taking advantage of an alteration in a deed is by plea of *non est factum*: that plea goes to the existence of the instrument, as the deed of the defendant, at the time of plea pleaded; *Barrington and others v. Bank of Washington*, 14 Sergeant & Rawle, 423; *Smith v. Weld*, 2 Barr, 54; *Miller v. Stewart*, 9 Wheaton, 680, 716.

As to NOTES: it seems generally agreed, that an alteration, to avoid them, must be material; *Bowers v. Jewell*, 2 New Hampshire, 453; *Homer v. Wallis*, 11 Massachusetts, 309; *Gardinier v. Sisk*, 3 Barr, 326. A material alteration, such as would avoid a note, would be; the altering of the date, *Stephens v. Graham*, 7 Sergeant & Rawle, 505; *Hocker v. Jamison*, 2 Watts & Sergeant, 438; the insertion of the negotiable words "or order" in a note before not negotiable; *Pepoon v. Stagg & Co.*, 1 Nott & McCord, 102; *Haines v. Dennett*, 11 New Hampshire, 181; *Bruce v. Westcott*, 3 Barbour's S. Ct. 374; the insertion of "young" before "merchantable stock" in the promise; *Martendale v. Follet*, 1 New Hampshire, 95: in Massachusetts, the adding of a subscribing witness, when there was none before, which in that state affects the operation of the Statute of Limitations; *Homer v. Wallis*; see *Smith v. Dunham*, 8 Pickering, 246; *Adams and another v. Frye*; (but adding a second witness where there was already one, is immaterial, for it does not affect the operation of the statute; *Ford v. Ford*, 17 Pickering, 418;) any alteration which affects the evidence of the validity or operation of the note; *Bates v. Hill*, 1 New Hampshire, 96: making a joint and several note to be merely joint; *Humphreys v. Guillou*, 13 New Hampshire, 386, 387; appointing a particular place of payment when before none was fixed; *Woodworth v. Bank of America*, 19 Johnson, 391; making a note payable on demand, which before, was payable on time; *Wheelock v. Freeman*, 13 Pickering, 165: and extending

the time of payment from six to sixty days, is such a material alteration, as discharges an indorser; *Davis v. Jenny*, 1 Metcalf, 221. But an alteration or insertion is immaterial, if it is the insertion of only what the law would imply, or the correcting of a mistake; *Hunt v. Adams*; *Bowers v. Jewell*; or the addition of senseless words; *Granite Railway Company v. Bacon*, 15 Pickering, 239: in *Wheelock v. Freeman*, 13 id. 165, 168, the test as to notes is said to consist in the inquiry "whether the notes would have the same legal effect and operation after the alteration as before."

Although a material alteration, made without the privity of the party claiming upon it, and after his title upon it has been vested and complete, will not discharge the liability of the maker of the note, yet care must be taken as to the mode of declaring. You must not declare upon the note in its altered state, for that would cause a variance; see *Stephens v. Graham* and another, 7 Sergeant & Rawle, 505: you must declare upon the note as it was actually made by the defendant: and it is safer to take notice, in the declaration, that the note was altered without the privity of the party; see *Phoenix Ins. Co. v. Walden & Co.*, Anthon's N. P. 126, note: and then the jury will decide from the note and the explanatory evidence, whether the defendant made a note such as that declared upon.

The cases in which the circumstance of the alteration's having been made without the privity of the person claiming, prevents its being fatal, are those in which, previously to the alteration, the plaintiff had acquired a good *title* to the money on the note: and the alteration in the instrument makes an apparent discrepancy or chasm between his title as set out in the declaration, and the evidence; and it is this apparent variance which, when it was not produced by the fraud of the party, may be explained away by parol evidence. But it must be observed that there are cases, in the successive transfer or negotiation of notes and bills, where a variation made in the instrument during these transfers, may produce a chasm in the title of the claimant; causing the bill which has been indorsed to him to be not the bill made by the defendant; and this variance, as it affects the *title* of the indorsee, is incurable, although there be no fault in the plaintiff. This is the point involved in *Master v. Miller*; a case which has been often misunderstood, and, on that account, sometimes complained of. The facts are briefly thus: *Wilkinson & Cooke* hold *Miller's* acceptance of a note dated 26th March; while the note is in their hands, and before its indorsement and delivery to *Master*, the date is altered, by some one unknown, to 20th March; whereby the identity of the note is destroyed, and it becomes a new note. It is this last note, and not the one on which *Miller* was liable to them, which they indorse to *Master*. As *Wilkinson & Cooke* hold the promissory note of *Miller*, and they indorse a different note to *Master*, of course *Miller* is not liable to *Master* on either note. The legal relations of the parties seem to be thus: *Wilkinson & Cooke* can recover from *Miller* upon the note dated 26th March, if they can prove that the alteration was not made with their privity, and cannot recover unless they prove that: *Wilkinson & Cooke* have given to *Master*, a bill dated 20th March, with the name of an acceptor forged upon it by the person who made the alteration, and upon this note they are liable to him. The decision of the court upon the special verdict, which found as a fact that the date was "altered" from 26th March to 20th March, is certainly the only decision that could have

been given: and BULLER, J., does not appear to have differed on the principle of law; but he attacks the *facts* of the special verdict, and declares that the "alteration" was only a blot, by which the bill was disfigured, but not transformed; and indeed there can be little doubt that the plaintiff would be entitled to recover upon such a state of facts as he supposes: viz. where a figure was changed to the eye, but was understood and taken by both indorser and indorsee to be original figure—26 and not 20. In accordance with the principles here noted, there can be no doubt that if the alteration had been made without the privity of the indorsee, *after* the indorsement and delivery to Master, Master would have been entitled to recover.

The case of *Bank of the United States v. Russell & Boone*, 3 Yeates, 391, is similar to *Master v. Miller*, and was decided upon its authority: the only difference being, that in the former the alteration was made by the indorser, and in the other, its being made while the note was in the hands of the indorser, raised a presumption against him, which was not removed. The plaintiffs declared on two notes made by defendants; one dated 9th June, the other dated 19th June. The special verdict found that the defendants made their note dated 9th June, in favour of J. T. or order; who altered the date to 19th June; and discounted it with the plaintiff. The court decided that the bank could not recover from the defendants on either note. The opinion of the majority in *Woodworth v. Bank of America*, 19 Johnson, 391, in error, involves the same principle: the plaintiff, for the accommodation of the maker, indorsed a note payable to himself, and delivered it to the maker, who made a material alteration in it, and discounted it with the defendants: the majority held, that even without reference to the error in giving notice, the plaintiff was not liable to the bank. In *Nazro & Green v. Fuller & Patterson*, 24 Wendell, 374, a similar alteration by payee voided the note in the hands of the indorsee against the maker; and see *Haines v. Dennett*, 11 New Hampshire, 181.

H. B. W.

WAUGH v. CARVER, CARVER, AND GIESLER.

*C. B.—MICHAELMAS.—31 G. 3.

[*491]

[REPORTED 2 H. BL. 235.]

A. and B., ship-agents at different ports, enter into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they become liable, as partners, to all persons with whom either contracts as such agent, though the agreement provides that neither shall be answerable for the acts or losses of the other, but each for his own.

He who takes the general profits of a partnership must, of necessity, be made liable to the losses.

He who lends his name as a partner becomes, as against all the rest of the world, a partner.

THIS action of *assumpsit* for goods sold and delivered, work and labour done, &c., was tried at Guildhall, before the Lord Chief Justice, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated—

That on the 24th February, 1790, the defendants duly executed articles of agreement, as follows:—"Articles of agreement indented, made, concluded, and agreed upon this twenty-fourth day of February, in the year of our Lord one thousand seven hundred and ninety, between Erasmus Carver and William Carver, of Gosport, in the county of Southampton, merchants, of the one part, and Archibald Giesler, of Plymouth, in the county of Devon, merchant, of the other part. Whereas the said Archibald Giesler, some time since, received appointments from several of the principal ship-owners, merchants, and insurers in Holland, and other places, to act as their agent in the several counties of Hampshire, Devonshire, Dorsetshire, and Cornwall; and whereas the said Erasmus Carver and William Carver [*492] have *for a great number of years been established at Gosport aforesaid, in the agency line, under the firm of Erasmus Carver and Son, and hold sundry appointments as consuls and agents for the Danish and other foreign nations, and also have very extensive connections in Holland and other parts of Europe; and whereas it is deemed, for their mutual interest and the advantage of their friends, that the said Archibald Giesler should remove from Plymouth, and establish himself at Cowes, in the Isle of Wight; and the said Erasmus Carver and William Carver, and the said Archibald Giesler, have agreed that each should allow to the other certain portions of each other's commissions and profits, in manner hereafter more particularly mentioned and expressed. Now, therefore, this agreement witnesseth, and the said Archibald Giesler doth hereby for himself, his executors and administrators, covenant, promise, and agree, to and with the said Erasmus Carver and William Carver, their executors and assigns, in manner following (that is to say), that the said Archibald Giesler shall and will, when required so to do by the said Erasmus Carver and William Carver, remove from Plymouth, and establish himself at Cowes aforesaid, for the purpose of carrying on a house there in the agency line, on his account; but in consequence of the assistance and recommendations which the said Erasmus Carver and William Carver have agreed to render in support of the said house at Cowes, the said Archibald Giesler doth covenant, promise, and agree, to and with the said Erasmus Carver and William Carver, that the said Archibald Giesler, his executors, administrators, and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed to the said Erasmus Carver and William Carver, their executors, administrators or assigns, one full moiety or half part of the commission agency to be received on all such ships or vessels as may arrive or put into the port of Cowes, or remain in the road to the westward thereof within the Needles, of which the said Archibald Giesler may procure the address, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs

of such ships or vessels; and as there have been for a considerable time past, very general complaints made abroad of the malpractices and impositions that have prevailed at Cowes aforesaid, and it being a principal object of the said Erasmus Carver and William Carver to counteract *and prevent such, [*493] the said Archibald Giesler doth further covenant, promise, and agree, to and with the said Erasmus Carver and William Carver, that he the said Archibald Giesler shall and will use his utmost diligence and endeavours to prevent ships or vessels arriving at the east end of the Isle of Wight, from being carried past the port of Portsmouth to that of Cowes; and also to induce the mariners or commanders of such ships or vessels as may come in at the west end of the island through the Needles, whenever it is practicable and advisable, to proceed to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, and that he will consult and advise with the said Erasmus Carver and William Carver on and respecting the affairs of such ships or vessels as may put into and remain at the port of Cowes under the care of the said Archibald Giesler, and pursue such measures as may appear to the said Erasmus Carver and William Carver for the interest of the concerned. And whereas one of the causes of complaint before mentioned is the very heavy charge made at Cowes, for the use of warehouses for depositing the cargoes of ships or vessels, the said Archibald Giesler doth also covenant, promise, and agree to and with the said Erasmus Carver and William Carver, that they the said Erasmus Carver and William Carver shall be at full liberty to engage warehouses at Cowes aforesaid, on such terms and in such manner as they may think proper, in which the said Archibald Giesler shall not upon any grounds or pretence whatsoever either directly or indirectly interfere. And the said Erasmus Carver and William Carver, for the considerations hereinbefore mentioned, do hereby covenant, promise, and agree to and with the said Archibald Giesler, his executors and administrators, that they the said Erasmus Carver and William Carver shall and will well and truly pay or allow, or cause to be paid or allowed to the said Archibald Giesler, his executors, administrators, or assigns, three-fifth parts or shares of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels, the commanders whereof may, in consequence of the endeavours, interference, or influence of the said Archibald Giesler, proceed from Cowes to Portsmouth, and there put themselves under the direction of the said Erasmus Carver and William Carver, in manner hereinbefore mentioned, and likewise one and one half *per cent. on amount of the bills of the [*494] several tradesmen employed in the repairs of such ships or vessels, together with one-fourth part of such sum or sums as may be charged or brought into account for warehouse rent, on the cargoes of such ships or vessels respectively; and also one-sixth part of such sum or sums as may be charged or brought into account for warehouse rent on the cargoes of such ships or vessels as may be landed at Cowes aforesaid: and also that they the said Erasmus Carver and William Carver, their executors, administrators, and assigns, shall and will well and truly pay or allow, or cause to be paid or allowed unto the said Archibald Giesler, his executors, administrators, or assigns, one-fourth part or share of the commission or agency to be received by the said Erasmus Carver and William Carver, on account of all such ships or vessels that may arrive or put into the port of Portsmouth, or remain in

the limits thereof, under the care and direction of the said Erasmus Carver and William Carver : and likewise one-half per cent. on amount of the bills of the several tradesmen employed in the repairs of such ships or vessels : and in order to prevent any misunderstanding or disputes, with respect to the commission and discount to be paid and divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, and for the better ascertaining thereof, it is hereby mutually covenanted, declared, and agreed upon between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that one-fifth part of the commission or agency on each ship shall and may be first retained by the party under whose care such ship or vessel shall be, as a full compensation for clerks, boat hire, and all other incidental charges and expenses in regard of such ships or vessels respectively ; after which deduction, the then remaining balance of such commissions or agency shall be divided between the said Erasmus Carver and William Carver, and the said Archibald Giesler, in the proportion hereinbefore mentioned ; and that such commission or agency shall be ascertained by one party's producing to the other true and authentic copies of the general accounts of each ship or vessel under their respective care and direction, signed by the several masters of such ships or vessels respectively, and notarially authenticated. And it is hereby further covenanted, declared, and [*495] agreed upon by and between the said Erasmus Carver *and William Carver, and the said Archibald Giesler, that this present contract and agreement shall commence and take effect from the date hereof, and shall continue in full force and virtue for the term of seven years, during the whole of which said term the said parties, or either of them, shall not upon any grounds or pretence whatsoever, directly or indirectly, enter into, or form any connection, contract, or agreement, with any other house or houses, or with any person or persons whatsoever, concerning the commission or agency of ships or vessels, that may during the said term put into or arrive at either of the before-mentioned ports of Portsmouth or Cowes, nor shall the said Archibald Giesler at the expiration of the said term of seven years, directly or indirectly, establish himself at Gosport or Portsmouth, nor on any grounds or pretences whatsoever, enter into or form any connection, contract, or agreement with any house or houses, person or persons whomsoever at Gosport or Portsmouth aforesaid. And also that they the said Erasmus Carver and William Carver, and the said Archibald Giesler, shall and will meet at Gosport on or about the first day of September yearly, for the purpose of examining and settling their accounts, concerning the said commission business, and that such party from whom the balance shall then appear to be due, shall and will well and truly pay or secure the same unto the other party, his executors, administrators, or assigns, on or before the twenty-ninth day of the said month of September yearly. And it is hereby likewise covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver, and the said Archibald Giesler, that each party shall separately run the risk of, and sustain all such loss and losses as may happen on the advance of moneys in respect of any ships or vessels under the immediate care of either of the said parties respectively ; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall at any time or times, during the continuance of

this agreement, be in any wise injured, prejudiced, or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall in *his own person and with his own goods and effects respectively be answerable and ac- [496] countable for his own losses, acts, deeds and receipts. Provided always nevertheless, and it is hereby declared and agreed to be the true intent and meaning of these presents, and the parties hereunto, that in case the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler shall dissolve or cease to exist, from any circumstance whatsoever, before the expiration of the said term of seven years, that then this present agreement, and every clause, sentence, and thing herein contained, shall from thence cease, determine, and be absolutely void, to all intents and purposes whatsoever; but without prejudice nevertheless to the settlement of any accounts that may then remain open and unliquidated, between the said Erasmus Carver and William Carver, and the said Archibald Giesler, which shall be settled and adjusted within the space of six months next after the dissolution of the houses of either of them the said Erasmus Carver and William Carver and Archibald Giesler; and also that at the expiration of the said term of seven years, it shall be at the option of the said Erasmus Carver and William Carver to renew this agreement for the further term of seven years, under and subject to the several clauses, covenants, and agreements hereinbefore particularly mentioned and set forth, which the said Archibald Giesler doth hereby engage to do. And it is hereby further covenanted, declared and agreed, by and between the said Erasmus Carver and William Carver and Archibald Giesler, that these presents do not, nor shall be construed to mean to extend to such ships or vessels that may come to the address of either of the said parties respectively, for the purpose of loading or delivering any goods, wares, or merchandise, it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to bear reference to their particular or separate mercantile concerns or connections; and that in case any disputes or misunderstanding shall hereafter arise between them, respecting the true intent and meaning of any of the articles or covenants hereinbefore contained, that then such disputes or misunderstandings shall be submitted to the arbitration of two indifferent persons, one to be chosen by the said Erasmus Carver and William Carver, and the other by the said Archibald Giesler; and in case such two persons cannot *agree [497] about the same, then they are hereby empowered to name some third person, as an umpire; and it is hereby declared and agreed, that the award and determination of the said referees and umpire, or any two of them, concerning the object in dispute, shall be made and settled six calendar months next after such differences shall have arisen between the said parties, and shall be absolutely final, conclusive and binding. And lastly, for the true performance of all and every the covenants, articles and agreements hereinbefore mentioned, they the said Erasmus Carver, and William Carver and Archibald Giesler, do here bind themselves, their heirs, executors and administrators, each to the other, in the penalty of five thousand pounds of lawful money of Great Britain, firmly by these presents."

In pursuance of these articles, Giesler removed from Plymouth and settled at Cowes, where he carried on the business of a ship-agent, in his own name, and contracted for the goods, &c. which were the subject of the action.

And the question was, Whether the defendants were partners on the true construction of the articles?

This was argued in Trinity Term last, by Clayton, Serjt., for the plaintiff, and Rooke, Serjt., for the defendants; and a second time in the present term by Le Blanc, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendants. The substance of the arguments for the plaintiff was as follows:—

The question in this case is, Whether the articles of agreement entered into by the defendants constituted a partnership between them? That such was the effect of these articles will appear by considering the general rules of law respecting partners, and the particular circumstances in the case. The law is, that wherever there is a participation of profits a partnership is created; though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace v. Smith*, 2 Black. 998, a retiring partner lent the other who continued in business a certain sum of money at 5%. per cent., and was to have an annuity of 300*l.* a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner; but Chief Justice De Grey there said—"The question is, What constitutes a secret partner? Every man who has a share of the profits of a trade ought also [*498] to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson; or whether he only relied on those profits as a fund for payment?" And Blackstone, J., also said—"The true criterion, when money is advanced to a trader, is to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade. In the former case it is a loan, in the latter a partnership." In *Bloxam v. Pell*, cited in *Grace v. Smith*, a sum secured with interest on bond, and also an agreement for annuity of 200*l.* a year for six years, if Brooke so long lived, as in lieu of the profits of the trade, with liberty to inspect the books, was holden by Lord Mansfield to constitute a partnership. In *Hoare v. Dawes*, Dougl. 371, Svo., a number of persons unknown to each other, and without any communication together, employed the same broker to purchase tea at a sale of the East India Company. The broker bought a lot, to be divided among them according to their respective orders, and pledged the warrants with the plaintiff, for more money than they turned out to be worth; on the broker becoming a bankrupt, the plaintiff sued two of the purchasers, considering them all as secret partners, and liable for the whole. But the Court held there was no partnership, and Lord Mansfield said—"There is no understanding by one to advance money for another, nor any agreement to share with one another in the profit or loss." In *Coope v. Eyre*, 1 H. Bl. p. 37, one of the defendants bought a quantity of oil of the plaintiffs, and the other defendants had agreed, before the purchase, each to take certain shares of the quantity bought; but, when bought, each to do with his own share as he pleased; they were holden not to be partners, for there was

no share of profit or loss. In *Young v. Axtell* and another,^(a) which was an action to recover 600*l.* and upwards for coals sold and delivered by the plaintiff, a coal-merchant, an agreement between the defendants was given in evidence, stating that the defendant Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same: that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2*s.* *for every chaldron that should be sold to those persons who had been her customers, or were of her [*499] recommending. The plaintiff also proved, that bills were made out for goods sold to her customers in their joint names; and the question was, whether Mrs. Axtell was liable for the debt? Lord Mansfield said, "he should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as partner, she was certainly liable, though the plaintiff did not at the time of dealing, know that she was a partner, or that her name was used."^(b) And the jury accordingly found a verdict for the plaintiff.

It appearing, therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen, whether the agreement in question did not establish such a participation of the profits of the agency business between the defendants as to make them liable as partners. In the first place, it is stated in the recital, that the Carvers and Giesler had agreed to allow each other certain proportions of each other's commissions and profits. It is then agreed, that Giesler should, when required by the Carvers, remove from Plymouth to Cowes, and there establish a house: and in consequence of the Carvers' recommendation and assistance to support the house, Giesler is to allow them a moiety of the commission on ships putting into the port of Cowes, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills employed on such ships: he also covenants to advise with the Carvers and pursue such measures as may appear to them to be for the interest of the concerned. On the other hand, the Carvers agree to pay Giesler three-fifths of the agency of all vessels which shall come from Cowes to Portsmouth, and put themselves under the direction of the Carvers, by the recommendation of Giesler, one half per cent. on tradesmen's bills, and certain proportions of warehouse and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connection in the agency business during the period agreed upon; and they are to meet once a year at Gosport to settle their mutual accounts, and *pay over the balance. Now, it was not possible to express in clearer terms an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between the two houses. It may be objected, that there is a proviso, that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven v. Widdows*, 2 Chan. Cas. 139;

(a) At Guildhall sittings after Hil. 24 G. 3, cor. Lord Mansfield, cited by Mr. Serjt. Le Blanc, from a MS. note.

(b) Sed quære; vide the expressions of Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 140.

Heath v. Percival, 1 P. Wms. 682; Rich v. Coe, Cowp. 636. An agreement to share profits alone, cannot prevent the legal consequence of also sharing losses, for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has always been holden, that where there is a share of profits, there shall also be a share of losses; for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus, if in the year 1791 the profits were 100*l.*, and in the year 1792 there was a loss of 10*l.*, of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that, to constitute a partnership, the parties should advance money by way of capital; many joint trades are carried on without any such advance: there is therefore no ground to object, in the present instance, that neither party brought any money into a common stock, in order to carry on their business.

On behalf of the defendants, the arguments were as follow: The question is, Whether this agreement creates such a partnership as to make all liable to the debts of each? A partnership may be defined to be, "the relation of persons agreeing to join stock or labour, and to divide the profits." Thus Puffendorf described it, "*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo sane, ut quod inde reddit lucri inter singulos pro ratâ dividatur,*" lib. 5, cap. 8. Partners, therefore, can only be liable on the ground of their being joint contractors, or as partaking of a joint stock. In many cases, in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and [501] a common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a re-sale, they shall be considered as joint contractors, and therefore liable as partners. So if a joint stock or capital or joint labour be employed, each party is interested in the thing on which it is employed, and in the profits resulting from it. But in the present case, there is no joint contract for the purchasing goods, nor any joint stock or labour, but the parties are to share, in certain proportions, the profits of their separate stock, and separate labour: there was no house of trade or merchandise established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital, unless carried on as capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular

address of one were to be the sole profit of that one. It was indeed clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts, or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other, against their express intent. But all cases of partnership which have been hitherto decided have proceeded on one or other of the following grounds: 1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colours to the world. *Now the present case is not within [*502] either of those principles: because there was no authority given to either party to contract for the others; nor was there any joint capital or stock; nor were the public deceived by any false credit; no fraud is stated or attempted to be proved, nor can the Court collect from the articles that any was intended; it was merely a purchase of Giesler's profits by giving him a share of those of the Carvers, to prevent a competition between them.

Lord Chief Justice *Eyre*.—This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether, by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy? But I think this case will not lead to that consequence(†).

The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B., whether they were partners or not, it would be very well to inquire, whether they had contributed, and in what proportions, stock or labour, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors, claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now a case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of [*503] them, to whom, without the others, they *would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to

† Provided the annuity be not dependent on the profits of the business. *Bloxam v. Pell*, 2 W. Bl. 999; *Exparte Wheeler*, Buck. 48.

interfere more or less, with their advice and directions, and many small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed between the Carvers and Giesler, that they were not, nor ever meant to be, partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, whether they have not by parts of their agreement constituted themselves partners in respect to other persons? The case therefore is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement: and upon the authority of *Grace v. Smith*(a), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise; upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship agent employs tradesmen to furnish necessities for the ship; he contracts with them, and is liable to them: he also makes out the bills in such a way as to determine the charge of commission to the ship-owners. With respect to the commission, indeed, he may be considered as a mere agent; but, but, as to the agency itself, he is as much a trader as any other man, and [504] there is as much risk of profit and loss to the person with whom he contracts, in the transactions with *him, as any other trader. It is true he will gain nothing but his discount, but that is a profit in the trade, and there may be losses to him, as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

Gould, J., I am of the same opinion.

Heath, J., I am of the same opinion.

Rooke, J., having argued the case at the bar, declined giving any opinion.

Judgment for the plaintiff.(b)

(a) 2 Black. 998.

(b) See *Coope v. Fyre*, 1 H. Bl. p. 37, and the note there.

PARTNERSHIP is either *actual* or *nominal*. *Actual partnership* takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and loss. "I have always," says Tindal, C. J., in *Green v. Beesley*, 2 Bing. N. C. 112, "understood the definition of partnership to be a mutual participation in profit and loss."

But, with respect to third persons, an *actual* partnership is considered by the law to subsist wherever there is a participation in the *profits*, even though the participant may have most expressly stipulated against the usual incidents to that relation. (See *Bond v. Pittard*, 3 Mee. & W. 357.) Such stipulations will indeed hold good between himself and his companions, but will in no wise diminish his liability to third persons. And this is founded on a principle of justice to the community; for, to use the language of the L. C. J. in the principal case, by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. See *Cheap v. Cramond*, 4 B. & Ad. 663; *Exp. Wheeler, Buck*, 48; *Hoare v. Dawes*, Dougl. 371. Nor does it signify whether he receive them for his own benefit or as trustee for others, since the mischief to the creditors would be the same if he were to be exempt from liability in either case. *Wightman v. Townroe*, 1 M. & S. 412. Equally indifferent is it whether his share be large or small. *Rex v. Dodd*, 9 East, 527. In *Hoare v. Dawes*, Dougl. 371, Lord Mansfield gives another reason for holding one who has placed money in the firm, and is to receive part of the profits, liable, viz. that he would otherwise receive usurious interest without risk. [This reason, at no time a very satisfactory one, nor at all necessary to sustain the proposition for which it was adduced, is now taken away in the majority of cases by the operation of the act for the amendment of the usury law, 2 & 3 Vict. c. 37; continued by 8 & 9 Vict. c. 102.]

On the above principles it is that a *dormant partner*, i. e. a partner whose name does not appear to the world as part of the firm, is held responsible for its engagement, even to those who, when they contracted with the firm, were ignorant of his existence. *Exp. Gellar, Rose*, 297; *Wintle v. Crowther*, 1 C. & P. 316; 1 Tyrw. 210; *Robinson v.*

Wilkinson, 3 Price, 539. In one respect, however, there exists very considerable difference *between [*505] the liabilities of an *ostensible* partner and those of a *dormant* one; for the liability of a partner who has appeared in the firm, in respect of the acts and contracts of his copartners, continues even after the dissolution of the partnership, and the removal of his name therefrom, until *due notice* has been given of such dissolution. See *Parkin v. Carruthers*, 3 Esp. 248; *Graham v. Hope, Peake*, 154. And though, as far as the public at large are concerned, notice in the Gazette is held sufficient for this purpose, *Godfrey v. Turnbull*, 1 Esp. 371; *Wrightson v. Pullan*, 1 Stark. 375; yet, to persons who have dealt with the firm, more specific information must be given. *Kirwan v. Kirwan*, 4 Tyrw. 491. And this is generally effected by circulars. See *Newsome v. Coles*, 2 Camp. 617; *Jenkins v. Blizzard*, 1 Stark. 418. But if a fair presumption of actual notice can be raised from other circumstances, that will be sufficient. *M'iver v. Humble*, 16 East, 169. Thus, a change in the wording of checks has been held notice to a party using them. *Barfoot v. Goodall*, 3 Camp. 147. [But it is not to be taken as a legal incident of the position of a *dormant* partner, but rather as a probability arising from the greater likelihood of his share in the firm being unknown to those who deal with it, that his liability ceases upon the actual dissolution of the partnership, whilst that of an *ostensible* partner continues, towards persons who have no notice of the dissolution; for although, generally speaking, a *dormant* partner may retire without giving notice to the world, *Heath v. Sanson*, 4 B. & Ad. 172; yet, even such a partner remains liable to persons who became aware of his partnership whilst it lasted, and continued their dealings with the firm under the belief that he still remained a member of it. If such persons were not made aware of the dissolution, it might be inferred that they dealt on the faith of the partnership; and, as to them, unless the circumstances of the case rebutted such an inference, even a dormant partner would still be liable, *Evans v. Drummond*, 4 Esp. 89, *Lord Kenyon*; *Carter v. Whalley*, 1 B. & Ad. 13, per *Littledale* and *Parke, JJ.*; *Farrar v. Deffinne*, 1 Car. & K. 550, *Cresswell, J.*

It has been said that a participation in the profits constitutes a partnership. But the participation must be that of a person having a right to a share of the profits and to an account in order to ascertain his share, not that of a mere *servant* or *agent* receiving, in respect of his wages, a sum proportioned to a share of the profits, or which may be partly furnished out of the profits. The distinctions on this subject run so fine, that it will not be uninteresting briefly to review the principal cases, and endeavour to extract from them some rules for ascertaining when a particular contract falls under the head of *partnership*, when under that of *agency* or *service*. In *Dixon v. Cooper*, 3 Wils. 40, in an action for goods sold and delivered, the plaintiff, in order to prove the delivery, called his factor, who was to receive a shilling in the pound upon the price: he was held competent. It should be observed on this case, that although the factor would have incidentally come in for a share of the profits arising from the sale, yet he did not, like a partner, depend for his remuneration upon the contingency of profits accruing, since, as his commission was calculated upon the *price*, he would have been entitled to it even had no profits been obtained; and this very distinction has been acted on in *Dry v. Boswell*, 1 Camp. 329, where it was held that an agreement that A. should work B.'s lighter, and that they should share the *profits*, constituted a partnership; but an agreement that A. should receive half her *gross earnings* only rendered him B.'s agent for the purpose of working her. The case of *Benjamin v. Porteus*, 2 H. Bl. 590, went somewhat farther. There, in an action for the price of indigo, sold at three shillings per pound, the broker, being called to prove the contract, stated on the *voir dire*, that he was to have all that he could get for the indigo above half-a-crown per pound, instead of the usual commission on the price: Eyre, C. J., rejected him as incompetent, and directed a nonsuit, which was, however, set aside by the Court of Common Pleas, Eyre, C. J., dissentiente.

In *Wilkinson v. Frasier*, 4 Esp. 182, it was held that an agreement to divide the *produce* of a whaling voyage between the captain, seamen, and owners, did not constitute them partners, so as to prevent the seamen from recovering their share in an action. This case goes

no further than *Dixon v. Cooper*, since the seamen would have been entitled, though the owners might have gained no profit by the voyage. [See *The Riby Grove*, 2 Rob. 52.] In *Mair v. Glennie*, 4 M. & S. 240, Lord Ellenborough expressed an opinion, that an agreement to remunerate a captain with *one-fifth part of the profit on the intended voyage on ship and cargo* did not constitute him a partner. But it was sufficient for the decision in that case to hold, that it did not constitute him a partner *in the ship and cargo*, so as to prevent a transferee from obtaining such possession of it as would prevent it from remaining in the ordering and disposition of the transferor, who afterwards became bankrupt. *Wish v. Small*, 1 Camp. 331, is sometimes cited on this subject, but in fact bears little, if at all, upon it. There, A. depastured B.'s bullocks, and was to have half the profit of their sale. In an action against the vendee by B. alone, he contended that A. was a partner, and should have been joined. It was answered that A. was not a partner in the bullocks, *but in the profits, to which Thompson, B., at [*506] N. P., and the court in banc, afterwards assented. In that case, therefore, it will be seen that, so far from the distinction between an agent and a partner being acted upon, a partnership was admitted to exist in the profits.

It must be remarked, that in *Wilkinson v. Frasier* the question was between the seamen and the captain, not between the seamen and third parties; and that neither in *Benjamin v. Porteus*, *Dixon v. Cooper*, or *Mair v. Glennie*, was the liability of an agent, receiving part of the profits as his remuneration, to third parties, at all in question. In the two former cases he was equally interested in the result of the cause, whether he were a factor or a partner, and, if considered a factor, would be rendered competent only by an exception in the law of evidence introduced for general convenience, not on account of the difference between the liabilities of a factor and those of a principal. Now it seems very reasonable to allow persons sharing in the profits of an adventure to exclude, by express agreement, the relation of partnership from arising *as between themselves*, and at the same time to prohibit them from so excluding it to *third persons dealing with them*; for the rights and liabilities of partners

inter se have been created by the law for their own convenience. and *quilibet potest renunciare juri pro se introducto*. But to allow a person who receives part of the profits to shield himself from the creditors of the firm under the plea that he receives them as an agent, would militate against the reason given by Eyre, C. J., in the principal case, who places the liability of a participant on the ground that, by taking part of the profits, he takes from the creditors part of their security.

Thus, as we have already seen, persons who participate, even as principals, in the profits of an adventure, may, by express stipulation, prevent the ordinary incidents of partnership from arising *as between themselves*, but cannot except themselves from any tittle of the usual responsibility of members of a firm to strangers. For instance, in the principal case, the Lord C. J. intimates his strong opinion that the *Carvers* were not partners with *Giesler as between themselves*, though they were so *as to the rest of the world*; and Abbott, C. J., commenting on *Waugh v. Carver*, states the principle of it to be, "that if two houses agree that each shall share with the other the money received in a certain part of the business, they are, as to such part, partners *as to those who deal with them* therein, though they may not be partners *inter se*." This distinction was also expressly recognised by Lord Ellenborough in *Hesketh v. Blanchard*, 4 East, 143. In that case, A. having neither money nor credit, offered B. that if he would order with him certain goods to be shipped as an adventure, *if any profit should arise B. should have half for his trouble*. B. accordingly ordered the goods on their joint account, and paid for them; and A. having died without coming to a settlement, B. was held entitled to recover such payment in assumpsit from A.'s executors. "The construction," said Lord Ellenborough, C. J., "taken in *Waugh v. Carver*, applies in this case. *Quoad* third persons, it was a partnership, for the plaintiff was to share half the profits; but as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson (the deceased) his credit." See *Bolton v. Puller*, 1 B. & P. 546; [and *Rawlinson v. Clarke*, 15 Mee. & W. 292, where a surgeon and apothecary sold the good

will of his business to another, under an arrangement by which the seller was to continue to reside on the business premises, and to assist the buyer for a year, in consideration of which he was to be paid a moiety of the clear profits of the concern for that year at the expiration thereof: that arrangement was holden by the Court of Exchequer Chamber not to constitute a partnership between the buyer and seller, so as to prevent the latter from suing the former, who had received the money from the patients during the year, for the moiety of the profits. But it seems that, as to third persons, such an arrangement would make the seller liable as a partner. *Barry v. Nesham*, 3 C. B. 641.]

Upon the whole, the cases justify us in concluding, that whenever it appears that the agreement was intended by the parties themselves as one of *agency or service*, but the agent or servant is to be remunerated by a *portion of the profits*, then the contract would be considered *as between themselves* one of *agency* (see *Geddes v. Wallace*, 2 Bligh, 270; *R. v. Hartley*, Russ. & R. 139;) but, as between them and third persons, one of *partnership*. See *Smith v. Watson*, 2 B. & C. 407; *Exparte Rowlandson*, 1 Rose, 91; *Green v. Beasley*, 2 Bing. N. C. 110; *Exparte Langdale*, 18 Ves. 300. But that if the agent or servant is to be remunerated, not by a portion of the profits, but, as in *Dry v. Boswell*, *Dixon v. Cooper*, and *Wilkinson v. Frasier*, by part of a gross fund or stock which is not altogether composed of the profits, the contract, *even as against third persons*, will be one of *agency*, although that fund or stock may include the profits, so that its value,*and the *quantum* of the agent's re- [*507] ward, will necessarily fluctuate with their fluctuation. There is a third case, that, viz., in which the agent or servant is not to receive a part of the profits *in specie*, but a sum of money calculated in proportion to a given *quantum* of the profits. In such a case, Lord Eldon has expressed his opinion, that the agent so remunerated would *not* be a partner, even as to third persons. "It is clearly settled," said his Lordship, "in *Exparte Hamper*, 17 Ves. 112, though I regret it, that if a man stipulates that he shall have as the reward of his labour, not a specific interest in the business, but a given sum of money, *even in proportion to a given quantum of the profits*, that

will not make him a partner; but if he agrees for a part of the profits *as such*, giving him a right to an account, though having no property in the capital, he is *as to third persons* a partner." In another part of the same case he says—"The cases have gone to this nicety, upon a distinction so thin that I cannot state it as established upon due consideration, that if a trader agree to pay another person, for his labour in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner. But if he has a specific interest in the profits themselves he is a partner." 17 Ves. 404. See *Ex parte Watson*, 19 Ves. 461. [The criterion proposed by De Grey, C. J., in *Grace v. Smith*, 2 W. Bl. 998, "to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade and usury," was cited as correct by Tindal, C. J., in delivering the judgment of the Court in *Pott v. Eyton*, 3 C. B. 32. In *Pott v. Eyton*, A., a part owner of a mine, set up a tally-shop for the supply of articles to the miners, his own name being over the door and in the excise licenses; and he arranged with B. to supply the goods and conduct the business, on the terms that B. should allow A. five per cent. on the amount of sales to the miners, and retain the rest for himself. That was found by the jury, and afterwards held by the Court of Common Pleas, not to constitute an actual partnership; and Tindal, C. J., in delivering judgment, referred to the cases already mentioned, and after citing the dictum of Lord Eldon, in *Ex parte Watson*, that "one who receives a salary not charged upon profits—according to a known, though nice distinction—is not by that a partner," proceeded to say, that it makes no difference "whether the money is received by way of interest or money lent, or wages, or salary as agent," or commission on goods sold, that the payment of the five per cent. to A. was "in the nature of commission on certain sales supposed to be effected through his influence over his workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and in so far as it was a question of fact, it was disposed of by the jury." See *Barry*

v. Nesham, 3 C. B. 641, for a case where a share of the profits was stipulated for.]

In *Withington v. Herring*, 3 M. & P. 30, some of the judges of the Common Pleas seem to have thought that a bill drawn on H. and Co., by a person who acted as their agent abroad in a concern in which he was to receive 1000*l.* per annum salary, and one-fifth share of the profits, could not be considered as a bill drawn by a partner. The point, however, was not decided, as it appeared clear that he had authority to draw the bill, even assuming him to be but an agent. [It may be added, that the mere circumstance that a man has an option to become a partner and to receive a share of the profits, even from a past time, has been holden insufficient to constitute him a partner before he has exercised that option, and thereby become entitled to an account of the profits. *Gabriel v. Evill*, 9 Mee. & W. 297, at N. P. Car. & M. 358; see *Ex parte Turquand*, 2 M. D. & D. 340, *Wilson v. Whitehead*, 10 Mee. & W. 503.]

With respect to *nominal partnership*:—that takes place where a person, having *no* real interest in the concern, allows his name to be held out to the world as that of a partner, in which case the law imposes on him the responsibility of one to persons who have had dealings with the firm of which he has held himself out as a member. [See the judgment of the Lord Chief Justice in the principal case; and see *Guidon v. Robson*, 2 Camp. 302.] It has, as we have seen, been laid down in *Young v. Axtell*, cited in the text, that it makes no difference in such a person's liability that the party seeking to charge him did not know at the time when he gave credit to the firm that he had so held himself out. But this position appears very questionable; for the rule which imposes on a *nominal* partner the responsibilities of a *real* one is framed in order to prevent those persons from being defrauded or deceived, who may deal with the firm of which he holds himself out as a member, on the faith of his apparent responsibility. But where the person dealing with the firm has never heard of him as a component part of it, that reason no longer applies, and there is not wanting authority opposed to such an extension of the rule respecting a nominal partner's liability. "If it could be proved," says Parke, J., "that the defendant held himself out—not to the

world, for that is a loose expression—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff *knew of it, and believed him* to be a partner, he would be liable.” *Dickenson v. Valpy*, 10 B. & C. 140. So too in *Shott v. Streatfield* and another, 1 M. & Rob. 9, where the question was, whether Green was liable jointly with Streatfield, a witness proved that he had been told in Green’s presence that Green had become a partner. He was then asked whether he had repeated the information, on which Campbell objected that this was not evidence, unless it were shown that the defendants, or one of them, were present when it was repeated; sed per Lord Tenterden, C. J., “I think it is; *because otherwise it will be said presently, that what was said was confined to the witness, and that the plaintiff could not have acted on it.*” In *Alderson v. Popes*, 1 Camp. 404, n., it was held, that a man could not be charged as a partner by one who, when he contracted, had notice that he was but nominally so. The reason of this must have been, because he could not have been deceived, or induced to deal with the firm, by any reliance on the nominal partner’s apparent responsibility. And the same reason precisely [*805] *applies, whether the false impression on the customer’s mind

have been put an end to by a notice, or whether, in consequence of his ignorance that the nominal partner’s name has been used, no false impression ever existed on his mind at all. (See *Carter v. Whalley*, 1 B. & Adol. 11. [*Ford v. Whitmarsh*, Exch. Mich. 1841, 1 Hurl. & Walm. 53; *Pott v. Eyton*, 1 C. B. 32.]) However, in order to fix a person with this description of liability, no particular mode of holding himself out is requisite. If he do acts, no matter of what kind, sufficient to induce others to believe him a partner, he will be liable as such. See *Spencer v. Billing*, 3 Camp. 310; *Parker v. Barker*, 1 B. & B. 9; 3 *Moore*, 226. But a man who describes himself as a partner with another in one particular business does not thereby hold himself out as such in any other business which that other may happen to profess. *De Berkomp v. Smith*, 1 Esp. 29; *Ridgway v. Philip*, 5 Tyrw. 131. Nor is a person liable as a nominal partner, because others, without his consent, use his name as that of a member of their firm, even although he may have previously belonged to it, provided he have taken the proper steps to notify his retirement. *Newsome v. Coles*, 2 Camp. 617. Nor, as has been already stated, can a man be charged as a member of a firm by one who had express notice that he was but nominally so. *Alderson v. Popes*, 1 Camp. 404, in notis.

It results from the principal case, and the general course of decision, that when two or more persons agree that each shall contribute capital or labour for the purpose of carrying on a trade or business, and that the proceeds shall be received on joint account, and subsequently apportioned among all, they will be considered as partners with respect to third persons, although such may not have been their intention in making the agreement. For, as under those circumstances, there will be a joint loss, if the returns of the business fall short of the outlay, and in the opposite event a corresponding gain, a community of profit and loss will ensue, and the law will imply the existence of a partnership. *Felichy v. Hamilton*, 1 W. C. C. R. 492; *Dobb v. Halsey*, 16 Johnson, 34; *Weldon v. Sherburne*, 15 id. 409; *Cumpston v. McNair*, 1 Wend. 462; *Musier v. Trumbour*, 5 id. 274; *Champion v. Bostwick*, 18 id. 175; *Cushman v. Bailey*, 1 Hill, 526; *Brown v. Robbins*, 3 New Hampshire, 34; *Everett v. Chapman*, 6 Conn. 347; *Bucknam v. Barnum*, 15 id. 87; *Goddard v. Pratt*, 16 Pick. 402; *Baring v. Craft*, 9 Metcalf, 380; *Scott v. Colmesnil*, 7 J. J. Marshall, 416; *Purviance v. Clintee*, 6 S. & R. 261. And the same result will follow, when an apportionment of

profit and loss is necessarily implied, although not expressly stipulated. *Baker v. Swann*, 5 Shepley, 180; *Holt v. Bornedel*, 1 Iredell, 199; *Cox v. Delano*, 3 Devereux, 89.

It must not, however, be understood, that the contribution of money, labour or capital stock, towards the prosecution of a business, coupled with a right to a corresponding return from the proceeds, will necessarily or essentially constitute a partnership; *Rice v. Austin*, 17 Mass. 197; *Gallop v. Newman*, 7 Pick. 282; *Sack v. Howland*, 5 Denio, 69; although such must inevitably be the result, if the right to a share of the proceeds of the business, be also an interest in the proceeds themselves, or in the property out of which they issue. In other words, stipulating for a compensation in proportion to the profits, or even out of the profits themselves, will not give the rights or impose the liabilities of a partner, unless the stipulation amounts to a *jus ad rem* or in re, and not merely to a demand or chose in action. *Loomis v. Marshall*, 12 Conn. 69. The reason of this distinction is deeply seated in the nature and effect of the contract of partnership, both as between the partners themselves and with regard to third persons. The general rule of law admits of no preference as between persons claiming in different rights, against the estate of a bankrupt or insolvent debtor, on the ground that the property in question, has resulted from the labour or sacrifices made by one claimant, and should therefore be appropriated to him, to the exclusion of the others. Thus, when goods are sold and delivered to an insolvent purchaser, they may be seized in execution by an antecedent creditor, and applied to the discharge of his debt, without any regard to the claim of the vendor for the purchase money. But a debt due for advances made in money or goods, by one partner to another, in the course of the partnership business, is entitled to a preference, so far as the partnership assets are concerned, over all debts due by the debtor partner individually, and must be paid in full, before they can be taken into consideration. In other words, each partner has a lien on the partnership property for the balance of accounts between himself and his co-partners, which he may enforce as against all persons claiming under them, in their individual capacity. *Pierce v. Jackson*, 6 Mass. 242; *Christian v. Ellis*, 1 Grattan, 396; *Gibson v. Stevens*, 7 New Hampshire, 352; *Garbett v. Veale*, 5 Q. B. 408. But this advantage, of having a specific security for the amount due on a business contract, as against the separate creditors of the other party to the contract, can only exist where the contract is one of partnership, and is necessarily and essentially coupled with the disadvantage, of being personally liable for all debts contracted on account of the business, to which the contract relates. Whether, therefore, a partnership will be implied by the law, where it was not contemplated by the parties, seems to depend on whether each would have been entitled to a preference, as against the separate creditors of the other, for the balance due as between themselves; for whenever such a right exists, it will be attended with a corresponding liability, to all debts contracted on joint account, and a partnership will necessarily follow. These principles are strikingly illustrated by the case of *Denny v. Cabot*, 6 Metcalf, 92, where an agreement that one party should manufacture the materials furnished by the other into cloth, on the terms of receiving a fixed compensation, and one-third of the net proceeds of the cloth, after deducting all expenses, was held not to give either any specific lien on the stock or profits in the hands of the other, and consequently

not to render them partners, either as between themselves, or in their relations with third persons. If, said Wilde, J., in delivering the opinion of the court, "the defendant had stipulated for a share in the profits, (whether gross or net profits,) so as to entitle him to an account, and to give him a specific lien, or a preference in payment over other creditors, and giving him the full benefit of the profits of the business, without any corresponding risk in case of loss; justice to the other creditors would seem to require that he should be holden to be liable to third persons, as a partner. But where a party is to receive a compensation for his labour, in proportion to the profits of the business, without having any specific lien upon such profits, to the exclusion of other creditors, there seems to be no reason for holding him liable as a partner, even to third persons." In other words, as the agreement did not put the defendant in a better position than that held by the rest of the world, and merely gave him a right of personal recourse, without any specific lien or preference, as against creditors, whose debts were not contracted for the purposes of the business in question, there was no reason for making him responsible for those which were. In support of this conclusion, the court relied on the prior cases of *Turner v. Bissell*, 14 Pick. 192, and *Loomis v. Marshall*, 12 Conn. 69, where it had been held that an agreement to furnish wool, for the purpose of being worked up into cloth, at a rate of compensation which was wholly dependent on the profits of the business of the manufacturer, gave a mere right of personal recourse against him, and did not constitute a partnership. Similar decisions were made in *Heckert v. Fegely*, 6 W. & S. 139, and *Clement v. Haddock*, 13 New Hampshire, 185. It results from these cases, and from what has been said above, that parties may make any stipulation which they think fit, as to the mode or ratio in which either shall be compensated for services rendered, or advances made, to or on account of the other, without acquiring the character of partners, so long as they neither hold themselves out to the world as such, nor stipulate expressly or by implication, for any specific interest in the property or business for which the advances are made, or in which they are invested. But if they go beyond this, and acquire a right of property, in addition to a right of action, a partnership will arise by legal construction, and without regard to intention. Thus it was held in *Tobias v. Blin*, 21 Vermont, 544, that when the effect of the contract is to create a debt, without conferring an interest, there will be no partnership. The law was held the same way in *Dwinel v. Stone*, 30 Maine, 384. "There may," said Shepley, C. J., in delivering the opinion of the court, "be a partnership embracing a capital invested in the business, and also the profit and loss arising out of it. And there may be a partnership embracing only the profit and loss. There may be also business transactions, from which the persons concerned may receive profits, and be subjected to losses; and yet there may be no partnership. The mere fact of a participation in profit and loss, does not necessarily constitute a partnership. Many of the elements constituting one may exist, while others equally essential do not."

The doctrine, that a contract which merely creates a debt, without conferring an interest, will not constitute a partnership, has been frequently applied in the case of agents employed in commercial or other business, under an agreement, for a compensation in proportion to the pro-

fits made by their employers, and it is thoroughly well settled, that such an agent will not have the character of a partner, either in his relations with those by whom he is employed, or with third persons; *Miller v. Bartlett*, 15 S. & R. 137; *Dunham v. Rogers*, 1 Barr, 255; *Ross v. Tucker*, 2 Hall, 175; *Champion v. Bostwick*, 18 Wend. 175; *Norment v. Hull*, 1 Humphreys, 320. This has long been held, when the compensation is to be in the ratio or proportion of the profits, and is now settled even when it is payable out of the profits; if it appear that the intention was to give a mere right of action, and not a specific lien on the proceeds of the business; *Muzzy v. Whitney*, 10 Johnson, 226; *Vanderburgh v. Hall*, 18 Wendell, 70; *Buckle v. Eckhart*, 1 Denio, 343; 3 Comstock, 132; *White v. Bradley*, 10 Metcalf, 302; *Shropshire v. Shepherd*, 3 Alabama, 733; *Hodges v. Dawes*, 6 id. 215. When, however, a party who makes advances of money or goods to another, for the prosecution of a particular business, does not rely solely on the personal responsibility of the latter for reimbursement, and looks to the creation of an interest in the resulting property or its proceeds, the transaction will be regarded as a partnership; *Goddard v. Pratt*, 16 Pick. 422; *Beming v. Craft*, 9 Metcalf, 380; *Champion v. Bostwick*, 18 Wend. 175; *Everett v. Chapman*, 6 Conn. 347. Thus, in *Loomis v. Marshall*, the decision in *Everett v. Chapman*, was put on the ground, that although the business was to be conducted, and the sales made by the partners severally, each must have contemplated a specific lien on the proceeds in the hands of the others, as the only means of securing an equal apportionment of the profit and loss among all.

There are some cases, however, in which the courts have taken no notice, of the distinction between stipulating for a compensation in the ratio of profits, or out of profits, and for a specific interest in the profits themselves, and have proceeded on the more arbitrary and less intelligible rule, that every agreement under which different persons are to concur in the prosecution of a business, on the terms of receiving reimbursement out of and in proportion to the profits, and depending upon the contingency, whether profits are made or not, will constitute a partnership with respect to strangers, without regard to the intention of the parties; *Oakley v. Aspinwall*, 2 Sandford's S. C. R. 7; *Taylor v. Terene*, 5 Har. & J. 505; *Solomon v. Solomon*, 2 Kelly, 18; *Everett v. Coe*, 5 Denio, 180; *Barry v. Nesham*, 3 C. B. 640. Thus, in *Everett v. Coe*, the question whether the defendant, who had agreed to furnish a manufacturing firm with the funds for carrying on their business, was to be regarded as a partner, was held to depend on whether a stipulation, that he should have a "profit of one per cent a-yard on all goods manufactured in the mill, in addition to the reimbursement of his advances," entitled him to this per centage absolutely, only in case profits were actually made. It was said, that if the stipulation bore the latter construction, it would subtract from the fund, on which the creditors of the firm had to rely for the payment of their debts, and the defendant would be clearly liable to them as a partner. It is not easy to see the force of this reasoning, or to understand why a payment to be made on a contingency, and only in case a business prove profitable, should be more disadvantageous to other creditors, than if it were payable absolutely. But, no doubt can be entertained as to the propriety of the decision, if the defendant meant to stipu-

late for a specific interest in the profits, and not merely for a compensation, to be measured by the profits.

When the agreement between the parties is such in other respects, as to give rise to a partnership, its effect will not be varied by the shortness of the period to which it has reference, nor by its limitation to the purposes of a single transaction; *Benson v. M-Bee*, 2 *McMullin*, 91; *Musier v. Trampbour*, 5 *Wend.* 275. Thus in *Sims v. Willing*, 8 *S. & R.* 103, the defendant purchased flour and shipped it to Lisbon on his own account, using the name of H. T. Sampayo, a merchant residing in that city, as a cover. The rest of the cargo of the vessel was composed of other flour, owned and paid for by Sampayo. So far there was nothing to give rise to a joint ownership in the flour, or to constitute a partnership. But as the flour was to be sold by Sampayo on its arrival at Lisbon, and the defendant's share of the proceeds remaining after deducting the charges and expenses, remitted to London, the court were of opinion, that he must have intended a joint ownership, and consequent community of profit and loss for his own protection, and that he was consequently liable as a partner to the owners of the vessel, for the general average, which had attached to the cargo on the voyage out. This conclusion was fortified by the fact, that as there were no marks or brands, by which the defendant's portion of the cargo could be distinguished from that belonging to Sampayo, the understanding must necessarily have been, that all expenses incurred in transporting the cargo to Lisbon, and selling it there, should be charged equally and jointly on the whole, and not apportioned on the respective shares of the parties concerned. In this case, however, as in every other of a similar nature, the partnership was limited to the purpose for which it was created, and would not have exposed the parties to any liability, not incurred in the necessary and usual prosecution of the voyage. Thus in *Post v. Kimberly*, 9 *Johnson*, 488, where the circumstances were nearly similar to those in *Sims v. Willing*, the court held, that although the shipping of a cargo belonging to different persons, for sale on their joint account, might create a partnership for the purposes of the voyage, it would not go further, or render them partner in the return cargo, in which the proceeds of the sale were invested. The same point was determined in *Jackson v. Robinson*, 3 *Mason*, 138, and it was said, that the shipment of goods on board a vessel, consigned to the master for a sale and returns, does not render the shippers liable as partners, even though they are tenants in common, both of the goods and vessel. Similar decisions were made, and the same language held in *Thorndike v. De Wolff*, 6 *Pickering*, 1, and *French v. Price*, 24 *Pickering*, 10. But the question actually before the court in these cases, was as to the existence of a partnership in the goods, or their proceeds, and not, as in *Sims v. Willing*, whether the owners of the cargo were jointly liable for the expenses of the voyage.

A stipulation, or understanding, that no partnership shall exist, will be binding as between the parties themselves, whatever may be the character of the agreement in other respects; *Gill v. Kuhn*, 6 *Sergeant & Rawle*, 338; *Jordan v. Wilkins*, 3 *Washington C. C. Reports*, 110; and even on third persons who know of its existence; *Bailey v. Clark*, 6 *Pickering*, 372. And on the other hand, nothing is better settled than that persons, who hold themselves out to the world as partners, will be liable as such to third persons, whatever may be the actual relation as between themselves; *Mars-*

ton v. Hallenback, 2 Zabriskie, 373; Buckingham v. Burgess, 3 McLean, 364; Stearns v. Haven, 14 Vermont, 540. But the rights and liabilities incident to the relation of partnership, do not take effect until the partnership has been actually created, whatever may be the date of the agreement to create it. Thus money advanced by the plaintiff to the defendant, for the purpose of being employed on their joint account, in a partnership which does not go into operation, may be recovered back in assumpsit, although the articles of co-partnership were signed before the payment. *Murray v. Richards*, 1 Wend. 63. And as this rule holds good with reference to third persons, as well as between the partners themselves, no liability will attach to the firm for advances made to one of the partners, with a view to enabling him to contribute his quota to the partnership stock; *Post v. Kimberly*, 9 Johnson, 188; *Heckert v. Fegely*, 6 Watts & Sergeant, 139; *Saville v. Robertson*, 4 Term, 720.



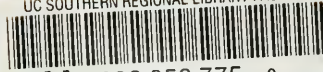




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